The Magnuson-Moss Act - An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool

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INTRODUCTION

Congressional adoption of the Magnuson-Moss Consumer Product Warranty Act1 signaled the creation of a new consumer remedy for violation of warranty obligations. One might inquire, why has breach of warranty been made a matter of federal concern? The answer lies in an examination of the nationwide scope and impact of consumer transactions involving warranted products.

The consuming public has available a diversity of products from which to choose. Despite a marked decrease in purchasing power,2 the volume of consumer product purchases continues to increase. Durable household items such as appliances and furniture annually account for $25.5 billion in retail sales.3 These substantial retail figures exclude not only nondurable household items, wearing apparel and general merchandise, but also automobiles, whose sales receipts are exceeded only by those of grocery items.4

In light of the volume of consumer transactions, it would seem that if there were significant dissatisfaction with consumer products it would be reflected by a decrease in sales.5 On

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2. Between 1965 and 1975 the consumer price index for all commodities, excluding food, rose 53.9%. During this period the cost of household durables increased by 41.8%. The price of non-durable goods, excluding food and apparel, increased by 63.7%. U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, A STATISTICAL ABSTRACT OF THE UNITED STATES 423, table 688 (1975). Quantitatively, the consumer is getting less for his money.

3. Id. at 775, table 1314. The service industry generated by home appliance sales had receipts totalling more than $2 billion in 1972. Id. at 787, table 1330.

4. In 1974, new car sales grossed more than $80 billion. Id. at 788, Fig. 29.2. Auto repair industry receipts exceeded $12 billion in 1972. Id. at 787, table 1330.

5. See Warranties and Guaranties: Hearings on H.R. 18056; H.R. 10690, H.R.
the contrary, retailers have largely enjoyed a steady increase in demand. Nevertheless, this increase does not necessarily signal that consumer complaints are being resolved successfully on an informal basis.

A significant number of consumer products require repair, often substantial, while they are relatively new. Quite naturally, the consumer will refer to the product warranty to determine whether the warranty is still in force. If the product is new, he will expect to obtain necessary adjustments without charge. It is at this point that the significant consumer problem begins. The first barrier is one of language. Historically,


6. Despite an escalating number of complaints from disgruntled consumers, new car sales increased from 6.6 million to 9.4 million between 1960 and 1968. FEDERAL TRADE COMM'N, REPORT ON AUTOMOBILE WARRANTIES 6 (1970) [hereinafter cited as FTC REPORT].


8. A Federal Trade Commission study of automobile warranties and service observed that reliable surveys indicated that approximately 33% of new automobiles were delivered in unsatisfactory condition. FTC REPORT, supra note 6, at 31. In 1967, 9% of new car purchasers reported that their automobiles were mechanically unreliable. Id. at 30. The Commission noted the tremendous number of automobiles involved in recalls (4.5 million between Sept. 1, 1966 and Jan. 1, 1968) as substantiating consumer complaints that new cars not infrequently are delivered from the factory with defects. Id. at 27-28.

Consumers Union found similar problems with the quality of other types of consumer goods. After purchasing approximately 25 instant-load, automatic-exposure cameras ranging in price from $30 to $70, the organization discovered that fully one-half "were not operable or became inoperable" shortly thereafter. One-third of the 15 tape recorders purchased by the organization, costing several hundred dollars each, were defective. Six percent of the color televisions purchased by consumers in 1968 required replacement of the picture tube before the year was out. Consumer Product Guaranty Act: Hearings on S. 3074 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 91st Cong., 2d Sess. 123 (1970) (statement of Nat'l Small Business Ass'n, Appendix, Caveat Emptor—Many People Complain the Quality of Products is Deteriorating Rapidly, Wall St. J., June 26, 1969, at 1, col. 1 [hereinafter cited as Consumer Product Hearings].

This problem has been documented by a third study conducted by Better Business Bureaus International (BBB). In July, 1965, BBB surveyed 15 member bureaus concerning appliance repair problems. The conclusions of the survey were based on general observations of the member bureaus and on 146 specific complaints selected at random. Sixty percent of the consumer complaints related to appliances that were less than one year old. Of those appliances, one-third had been repaired on average of 2.88 times. FEDERAL TRADE COMM'N, DEP'T OF COMMERCE, DEP'T OF LABOR & SPECIAL ASS'T TO THE PRESIDENT FOR CONSUMER AFFAIRS, REPORT OF THE TASK FORCE ON APPLIANCE WARRANTIES AND SERVICE 131-32 (1969) [hereinafter cited as Task Force Report].

warranty documents have not accurately conveyed the respective obligations of the seller and the buyer. A survey of approximately 300 new car purchasers aptly illustrated this point. When asked to read and explain the disclaimer clause in their automotive warranties, fewer than half demonstrated a fairly accurate understanding of the term. Fully one-fourth confessed that the clause was incomprehensible. Moreover, questions concerning other aspects of the warranties elicited responses which indicated that misunderstanding was not limited to the legal consequences of a disclaimer, but related to numerous facets of basic warranty coverage. For example, the correct response rate ranged from a high of 64% regarding purchaser understanding of the duration of the warranty to a low of 34% regarding what maintenance services were required to keep the warranty in force. These results indicate that there is a serious problem regarding the lack of clarity in warranty documents. This leads to considerable consumer frustration. A purchaser seeking warranty service may be genuinely surprised to learn that the warranty covering a defective component has expired or that the particular component was never covered by the warranty; that the warranty does not cover damage to the product caused by a defective warranted part; or that he will have to pay substantial labor or transportation costs in connection with obtaining the "free replacement" of a defective part. Rather than a document which extends a benefit to the purchaser, a written warranty is frequently a limitation of rights which might otherwise accrue under an implied warranty.

The next hurdle is the problem of obtaining warranty service which actually is due the consumer. There is an abundance of complaints about poor service on products under warranty. The problem has been particularly acute in the auto-

11. Id. at 146.
12. Id. at 147. In a similar survey of first-year law students, approximately 50% demonstrated some awareness of the meaning of the disclaimer clause. Id. at 147 n.200.
14. The Presidential Task Force on Appliance Warranties and Service reported that consumers may experience substantial delays in obtaining service on relatively new appliances. Manufacturers' concentration on production and distribution of new models often means sacrificing early availability of repair parts or components and of parts and service manuals. Task Force Report, supra note 8, at 7-8.
15. FTC Report, supra note 6, at 35-38. A National Association of Fleet Administrators survey concluded that 26% of all warranty repairs require repeated visits. Id. at 36.
mobile industry, in which warranty competition briefly was equated with sales competition. Widely advertised increased warranty coverage seemed to stimulate consumer interest and to influence the share of the market held by some companies.\textsuperscript{16} Another result of this competition was increased consumer expectation regarding the performance of automobiles carrying greater warranty coverage. Unfortunately, the warranties accompanied basically the same product with which more limited warranties had been associated. The automobiles did not perform significantly better. When the purchasers' expectations were disappointed, there followed an increased number of complaints and a burgeoning number of demands for warranty service. The new marketing technique simply generated increased warranty service on new cars over a longer period of obligation and at greater cost to the manufacturer.\textsuperscript{17} As a United States Senator stated in dismay, when one manufacturer detected an alarming increase in the cost of warranty service, “instead of going to the design engineers, the assembly line managers and asking them to produce a better more reliable product to improve [its] competitive position, the general manager asked the dealer to cut back on his warranty work.”\textsuperscript{18} Put simply, the few promises made in written warranties frequently have been broken. Consumers have lacked an effective and efficient method of enforcing their warranty rights.

Federal interest in warranty problems was evident in 1965, when the Federal Trade Commission (FTC) initiated its inves-

\textsuperscript{16} Id. at 24. When Chrysler introduced the 5 year/50,000 mile power train warranty in 1963, its sales increased by 40% and its share of new car sales increased from 9.6% to 12.4%.

\textsuperscript{17} The FTC staff concluded that while warranty costs substantially exceeded the anticipated level, those costs did not seem “to have impinged appreciably on the manufacturers’ profits. But they do represent a cost and the manufacturers try to hold them down.” \textit{Federal Trade Comm’n, Staff Report on Automobile Warranties} 161 (1968).

\textsuperscript{18} \textit{Consumer Product Hearings}, supra note 8, at 27 (statement of Sen. Hart). An interesting series of correspondence, which is reproduced in the printed hearings, provoked this comment. Id. at 28-32. An anonymous Chevrolet dealer sent to a member of the Committee a letter from Chevrolet to all of its dealers which cited the alarming increase in warranty costs. Among other suggestions, the letter stated: “Unless a safety defect is discovered, no warranty work is to be performed unless requested by the customer and needed.” Id. at 29. In response to an inquiry, Chevrolet wrote Senator Moss and explained that the dealer had misinterpreted the fair import of the statement. Id. at 31-32. A “revised letter superseding [the] earlier letter” was sent to all dealers in order to clarify the matter. Id. at 30. Chevrolet was suggesting only that dealers should refrain from performing unnecessary service. The revised letter recharacterized the “alarming increases” in the cost of warranty service as “rapidly rising costs.” Id. at 31.
tigation into consumer complaints about automobile warranty service. The Commission issued a highly critical report in 1970. The study revealed that quality control was rapidly deteriorating and that automobile warranties and service thereunder were inadequate. Since the industry response was perceived as "insufficient to protect the public," the FTC recommended that warranty and quality control standards for the industry be established by governmental action. The preceding year a special Presidential task force on appliance warranties reported that despite the appliance industry's knowledge of numerous problems with major appliance warranties, it had done little or nothing to correct the situation. The task force speculated that the reluctance of manufacturers to take corrective action was partially attributable to competitive forces, and it recommended governmental leadership to assist industry in eliminating abuses.

Despite these abuses, congressional response was neither swift nor sure. Over a four-year period numerous bills were authored and four sets of hearings were held, to deal with the problems relating to warranty obligations. Faced with the

19. FTC REPORT, supra note 6.
20. Id. at 68.
21. Id.
23. TASK FORCE REPORT, supra note 8, at 101. The appliance warranties were difficult to understand and sometimes deceptively captioned or advertised. Moreover, it was found that the warranties contained unfair exceptions and exclusions and that warrantors frequently failed to honor fully their obligations. Id. at 103-05.
24. Id. at 101. There are some who claim that federal participation in the free enterprise system has fostered an unhealthy competitive posture and has performed a disservice to consumers. Deterioration in the quality of goods produced has been blamed, in part, on an economic regulatory policy which encourages making available a greater variety of goods at a cheaper price. An antitrust policy that deprives the producer of control over the marketing of its products, particularly with regard to price and retail channels, effectively causes a product to compete with itself. This policy rewards mass merchandisers and discounters who stimulate sales by cutting prices. The resulting market pressures contribute to the production of more cheap goods rather than products of higher quality. Consumer Product Hearings, supra note 8, at 120-21 (statement of Nat'l Small Business Ass'n). It has been argued that consumers should be disabused of the notion that they will benefit from more regulation.
conflicting options of mandatory quality standards for consumer products, requiring that consumer products be warranted, and leaving unregulated competitive market forces that presumably work to provide the greatest variety of consumer choices, Congress devised and adopted an intermediate level of intervention. The result was the Magnuson-Moss Consumer Product Warranty Act. The Act establishes a regulatory scheme that relies primarily on disclosure as a consumer protection tool. This disclosure mechanism is supplemented by provisions imposing minimum obligations on those giving

 tee warranty alternative. Two bills introduced in 1967, would have required that automobile and appliance warranties be given and would have subjected those warranties to extensive regulation. S. 2727 & S. 2728, 90th Cong., 1st Sess. (1967). Each was read twice and reported to the Commerce Committee. 113 Cong. Rec. 35281, 35284 (1967). Neither was reported out of committee. See generally Comment, Consumer Protection and Warranties of Quality: A Proposal for a Statutory Warranty in Sales to Consumers, 34 ALB. L. REV. 339 (1970).


30. 15 U.S.C. § 2302(a) (Supp. IV 1974). In the absence of a disclosure requirement, the seller is free to provide no information to consumers about warranted products. Alternatives to the disclosure approach embodied in the Magnuson-Moss legislation include governmental assumption of the obligation to inform consumers. That obligation could be accomplished by publication of information compiled by various governmental agencies or by initiation of a governmental product testing program, the results of which would be published. See Rhoades, Reducing Consumer Ignorance: An Approach and Its Effect, 20 ANTITRUST BULL. 309, 314-15 (1975) (consumer information about products would increase competition and eventually result in higher quality products).
warranties governed by the Act,\textsuperscript{31} granting rulemaking\textsuperscript{32} and enforcement powers to the Federal Trade Commission,\textsuperscript{33} and creating a consumer cause of action.\textsuperscript{34}

The Act is designed to rectify the previous identified problems with consumer warranties. Foremost among these problems is consumer deception. The disclosure rules promulgated under the Act are intended to prevent deception by requiring a clear statement of the terms and conditions of warranty coverage.\textsuperscript{35} Disclosure also was perceived as a vehicle for improving the adequacy of information made available to consumers\textsuperscript{36} and promoting more meaningful competition in the marketing of consumer products.\textsuperscript{37} Of equal importance is the Act's prohibi-

\begin{itemize}
\item \textsuperscript{31} 15 U.S.C. § 2304 (Supp. IV 1974).
\item \textsuperscript{32} Id. § 2303(b).
\item \textsuperscript{33} Title II of the Act, \textit{id.} §§ 45, 46, 56 (Supp. II 1973), is devoted to strengthening the enforcement powers of the Federal Trade Commission and is beyond the scope of this article. See \textit{Note, The Magnuson-Moss Amendments to the Federal Trade Commission Act: Improvements or Broken Promises?} 61 Iowa L. Rev. 222 (1975), for a discussion of the history of the Federal Trade Commission Act, the past ineffectiveness of the Commission, and the expansion of FTC enforcement powers under Title II of the Act.
\item \textsuperscript{34} The Act creates a cause of action for damages which may be pursued by any consumer who suffers damage as the result of a warrantor's failure to comply with the requirements of the Act or to comply with his obligations under a warranty. 15 U.S.C. § 2310(d)(1) (Supp. IV 1974). If, however, a warrantor has established an informal dispute settlement mechanism and has provided in the warranty that resort to the informal procedure is a condition precedent to pursuing any legal remedy under the Act, the consumer must first attempt to resolve the dispute within the framework of that mechanism. Id. § 2310(a)(3). See generally \textit{Note, Consumer Protection: The Federal Trade Commission Rule for Informal Dispute Settlement Mechanisms, Promulgated Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Neglects the Commercial Incentive Necessary to Secure Adoption,} 49 TEMP. L.Q. 459 (1976).
\item A civil action under the Act may be filed in either state or federal court, but there are several hurdles that must be leaped before breach of warranty becomes a federal case. The amount in controversy must be at least $50,000, each individual claim must be at least $25, and the warrantor must have been afforded a reasonable opportunity to cure his noncompliance. 15 U.S.C. § 2310(d)(3), (e) (Supp. IV 1974). Consumer class actions are authorized, but there are additional barriers to federal litigation in this context. It must be established that the claim of each member of the class is not less than $25 and that the number of named plaintiffs equals not less than one hundred. \textit{id.} § 2310(d)(3).
\item \textsuperscript{35} 15 U.S.C. § 2302(a) (Supp. IV 1974).
\item \textsuperscript{36} Several factors have been identified as contributing to the prevalence of consumer ignorance: (1) the increasing number and complexity of consumer products; (2) the cost inefficiency of providing information; and (3) the desire to acquire or retain oligopoly power which tends to result from consumer ignorance. "Since consumer ignorance tends to yield and maintain profits above the competitive level, the argument frequently given that much of the advertising of the private sector is designed to persuade, rather than inform seems plausible." Rhoades, \textit{supra} note 30, at 310-11.
\item \textsuperscript{37} \textit{id.}
\end{itemize}
tion against disclaimer of implied warranties, which is also intended to prevent deception. That prohibition is combined with provisions limiting the inclusion of other unfair terms and conditions of warranty coverage in an attempt to equalize the bargaining positions of warrantors and consumers and to improve competition. Finally, the Act endeavors to ensure that consumers have available effective recourse for breach of warranty obligations by providing an operable private enforcement mechanism.

This article focuses on the key provisions of the Act which are important to the accomplishment of its goals. The analysis scrutinizes the underlying policy decisions supporting the legislative approach, the lack of clarity in the statutory language, and the problems posed by the regulatory response to the legislation. Finally, within this framework, this article assesses the viability of the Act as a vehicle for achieving its stated objectives.

THE SCOPE OF STATUTORY REGULATION

The Act governs obligations incurred in connection with the sale of consumer products. The term consumer product includes tangible personal property which is normally used for personal, family or household purposes, and it also extends to certain products intended to be attached to or installed in real property.

39. See text accompanying notes 118-120 infra.
40. See e.g., text accompanying notes 113-115 infra.
41. See note 34 supra. Perhaps the most significant aspect of this newly created consumer remedy is the authorization of recovery of costs and attorneys' fees by prevailing consumer plaintiffs, unless the court determines that the award of attorneys' fees is inappropriate. This feature may make feasible the litigation of relatively small claims involving difficult problems of proof and relatively large legal fees.
42. 15 U.S.C. § 2301(3) (Supp. IV 1974). The FTC has provided a rule of thumb as guidance for determining whether fixtures will be considered consumer products. Goods which are affixed to reality at the time of sale will be considered consumer products if they have a separate function apart from the reality. Included in this category of products are appliances such as dishwashers, ranges, furnaces, water heaters, and the like. [1976] 3 TRADE REG. REP. (CCH) ¶ 21,245. Products such as roofing, wiring, ductwork and plumbing which have no separate function apart from the reality will be included or excluded from the definition of consumer product depending on the character of the sales transaction. 42 Fed. Reg. 36,112, 36,115 (1977) (to be codified in 16 C.F.R. § 700.1). Building materials and products which are integral components of a structure at the time of sale are not consumer products. On the other hand, if a consumer purchases such goods over the counter from a building supply company or contracts for their purchase in connection with home improvement, repair or modification, they are consumer products. See Peters, How the Magnuson-Moss Warranty Act
In addition to restricting the right to include onerous terms and conditions in written warranties, the regulatory scheme requires those who make express written warranties to provide sufficient information to enable consumers to understand their warranty rights.\(^\text{43}\)

**Designation Requirements**

Any warrantor who gives a written warranty on a product that actually costs the consumer more than $10 is obligated to designate the warranty as either "full" or "limited."\(^\text{44}\) A full warranty is one that meets minimum federal standards, and it must be designated "Full (statement of duration) Warranty."\(^\text{45}\) Any person making a full warranty is required to repair or replace, without charge, a defective or nonconforming product or part covered by the warranty, or to refund the purchase price.\(^\text{46}\) If a product still malfunctions after a reasonable number of attempts to remedy defects, the consumer is entitled to elect a refund or free replacement of the product or part.\(^\text{47}\) The

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\(^{43}\) See text accompanying notes 128-137 **infra** (discussing the prohibition against disclaimer of implied warranties); text accompanying notes 97-106 **infra** (discussing the prohibition against preconditioning full warranty coverage on the consumer's assumption of onerous obligations).

The Act also prohibits a warrantor from conditioning the warranty on the consumer's using a particular brand of article or service in connection with the warranted product. The Commission is authorized to permit such a tie-in arrangement if it is satisfied that the product in question will function properly only if another particular product or service is used in connection with it and if it determines that a waiver of the prohibition would be in the public interest. Public comment must be permitted prior to making such a waiver, and the Commission must publish its disposition and justification in the Federal Register. 15 U.S.C. § 2302(c) (Supp. IV 1974). A warrantor who provides an article or service without charge may condition his warranty on the consumer's acceptance of that article or service. *Id.*


\(^{45}\) *Id.* §§ 2303(a)(1), 2304(a).

\(^{46}\) *Id.* §§ 2304(a)(1), 2301(10).

\(^{47}\) *Id.* § 2304(a)(4).
duty to repair or replace under a full warranty runs to every person who is a consumer of the warranted product, and that duty may not be qualified by imposing unreasonable requirements on the consumer.

Full warrantors are prohibited from disclaiming, modifying or limiting the duration of implied warranties, but they may limit or exclude consequential damages for breach of express and implied warranties if the limitation or exclusion conspicuously appears on the face of the warranty. Full warranties must, of course, comply with the disclosure requirements of the Act.

The statutory obligations imposed on those giving warranties that do not meet the federal minimum standards are fewer in number. Any such warranty must be designated "Limited Warranty" and must comply with the disclosure rules. Although limited warrantors may not disclaim or modify implied warranties, they may limit the duration of such warranties. No obligation of free repair or replacement is imposed on those making limited warranties, nor are there any proscriptions against preconditioning limited warranty coverage on the consumer's assumption of duties such as returning the product to the factory.

Products may be sold with both full and limited warranties so long as the warranties are differentiated clearly and conspicuously. For example, a refrigerator might be sold with a full one year compressor warranty and a limited six month warranty against defects in material and workmanship in other components of the unit. If the compressor proved to be defective within the one year period of warranty coverage, the seller would be obligated to repair or replace it free of charge to the purchaser. If some other part evidenced defects within the initial six months of use, the warrantor would be required to remedy the defect in accordance with the terms of the warranty, but he could exclude from his obligation the cost of labor involved in remedying the defect.

48. Id. § 2304(b)(4). See text accompanying notes 82-87 infra.
51. Id. § 2304(a)(3). See text accompanying notes 184-188 infra.
53. Id. § 2308(b). See text accompanying notes 130-137 infra.
Disclosure Requirements

The Federal Trade Commission is charged with the responsibility of implementing the Act. Central to discharging that responsibility is the power to require disclosure of terms and conditions of warranty coverage. The disclosure rules promulgated by the Commission require designation of the parties who may enforce the warranty and of the parts of the product that are covered by the warranty; identification of the remedy to which the consumer is entitled in the event of nonconformity and a statement of how that remedy may be obtained; disclosure of any limitations on implied warranties or of incidental or consequential damages; and a statement of the date of commencement of warranty coverage if it is other than the date of purchase.55 The disclosure rules apply only to products actually costing the consumer more than $15.00.56

In its basic framework then, the Act purports to regulate the terms and conditions of both express and implied warranties. In order to accurately assess the efficacy of the Act as a consumer remedy, the regulatory approach to each type of warranty must be examined.

REGULATION OF WRITTEN EXPRESS WARRANTIES

Disclosure in Consumer Product Warranties

When disclosure is required. The designation and disclosure requirements of the Act are applicable only when a written warranty has been given,57 and there is no requirement that consumer products be warranted. The term “written warranty” includes any affirmation of fact or promise that: (1) the material or workmanship in a specified product is defect free; (2) the product will meet a specified level of performance for a speci-

55. 16 C.F.R. § 701.3(a) (1977).
56. Id. The Act authorizes the Commission to promulgate disclosure rules that are applicable to written warranties accompanying products actually costing the consumer more than $5. 15 U.S.C. § 2302 (Supp. IV 1974).
57. The Senate bill authorized recovery under the Act for breach of an express oral warranty, but this provision was deleted by the conferees to conform to a House amendment. S. Rep. No. 1408, 93d Cong., 2d Sess. 26 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7755, 7758 [hereinafter cited without parallel citation as SENATE REPORT]. This decision evidently was based upon the belief that at present there are no significant consumer problems with regard to this type of obligation. Moreover, attempted regulation of written and oral warranties in the context of a single statutory mechanism was deemed awkward at best. The conference report did, however, express the caveat that Congress “would re-examine the issue if oral express warranties became more prevalent.” Id.
fied period of time; or (3) the warrantor will take remedial action if the product does not conform to the terms of the warranty.\textsuperscript{58} Many representations that would constitute express warranties under state law will be excluded from the designation and disclosure requirements of the federal act.\textsuperscript{59}

Energy efficiency ratings for electrical appliances, care labeling of garments, and comparable product information are examples of exempted affirmations.\textsuperscript{60} Similarly, representations that

\textsuperscript{58} 15 U.S.C. § 2301(6) (Supp. IV 1974). As is the case under the Uniform Commercial Code, a representation must become part of the basis of the bargain in order to constitute an enforceable warranty obligation. While the federal act does not further refine the concept, some guidance may be found in the official comments to the UCC.

\cite[\textsuperscript{58}]{58}

[U.C.C. § 2-313, comment 3. The interpretation adopted by the Commission is that warranties which are not intended to be conveyed to the consumer nor to be brought to his attention are outside the coverage of the Act. 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.3(c)). A component supplier's warranty to a manufacturer of consumer goods does not become part of the basis of the consumer's bargain and is exempt. On the other hand, a component supplier may make a written warranty to the consumer which is conveyed through another seller. The Commission has used as an example, a refrigerator carrying a consumer warranty and which is installed in a boat. In this instance, the warranty runs to the purchaser of the boat and is within the scope of the Act.

\cite[\textsuperscript{58}]{58}

Under U.C.C. § 2-313, any affirmation of fact or promise, which relates to the goods and which becomes part of the basis of the bargain, is sufficient to create an express warranty.

\cite[\textsuperscript{58}]{58}

The Act exempts from the bulk of its provisions any disclosure which is otherwise governed by federal law. 15 U.S.C. § 2311(d) (Supp. IV 1974). The specific examples cited in the text are typical of those which likely will fall within this exemption. See FTC Trade Regulation Rule, Care Labeling of Textile Wearing Apparel, 16 C.F.R. § 423.1 (1977); Department of Commerce Procedures for a Voluntary Labeling Program for Household Appliances and Equipment to Effect Energy Conservation, 15 C.F.R. §§ 9.0 .11 (1977). The sole provision of the Act which applies to such written affirmations is § 2302(c), which prohibits conditioning them on the consumer's using a particular brand of article or service in connection with the product. See note 43 supra.

Several other exemptions are worthy of note. Written representations which are expressions of general policy concerning consumer satisfaction and which are not subject to specific limitations are excluded from §§ 2303-2304 of the Act. 15 U.S.C. § 2303(b) (Supp. IV 1974). But see 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.5(b)). Moreover, certain terms and conditions of sale, such as a term permitting a customer to exchange a product within a specified period of time will not be considered to be a written warranty for purposes of the Act. Id. at 36,115 (to be codified in 16 C.F.R. § 700.3(b)). The Commission has advised sellers who employ such practices that the relevant terms should be stated separately from any warranty given in connection with the sale, and that these terms should not be characterized as warranties. Id. at 36,116.
a fabric has been treated with a flame retardant or that paint will not peel are beyond the scope of the definition.

**Shortcomings of disclosure.** The restricted approach of the Act raises fundamental questions regarding the wisdom of selecting disclosure as the primary mechanism for achieving the stated legislative goals. That the threshold definition was narrowly drafted may be explained by concern about the potential negative impact of broader application of the disclosure requirements. Disclosure of product information should be encouraged in advertising and labeling, and imposition of burdensome requirements that must be satisfied when such information is supplied might tend to discourage disclosure of useful data. In short, the mechanics of compliance with disclosure rules may provide a disincentive to making disclosures governed by them.

The congressional decision to narrowly limit the applicability of the Act leaves unaffected numerous representations that may serve as an inducement to purchase. Compliance with federal requirements may be avoided by making representations that are universally regarded as warranties under state law but that do not fit within the federal statutory definition of written warranty. In this respect, the legislation does nothing to prevent consumer deception or to provide a remedy in the event that product characteristics are misrepresented.

A more basic problem inherent in the statutory approach relates to the substance of required disclosures when written warranties are given. Curiously, the Act mandates disclosure of only two warranty terms: limitation or exclusion of consequential damages and limitation of the duration of implied warranties. Full disclosure of other terms and conditions of warranty coverage is called for only "to the extent required by rules..."

61. See 41 Fed. Reg. 36,112, 36,115 (1977) (to be codified in 16 C.F.R. § 700.3(a)).

62. It has been noted that advertising of interest rates has decreased significantly since the disclosure requirements of the Truth-in-Lending Act became effective. "Clearly, the drafters of the statute did not intend this result; the disclosure requirements of the Act were designed to supply consumers with more information, not less." Thain, Credit Advertising and the Law: Truth in Lending and Related Matters, 1976 WASH. U.L.Q. 257, 275. Professor Thain suggests that a requirement of compulsory disclosure of interest rates in all credit advertising would be more likely to promote the legislative goals.

63. 15 U.S.C. § 2304(a)(3) (Supp. IV 1974). The statutory requirement that this term be disclosed clearly and conspicuously is limited to full warranties only. Id.

64. Id. § 2308(b). Since full warranties are prohibited from limiting the duration of implied warranties, this requirement is applicable to limited warranties only. See id. § 2304(a)(2).
of the Commission." The disclosure rules promulgated by the FTC closely parallel the non-exclusive statutory list of items that it may require to be disclosed. The rules require a clear statement of what is covered by a warranty and what the respective obligations of the seller and consumer are in the event of a product malfunction. Neither the statute nor the rules require disclosure of meaningful information that would enable consumers to evaluate the risks associated with cost benefits. In the absence of information regarding the anticipated level of product performance and cost of repair, consumers are unable to determine whether increased warranty coverage is likely to provide benefits commensurate with the cost of the coverage.

For example, of fifteen black and white portable televisions rated by Consumers Union, ten had identical warranties. Ranging in price from $105 to $160, these sets carried a twelve month parts and three month labor warranty. Of the remaining televisions, three had identical twelve month parts and labor warranties. These sets ranged in price from $100 to $125. All of the warranties conditioned coverage upon return of the set to an authorized dealer or prepaid shipment to the factory in the event of malfunction. The seven top rated sets were evaluated as providing comparable performance, and each was within one of the described warranty categories.

In light of these facts, can a consumer make an informed judgment about the reliability of the product and the effectiveness of the warranty? Assuming a price conscious purchaser, the least expensive model with the longest warranty might seem the most attractive alternative. In this case, the purchase price would be $100 and the television would have a twelve month parts and service warranty. On the other hand, the manufacturer of this set has only 3,500 authorized service outlets as opposed to the 15,000 outlets authorized to service another highly rated set, which sells for $20 more but carries the

65. Id. § 2302(a).
67. 15 U.S.C. § 2302(a) (Supp. IV 1974). This provision lists 13 categories of items that may be required to be disclosed, among which are the following: the identity of the warrantor; the identity of the parties who may enforce the warranty; the parts of the product that are covered and the parts that are excluded from warranty coverage; the availability of informal as well as formal legal methods of resolving disputes; and, the steps that consumers should take in order to obtain warranty service.
69. Consumer Reports, March 1977, at 158.
70. Money, March 1977, at 50. In all likelihood, this information will not be
three month service warranty. Warranty service for the former
may cost the purchaser a considerable amount in light of ship-
ment charges which may be incurred if the purchaser does not
happen to live in close proximity to an authorized service facil-
ity. The purchaser lacks adequate information to assess the
risk that a warranted part (or parts) will require replacement
or repair during the nine month period in which the service
warranties differ;\textsuperscript{71} to evaluate the relative costs of shipment
and anticipated labor charges; and to weigh the risk and costs
against the $20 differential in purchase price. The purchasing
decision will be more difficult if the product carries both full
and limited warranties.\textsuperscript{72}

Thus, while the disclosure requirements probably will pre-
vent deceptions which stem from unarticulated terms and con-
ditions of warranty coverage, it is doubtful that they will pro-
vide the incentive to make available product information that
enables consumers to make meaningful choices. Marketing
competition predicated largely upon price differentials, and to
a lesser extent upon minor differences in warranty coverage, is
not necessarily beneficial to the consumer in the absence of
information relating to performance characteristics and the
disclosed in the warranty document. Although the warrantor must make available
information regarding the location of authorized service representatives, it is not re-
quired that this be accomplished at the point of sale. 16 C.F.R. § 701.3(5) (1977).

71. Disclosure of the duration of the warranty in terms of usage measurement
rather than time would assist the consumer in making this type of assessment. Al-
though most manufacturers of major household appliances can estimate the average
useful life of their products, “they [are] unanimous in opposing the publication of
such estimates, even when based on exacting durability tests.” TASK FORCE REPORT,
supra note 8, at 140. Manufacturers’ objections are attributed to concern that provid-
ing such information could mislead consumers and give rise to implied warranty prob-
lems.

On May 25, 1976, the Department of Commerce proposed procedures for creating
and implementing a voluntary consumer product information labeling program. On
the basis of comments and testimony received in connection with its proposals, the
Department concluded that need for such a program existed. Consumers were per-
ceived to be unable “to make rational and accurate marketplace decisions because of
the lack of comparative, easily comprehensible information at the point of sale on
consequence, the Department instituted a limited pilot program to make available
demonstrably important consumer product information that can be measured objec-
tively and reported in understandable terms. \textit{Id.} (to be codified in 15 C.F.R. Part 16).
Since a majority of the trade associations and manufacturers of mechanical and elec-
tronic products opposed the program, it remains to be seen whether this effort will
provide greater incentive for improving the quality of product information made avail-
able to consumers than does the Magnuson-Moss Act.

72. See text accompanying note 54 \textit{supra}. 
cost of repair. The primary benefit derived from the disclosure requirements relates to post-contract events. The consumer must be advised of the steps he must take to perfect his remedial rights if a written warranty has been given. While this information enables a consumer to “maximize his gain from the contract,” the preceding discussion illustrates that the gain may be marginal.

Regulated and Protected Parties

Warrantors and consumers. In sharp contrast with its narrow definition of the threshold term “written warranty,” the Act provides relatively expansive definitions of those who may incur and enforce warranty obligations. The term “warrantor” is defined as including any supplier or other person who gives or offers to give a written warranty or who is obligated under an implied warranty. Despite pleas to give this basic statutory term its “historic and accepted” meaning, an amendment that would have defined warrantor in such a manner that third party guarantors would be excluded from the Act’s coverage was defeated. The definition clearly includes parties outside the distributive chain who undertake to provide a remedy in the event of a product malfunction. An example of a third party guarantee is the Good Housekeeping Seal, which promises replacement or a refund of the purchase price if an approved product proves to be defective. It is clear that this un-

73. A color television warranty covering transistors for 10 years may give a slightly higher priced product a competitive edge. That warranty may provide only marginal benefits to the purchaser, as transistors “cost next to nothing to replace.” MONEY, March 1977, at 51.


75. In addition to the problems discussed in the text, a common consumer complaint is that parts that most frequently break down are the most expensive and the least adequately covered by warranties. TASK FORCE REPORT, supra note 8, at 128.

76. “Supplier” is defined as any person who is in the business of making consumer products available to consumers directly or indirectly. 15 U.S.C. § 2301(4) (Supp. IV 1974).

77. Id. § 2301(5). The conference report made clear that if a person would be deemed to have made a written affirmation of fact, promise or undertaking under state law, he would have done so for purposes of the federal legislation. SENATE REPORT, supra note 57, at 27.

78. HOUSE REPORT, supra note 22, at 90 (Reps. Preyer & McCollister).


The undertaking may influence the purchasing decision as much as a manufacturer's warranty. Consequently, rules designed to prevent deception and provide access to information regarding the enforcement of obligations should be applicable to both.81

The statutory definition of the term "consumer" is equally broad; it has considerably expanded express and implied warranty protection beyond the original purchaser. The definition includes buyers, transferees who acquire the product during the term of an express or implied warranty, and other persons who are entitled by the terms of either the warranty or state law to enforce warranty obligations.82 Senator Magnuson viewed the definition as a designation of the scope of the warranty obligation: "The intent of the definition is to make clear that the supplier is not entitled to specify which classes of people may enforce the obligations of the warranty or service contract so long as the product is transferred during the term of the warranty or service contract . . . ."83 Read literally, this explanation is an overstatement of what actually was accomplished, although there were staunch advocates of this position. The Federal Trade Commission steadfastly maintained that warranties should run with the product and should be transferable to subsequent owners.84 As Senator Hart noted, a purchaser who invests $250 for a new automobile transmission "loses a substantial part of that investment if his guarantee is worthless to the next owner."85

Notwithstanding that loss of bargain, the federal legislation permits some warranty obligations to be limited in scope.

81. The FTC promulgated a rule that partially exempts from the disclosure requirements third party guarantors. 16 C.F.R. § 701.3(b) (1977). As long as organizations furnishing seals of approval state only general policy promising remedial action on the seals, the emblems themselves need not disclose the information required to be included in warranty documents. The exemption is subject to the proviso that the organizations publish the disclosures in each issue of a publication with a general circulation and make available the disclosures upon request free of charge. This rule recognizes the value of the services rendered by sponsoring organizations such as Good Housekeeping, but the Commission indicated that the staff should monitor the impact of the rule and make any recommendations regarding necessary or desirable changes. 40 Fed. Reg. 60,168, 60,179 (1975). The propriety of this exemption has been questioned in light of the legislative history surrounding third party warrantors. See Strasser, supra note 29, at 1116.


83. Magnuson, supra note 80, at 138.

84. See Warranties Hearings, supra note 5, at 72; 1971 Warranty Protection Hearings, supra note 25, at 196 (statement of Miles Kirkpatrick, FTC Chairman).

While the Act provides that the duties of a warrantor who gives a full warranty extend to all persons who are consumers with respect to the product, there is no similar expression of the scope of the obligation assumed by one who gives only a limited warranty. It is implicit that such a warrantor may limit those to whom he owes a duty.

The regulatory response. The FTC promulgated a disclosure rule that applies when a limited warranty does not extend to all consumers of the product. As originally proposed, the rule would have required the warrantor to specify the parties to whom the warranty ran and, where applicable, to indicate any limitations on the enforceability of the warranty by parties other than the first purchaser at retail. The rule was subsequently revised to require such disclosures only when the enforceability of the warranty is limited to the consumer purchaser or to persons other than every consumer owner during the warranty term. The Commission noted that "under Sections 104(b)(4) and 101(3) of the Act, a warrantor offering a full warranty is precluded from limiting warranty coverage to the first purchaser."

In a startling turn of events, the Commission later adopted a contradictory interpretation that allows a full warranty to be extended only to the first purchaser of a product. This result may be accomplished by designating the duration of the warranty as the period of time during which the first purchaser owns the product: e.g., "full warranty for as long as you own your car." The rationale underlying the interpretation is that sections 104(b)(4) and 101(3) merely prohibit a full warranty from expressly restricting the warranty rights of a transferee during the stated term of the warranty. If the warrantor has by definition limited the duration of the warranty to the length of time the original purchaser owns the product, there can be no violation of the Act because "[n]o rights of a subsequent transferee are cut off as there is no transfer of ownership during

87. The FTC is authorized to promulgate rules requiring disclosure of the identity of the parties to whom coverage is extended. Id. § 2302(a)(2).
89. 16 C.F.R. § 701.3(a)(1) (1977). The decision was responsive to industry's position that in the absence of language to the contrary, a consumer would assume that there were no restrictions on who could enforce the warranty. 40 Fed. Reg. 60,168, 60,172 (1975).
91. 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.6(b)).
the duration of (any) warranty.' 192

This reasoning defies logic. Section 104(b)(4) does not merely prohibit express or implied limitation of the scope of the warranty. It imposes an affirmative obligation. "The duties under [a full warranty] extend from the warrantor to each person who is a consumer with respect to the consumer product."93 Moreover, the assertion that limitation of the duration of a written warranty to the period during which the first purchaser owns the product precludes transfer of ownership "during the duration of (any) warranty" is clearly wrong. The definition of the term consumer includes persons to whom a product is transferred "during the duration of an implied or written warranty."94 Since those who give full written warranties are prohibited from limiting the duration of implied warranties,95 it is obvious that the transfer of ownership of an automobile two days after a fully warranted new muffler has been installed is a transfer during the duration of the implied warranty of fitness for ordinary use regardless of the duration of the written warranty. The duties of the warrantor run to the transferee, who is a consumer. The interpretation, which is in irreconcilable conflict with the statutory language, renders nugatory a portion of the definition of the term consumer.

This regulatory response is significant because it demonstrates that the FTC may be as cautious in its approach to implementing the Act as Congress was in drafting it.96 The extension of warranty obligations beyond the first consumer purchaser only when a full warranty is given is typical of the limited intervention effected by the Act. Unfair limitation of the scope of warranty obligations is prohibited only with regard to that narrow class of warranty documents.

The purpose of the prohibition obviously is to provide the

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92. Id. This interpretation does give consumers one advantage when a full warranty is limited in duration to the time when the first purchaser owns the product. Since warranties which indicate that "this muffler is warranted so long as you own the car in which it is installed" generally induce the purchaser to believe that proof of purchase is not required, the Commission has adopted the position that such a warrantor may not require documentary proof of purchase and that the warrantor has the burden of proving that a claimant under the warranty is not the original purchaser. See id.


94. Id. § 2301(3) (emphasis added).

95. See text accompanying notes 134-160 infra.

96. FTC caution is evidenced by the "slow pace" at which the agency promulgated rules and regulations essential to full implementation of the Act. See 7 Rut.-Cam. L.J. 379, 388 (1976).
consumer who purchases a fully warranted product a higher measure of protection and an opportunity to realize the maximum economic benefit from his bargain. In this regard, the prohibition constitutes an attempt to improve the bargaining position of the consumer by providing a meaningful distinction between full and limited warranties. A car owner who replaces a dead battery before giving the vehicle to a relative derives no benefit from full warranty coverage if the warranty is non-transferable. Nor does one who invests in a grand piano that is warranted only to the first purchaser gain much if he sells the piano while it is relatively new. If all warrantors may limit the scope of remedial obligations in this manner, the designation of such an undertaking as a full warranty is unjustified.

The proposed FTC interpretation will neither promote meaningful warranty competition nor provide a means for consumers to bargain for unconditioned protection. The qualified congressional mandate that unfair limitations be excluded is destined to fail if the regulatory agency charged with implementation of the legislation adopts a contrary policy.

Conditional Warranty Coverage

Prohibition on conditioning. In addition to the problem of unfair limitations on the scope of warranty obligations, imposition of onerous burdens on the consumer as a condition of warranty service was a matter of considerable concern to consumer advocates. The most frequently cited example of a burdensome requirement was a grand piano warranty under which the manufacturer agreed to repair or replace defective parts "provided the piano is delivered to our factory . . . and the transportation costs borne by the purchaser." A warranty requiring the return of such a product realistically may be described as an "illusory guarantee." This problem also is addressed by the Act on a limited basis. A full warranty may not precondition coverage on the purchaser's assumption of duties other than notification of a product malfunction and making the product

97. This warranty is appended to the testimony of David A. Swankin, Washington Representative, Consumers Union, in Consumer Product Hearings, supra note 8, at 262. The manufacturer, Baldwin Piano and Organ Company, was asked to respond to a consumer's criticism of the warranty term. Baldwin explained that the stated condition was not unusual in the piano industry, and that the warranty was "worded to discourage impulsive 'return to factory'" of the hefty product. Id. at 261. The gist of the reply was that the warranty did not mean what it said.
98. Id. at 137 (statement of Winston Pickett, Assoc. Counsel, Gen. Elec. Co.).
99. 15 U.S.C. § 2304(b)(1) (Supp. IV 1974). This prohibition is subject to the
reasonably available to the warrantor.\textsuperscript{100} It appears that requiring a consumer to bear the expense of returning an electric iron to the retailer or a nearby service facility or of mailing a cigarette lighter to the manufacturer would not be unreasonable.\textsuperscript{101} Requiring the prepaid return of a product which is not easily portable clearly would be unreasonable.

Another prevalent requirement of warrantors has been the return of warranty registration cards, a practice that apparently has been employed in deceptive and abusive ways. For example, a Major Appliance Consumer Action Panel survey indicated that twenty-eight of thirty-two companies responding would honor their warranty obligations even if a consumer had failed to comply with the stated requirement that the registration card be returned.\textsuperscript{102} In other words, the manufacturers misrepresented the terms and conditions of their warranties. The Federal Trade Commission correctly observed that a mere declaration that the return of a registration card is a prerequisite to warranty coverage “may chill the assertion and exercise of warranty rights . . . because of the mistaken (although logical) belief that the warranty accurately states the warrantor’s intentions.”\textsuperscript{103} Moreover, the survey revealed that owner registration cards were used by manufacturers for a variety of purposes, not the least of which was gathering marketing data. The House Subcommittee staff concluded that the primary purpose served by the requirement was market research\textsuperscript{104} and proviso that other duties which a warrantor can demonstrate as being reasonable may be imposed. The warrantor is required to demonstrate the reasonableness of any condition in an FTC rulemaking proceeding, or to be able to justify it in an administrative or judicial enforcement proceeding, or in an informal dispute settlement proceeding. \textit{Id.}

\textsuperscript{100} An exception is made for any requirement that an aggrieved consumer seeking refund or replacement of a product make the product available free and clear of liens and other encumbrances. Unless the Commission determines that such a requirement would not be practicable and promulgates a rule or issues an order prohibiting or limiting imposition of that duty, a seller is free to condition warranty coverage and performance upon fulfilling that obligation. \textit{Id.} § 2304(b)(2).

\textsuperscript{101} This may be viewed as part of the consumer’s obligation to make the product available to the warrantor. \textit{See House Report, supra} note 22, at 38. \textit{See generally Senate Report, supra} note 57, at 25.

\textsuperscript{102} 40 Fed. Reg. 60,168, 60,179 (1975).

\textsuperscript{103} \textit{Id.} at 60,180.

\textsuperscript{104} The Presidential Task Force on Appliance Warranties and Service also observed that increased use of warranty registration cards reflected intense competitive pressures for access to lists of potential consumers. \textit{Task Force Report, supra} note 8, at 9. Most manufacturers surveyed frankly admitted that the cards were used solely as a source of marketing data. \textit{Id.} at 78.
that the use of the cards posed a threat to privacy. The FTC has adopted an interpretation that designates a requirement that a consumer return a registration card as unreasonable. The Commission's position is that it is impermissible for a full warranty expressly or impliedly to condition coverage upon such a return. However, this determination affords protection only for consumers who receive "full" warranties.

Impact of the prohibition. As previously noted, the Act prohibits conditioned warranty coverage only when a full warranty is given. As a result, a large segment of the consuming public may continue to endure unreasonable requirements in order to obtain warranty coverage. The purchaser of a grand piano still may be required to ship it back to the factory for warranty service if only a limited warranty is given. That same purchaser may be denied warranty coverage altogether if he has failed to perfect his rights by returning a registration card. The FTC is powerless to remedy either problem, except insofar as a requirement of clear disclosure of the purchaser's obligations and the warrantor's intentions may dispel the elements of surprise and deception.

Several hypotheses may be advanced to explain this aspect of the legislation. First, there is the possibility that impo-

105. 40 Fed. Reg. 60,168, 60,180 (1975). This concern is particularly relevant when the consumer divulges the requested information only with the understanding that it is necessary for perfection of warranty rights.

106. 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.7(b)). The FTC, however, approved the practice of suggesting that a registration card be returned in order to insure the purchaser of a convenient method of proving the date of purchase of the product. Any such suggestion must be accompanied by a statement that the failure to return the card will not affect the consumer's warranty rights. Id. 36,116 (to be codified in 16 C.F.R. § 700.7(c)).

107. As was noted by the Senate Committee Counsel, the disclosures may be complete but the warranty may be of no substance because of the magnitude of the economic burden imposed upon the consumer. Consumer Product Hearings, supra note 8, at 137 (statement of Winston Pickett, Assoc. Counsel, Gen. Elec. Co.).

The disclosure rules promulgated by the FTC require warrantors to disclose in their warranty documents the step-by-step procedure that must be followed by consumers desiring to obtain warranty service. 16 C.F.R. § 701.3(a)(5) (1977). Consumers are entitled to be informed of the extent of their own obligations under a warranty, including such information as a requirement that the product be shipped to the factory at the purchaser's expense, a requirement that a sales slip and validated certificate must be preserved to prove the date of purchase, and a requirement that the consumer must bear some expense in connection with obtaining service under the warranty. Similarly, warrantors who use a warranty registration card must disclose the fact that return of the card is a condition precedent to warranty coverage. Id. § 701.4. If a registration card appears to be an essential element of the warranty but its return is not in fact required, then that information must be disclosed in the warranty document.
sition of a blanket prohibition against onerous terms might lead to the demise of written warranties. A small manufacturing concern having no network of service facilities might forego giving written warranties if it could not condition them. This decision could reflect a fear of prohibitive costs associated with returns to the factory or of underwriting unknown labor costs if the producer were unable to shift the risk to the consumer by virtue of its contract/warranty. Mass merchandisers also might consider it essential to substantially increase the price of their products if compelled to assume the statutorily designated obligations whenever written warranties are given. In order to engage in effective price competition, such concerns might shun warranties altogether.

If an absolute prohibition against unfairly conditioning written warranties would lead to a decrease in their availability, the benefits obtained by disclosure requirements would be neutralized. Rather than risking that result, the legislation

108. Consumer Product Hearings, supra note 8, at 122 (statement of Nat'l Small Business Ass'n). Statutory imposition of warranty obligations was cited by the association as a possible barrier to market entry. Id. The Presidential Task Force reported that manufacturers complained about the difficulty of locating qualified service agencies, particularly in rural areas. Task Force Report, supra note 8, at 83.

109. If required to assume the costs of labor and transportation in connection with servicing products, the manufacturers claim that it would be impossible to anticipate the costs because of consumer demands for servicing parts not covered by the warranty. Task Force Report, supra note 8, at 82.

110. Anticipated increased costs generally attributed to enactment of warranty legislation included the following: (1) frequent change of printed warranties and promotional materials in order to comply with FTC rules and regulations; (2) expansion of service capabilities in order to comply with a statutory requirement of timely repair or replacement; (3) refund of full purchase price, including dealer's mark-up, when full warrantor's efforts to repair fail; (4) legal fees and judgments resulting from a requirement that consumers be informed of their remedies. Warranties Hearings, supra note 5, at 148 (statement of George Lamb, Gen. Counsel, Ass'n of Home Appliance Mfrs.). With regard to the latter, it was also feared that one successful class action could force a relatively small concern out of business. Consumer Product Hearings, supra note 8, at 122 (statement of Nat'l Small Business Ass'n). A fifth and seemingly inconsistent cost argument was that there would be a loss of sales by one who gives no warranty. Warranties Hearings, supra note 5, at 148. This factor involves no industry loss but rather involves only the transfer of a gain to another seller who gives a warranty.

111. The fact that this technique is often employed to stimulate sales arguably supports industry's position that warranties should not be mandatory. See Warranties Hearings, supra note 5, at 82 (statement of Wallace Bruener, Director & Chairman, Warranty & Guaranty Comm., Nat'l Home Furnishings Ass'n). The consumer's range of options is broadened when less expensive products without warranties are available. See id. at 64-65 (statement of Richard McLaren, Assistant Attorney Gen., Antitrust Div., & Virginia Knauer, Spec. Assistant to the President for Consumer Affairs). Assuming a competitive market structure, the argument is not without merit. But see note 24 supra.
appears to reflect the judgment that a clearly spelled out "illusory guarantee" is better than none at all.\textsuperscript{112} The Act does not require that express undertakings be practical unless a full warranty has been created.

A second explanation for confining the limitations on conditional warranty coverage is suggested by the bifurcated approach of the legislation. Since a warranty that is required to be captioned as "limited" might convey the notion that the warrantor is supplying an inferior product that it cannot afford to fully guarantee, it might be assumed that competitive forces would provide a strong incentive for giving full warranty coverage.\textsuperscript{113} In this regard, industry spokesmen expressed concern that if market forces put pressure on all sellers to give full warranties, the result would be a lessening of competition and across-the-board price increases. The consumer response to this concern was that if full warranties become prevalent, manufacturers would be required to meet the minimum standards "without pricing much consumer demand out of the market."\textsuperscript{114} The result foreseen by consumer advocates was that manufacturers would find it more beneficial to invest in improving product quality than to invest in increasing their servicing potential.

As of this writing, the experience under the Act does not support the assumption that competitive pressures will influence warranty terms and product quality. The giving of full warranties is the exception rather than the rule. Moreover, within given product lines there is little competition among what appear to be "standard warranties."\textsuperscript{115} It seems unlikely that the regulatory scheme contained in the Act will generate meaningful warranty competition or have substantial impact on the substance of express obligations. It may, however, give a competitive edge to those who assume a greater obligation to their purchasers insofar as the designation "full warranty" may influence the purchasing decision.

\textsuperscript{112} See text accompanying notes 128-129 infra.


\textsuperscript{114} 1973 Warranty Protection Hearings, supra note 25, at 100 (statement of Prof. Leary).

\textsuperscript{115} See text accompanying note 69 supra.
REGULATION OF IMPLIED WARRANTIES

Disclaimer and Modification

The need for regulation. Unless disclaimed, there exists in every contract of sale by a merchant an implied warranty that the goods are reasonably fit for the ordinary purposes for which they are used.\textsuperscript{116} Prior to the enactment of the Magnuson-Moss legislation, substitution of extremely limited express obligations in lieu of implied warranties was a common practice.\textsuperscript{117} The resulting consumer hostility to this practice is attributable to several factors: (1) written warranties containing such disclaimers deceptively appear to increase rather than to decrease the rights and remedies of purchasers;\textsuperscript{118} (2) few consumers understand the effect of disclaimer clauses;\textsuperscript{119} and (3) disclaimers contradict representations in promotional and advertising material.\textsuperscript{120} Consumer advocates therefore urged adoption of a total prohibition against disclaimers of implied warranties.

Industry strenuously objected to this proposal. Opposition to regulating disclaimers was predicated upon the notion that the power to negate the existence of implied warranties universally is recognized as “a basic commercial right” of contracting parties “to freely and knowingly allocate the economic risks relating to the quality of goods.”\textsuperscript{121} While clear disclosure of the terms and conditions of warranty coverage was perceived as a valid legislative concern, governance of the substance of warranties was not.\textsuperscript{122} The competitive forces of the marketplace were deemed the best mechanism for assuring a variety of consumer options.\textsuperscript{123}

\textsuperscript{116} U.C.C. § 2-314.
\textsuperscript{117} See text accompanying notes 125-126 infra.
\textsuperscript{118} The Presidential Task Force characterized the major appliance warranty as “all too frequently a fog-shrouded halo which effectively camouflages a lengthy list of disclaimers and limitations.” TASK FORCE REPORT, supra note 8, at 38.
\textsuperscript{119} See text accompanying notes 10-12 supra.
\textsuperscript{120} A consumer who views a commercial demonstrating home use of a washing machine is entitled to believe that machine to be suitable for washing clothes in the home. TASK FORCE REPORT, supra note 8, at 47. A subsequent disclaimer of implied warranties is contradictory to the representation made in the advertising.
\textsuperscript{121} Consumer Product Hearings, supra note 8, at 35 (statement of James Lynn, Gen. Counsel, Dep’t of Commerce).
\textsuperscript{122} Mr. Lynn characterized the economic and public policies supporting the power to disclaim implied warranties as “entirely sound” and urged that they not be repudiated. Id. at 37.
\textsuperscript{123} Warranties Hearings, supra note 5, at 64-65 (statement of Richard W. McLaren, Assistant Attorney Gen., Antitrust Div., & Virginia Knauer, Spec. Assistant to the President for Consumer Affairs).
The idea that consumers are vested with power to bargain for meaningful warranty protection not surprisingly was attacked as "pure myth" by consumer advocates. Consumer advocates succeeded in persuading Congress that the concept of freedom of contract is outmoded when viewed in a mass merchandising context. When contracts are presented on a take-it-or-leave-it basis, rules premised upon principles of equal bargaining power must be discarded. The resulting legislation strikes a balance

124. Consumer Product Hearings, supra note 8, at 240 (statement of George Gordin, Senior Attorney, Nat'l Consumer Law Center at Boston College Law School).

125. FTC Report, supra note 6, at 23. The report noted that while Chrysler Corporation was the only manufacturer offering a long-term power train warranty "its advertising expenditures more than doubled, a considerable portion thereof being devoted to advertising the warranty." Id. at 24.

126. Except for guarantees against defects, the warranty documents were devoted to limiting the protection in terms of time and mileage periods, limiting the remedy for defects to repair or replacement, excluding components such as tires, and disclaiming implied warranties. Id. at 19.

127. Id. at 20.
between the polar options of leaving unchecked the practice of marketing shoddy products that are accompanied by illusory guarantees, or of making the government a partner of the consumer in private contract negotiations. The solution consists of a qualified limitation on the power of the author of the contract.

Nothing in the Act prohibits a seller from disclaiming all warranties, including the implied warranty of merchantability. New products may be sold on an "as is" basis. On the other hand, if a seller chooses to give a written warranty in a transaction that falls within the coverage of the federal legislation, implied warranties may not be disclaimed. The consumer who purchases a product on the strength of that written warranty has reason to expect and a right to require that the product supplied be reasonably fit for the ordinary purposes for which it is used.

The statute, however, does not signal the creation of a federal implied warranty of merchantability. The Act makes clear that state law governs the circumstances under which implied warranty obligations are imposed and that the law of the forum also determines the quality or performance level that impliedly warranted goods must meet. The source of state law governing implied warranties in most jurisdictions is the Uniform Commercial Code, which defines and governs the creation of implied warranties of merchantability and of fitness for a particular purpose. In some jurisdictions, the

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129. Id. § 2308(a). The prohibition was described as "perhaps the most significant part of this bill." 1971 Warranty Protection Hearings, supra note 25, at 278 (statement of Edward Berlin, Gen. Counsel, Consumer Fed’n of America).
131. With the exception of Louisiana, the Uniform Commercial Code is in effect in all jurisdictions, including the District of Columbia and the Virgin Islands.
132. U.C.C. § 2-314 provides that there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable, and the core test of merchantability is fitness for the ordinary purpose for which such goods are used. U.C.C. § 2-314, comment 8. Section 2-315 imposes an obligation of supplying goods which are suitable for the particular needs of the buyer when the seller has reason to know of those needs at the time of contracting and has reason to know that the buyer in relying on his skill or judgment to supply suitable goods. Each of these warranties may be disclaimed or modified by sellers who comply with U.C.C. § 2-316.

A written exclusion or modification of the implied warranty of merchantability must be conspicuous and must mention the word merchantability or use equivalent language which makes clear that implied warranties are excluded. The implied warranty of fitness for a particular purpose may be disclaimed or modified only by a conspicuous writing. U.C.C. § 2-316(2).
UCC warranty scheme is supplemented by independent consumer protection legislation.\textsuperscript{133}

Notwithstanding that one must look to state law in order to ascertain whether or not an implied warranty has been created in a given sales transaction, the Act regulates the conditions under which implied warranties may be limited or modified. In addition to the absolute prohibition against disclaimer of implied warranties if a consumer product is covered by a written warranty,\textsuperscript{134} the Act all but eliminates the power to modify such warranties. A supplier who gives a “full” written warranty is precluded from modifying implied warranty liability.\textsuperscript{135} A supplier who gives a “limited” written warranty is similarly restricted, but such a warrantor may limit the duration of implied warranties to the reasonable duration of the express warranty if the limitation is conscionable and conspicuous.\textsuperscript{136} What was intended to be accomplished by the inclusion of this exception is unclear.\textsuperscript{137}


134. "No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if ... such supplier makes any written warranty to the consumer with respect to such consumer product ...." 15 U.S.C. § 2308(a) (Supp. IV 1974). The subsection (b) reference relates to the power granted to persons who give limited written warranties to limit the duration of implied warranties.

135. \textit{Id.} § 2304(a)(2). Full warrantors may limit or exclude consequential damages for breach of implied warranties if the limitation or exclusion appears conspicuously on the face of the warranty. \textit{Id.} § 2304(a)(3).

136. 16 C.F.R. § 701.3(a)(8) (1977). In conjunction with the limiting language, a warrantor is required to disclose that the limitation may not be effective in the buyer's jurisdiction.

137. The interpretation problems inherent in § 2308 are highlighted by a statement made by Congressman Eckhart, who persistently quizzed witnesses at the hearings about the application of the provision. "Frankly, I have trouble with the whole section. I don't know precisely what it attempts to have done, and I am one of the authors of the bill. . . ." \textit{1971 Warranty Protection Hearings, supra} note 25, at 187.
Limitation of Duration

The use of the word "duration" in conjunction with the creation of express warranties under the Act fairly connotes the term during which a seller has undertaken an affirmative obligation, e.g., "Full One Year Warranty." Disclosure of this term is necessary to enable a purchaser to determine over what period of time the warranty promises that the product will meet a specified level of performance, or the period of time during which the warrantor promises to take remedial action should specified defects appear.

On the other hand, warranties implied by law have no duration in the sense that the word duration is commonly understood. An implied warranty of merchantability imposes upon the seller an obligation to supply goods which, at the time of sale, are fit for the ordinary purpose for which such goods are used. Similarly, when an implied warranty of fitness for a particular purpose has been created, the seller is obligated to supply goods that are suitable for the buyer's particular requirements at the time of sale. Duration ordinarily has meaning in the context of implied warranty liability only insofar as the purchaser is granted a limited period of time in which he must discover the existence of a breach and must notify the seller thereof, and an additional limited period of time in which to file suit in the event that the seller declines to remedy the defect. Hence, the provision in the federal act permitting limited express warranties to limit the duration of implied warranties lacks apparent meaning.

Statute of limitations theory. It has been suggested that the reference to duration relates to the statute of limitations governing an action for breach of implied warranty. Support for this hypothesis is sought in UCC section 2-725, which specifies that unless a warranty explicitly extends to future performance of the goods and discovery of the defect must await that performance, a breach occurs upon tender of deliv-

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138. U.C.C. § 2-607(3)(a) requires that a buyer notify the seller within a reasonable time after the breach is or should have been discovered. Failure to comply with this provision bars the purchaser from pursuing any remedy for the breach.

139. U.C.C. § 2-725 provides that a breach ordinarily occurs upon tender of delivery, which event causes the statute of limitations to begin to run. A four year period of limitation is provided by statute, but the parties may by agreement reduce the period to a term of not less than one year.

140. See Clark & Davis, supra note 133; Saxe & Blejwas, supra note 29, at 20-22.

141. Few warranties are held to extend explicitly to such performance, and there
ery of the goods. Notwithstanding that a defect may be latent, the cause of action accrues upon tender, and the purchaser has a maximum of four years to discover the breach and commence litigation.\textsuperscript{142} Since implied warranties do not explicitly extend to future performance, some commentators have suggested that “it is only logical to conclude that implied warranties have no continued existence, \textit{i.e.}, no duration. By using the phrase ‘duration of implied warranty,’ the writers of the Act must be referring to the statute of limitations.”\textsuperscript{143}

This rationale is not wholly persuasive. Nothing in the federal act or its legislative history suggests any intention to tamper with state statutes of limitation.\textsuperscript{144} If one accepts this

exists a genuine “judicial reluctance to infer from the language of express warranties terms of prospective operation that are not clearly stated.” Binkley Co. v. Teledyne Mid-America Corp., 333 F. Supp. 1183, 1186 (E.D. Mo. 1971), aff’d, 460 F.2d 279 (8th Cir. 1972).

The term “explicit” has been defined as “not obscure or ambiguous,” \textit{Black’s Law Dictionary} 689 (4th ed. 1951), and as “leaving nothing implied.” \textit{Webster’s Third International Dictionary} 801 (unabr. ed. 1971). Cases in which warranties have been found to be prospective include Rempe v. General Elec. Co., 28 Conn. Supp. 160, 254 A.2d 577 (1969) (warranty that disposal will work properly during its lifetime); Mittasch v. Seal Lock Burial Vault, Inc., 42 App. Div. 2d 573, 344 N.Y.S.2d 101 (1973) (warranty that burial vault will give satisfactory service at all times); and Perry v. Augustine, 37 Pa. D. & C.2d 416 (1965) (warranty that heating system will be able to heat at 75 degrees inside when sub-zero outside temperatures exist). The soundness of Perry has been appropriately questioned. See J. \textit{White} \& R. \textit{Summers}, \textit{Handbook of the Law Under the Uniform Commercial Code} 342 (1972).

Representations that a product will meet a specified level of performance or is capable of performing certain tasks do not fall within the exception unless directly linked with a reference to a future time. A warranty that a welding machine will weld at the rate of 1,000 feet per fifty-minute hour is breached when the seller tenders delivery of the machine. Binkley Co. v. Teledyne Mid-American Corp., 333 F. Supp. at 1183. Similarly, a representation that a tractor is suitable for heavy duty plowing relates only to a present capability of the product. Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 315 N.E.2d 580 (1974).

142. U.C.C. § 2-725.


144. There were several references to statute of limitations problems during the hearings on this legislation, but they seemed inapposite. For example, it was suggested that:

\[ \text{[T]here is no settled rule of law as to when the Statute of Limitations begins to run in the case of a breach of implied warranties. ... Section 108 as it stands would necessarily create undue conflict and confusion in the courts as to ... the time limits within which a consumer must commence an action for [breach of warranty].} \]

\textit{1971 Warranty Protection Hearings, supra} note 28, at 183 (statement of Thomas Nichol, Gen. Counsel, Gas Appliance Mfrs. Ass’n). This statement fails to take into account the fact that in most jurisdictions the question is resolved uniformly and statutorily by U.C.C. § 2-725. Hence, breach of an implied warranty occurs upon tender of delivery, regardless of the purchaser’s lack of knowledge of the breach. See General Motors Corp. v. Tate, 257 Ark. 347, 516 S.W.2d 602 (1974); Beckmire v.
theory, a collateral issue is raised in that the terms of a limited warranty under the Act would provide less protection than that afforded by state law. UCC section 2-725 permits the parties to reduce the period in which legal action must be commenced to a period of not less than one year. A warrantor giving a six month limited warranty which also limited the duration of implied warranties to six months would violate this provision of the UCC.

Moreover, proponents of this theory seem convinced that “duration” means the length of a warrantor’s affirmative undertaking when used in conjunction with express warranties, and that it refers to the statute of limitations only when used in conjunction with implied warranties. This interpretation would lead to an anomalous result. A cause of action accruing in connection with a limited six month warranty, in which the duration of implied warranties also was limited to six months, would be governed by a four year statute of limitations if the defect related to the express warranty. It would be governed by a six month statute of limitations if the defect related to an implied warranty. Absent a compelling reason which is not apparent, adoption of this construction of the statute needlessly complicates newly created consumer remedies.

A theory of prospective breach. A second possible meaning of the limitation of duration exception is that the language is designed to impose liability for prospective breaches of implied warranties. Rather than permitting the statute of limitations to run despite the fact that the defect is latent, the effect would be to protect the consumer “against a subsequent defect which he could not reasonably have been expected to discover at the time of sale.” The language may be perceived as broadening


145. “In the case of a ‘Full’ written warranty the four-year limit under the UCC presumably will continue to be the rule.” Clark & Davis, supra note 133, at 611. The other proponents of this position clearly believe that duration refers not to the length of an obligation under a written warranty but to the statute of limitations governing an implied warranty. Saxe & Blejwas, supra note 29, at 21.


147. Id. at 596.
consumer rights as they exist under the UCC which "makes no express provision for the duration of any implied warranty beyond the time of sale." This hypothesis suggests that the only statute of limitations ramification is that the accrual of a cause of action would not automatically occur on tender of delivery. Rather it would accrue at some other time during the warranty period, presumably when the purchaser in fact discovers or should have discovered the breach.

There is nominal support in case law for the proposition that implied warranties should have prospective application. In *Aced v. Hobbs-Sesack Plumbing Co.*, the California Supreme Court squarely confronted the issue in a case arising under the Uniform Sales Act. Hobbs, a sub-contractor, supplied material and labor for a radiant heating system installed in the concrete slab floor of a house constructed by Aced. About a year after the date of installation, the homeowners discovered that the tubing had developed leaks. The following year the entire system had to be replaced, and the home owners filed suit against Aced one year later. Aced filed a cross-complaint against Hobbs for breach of the implied warranty of merchantability. Among other defenses, Hobbs claimed that the breach occurred, if at all, no later than the date of installation. Since Aced's cross-complaint was filed more than four years after that date, Hobbs asserted that the claim was barred by the statute of limitations. The court held that implied warranties may be deemed prospective in nature if a defect cannot reasonably be discovered at the time of sale. The court concluded that the trier of fact could have determined that a reasonable time had not elapsed when the leaks were discovered in the radiant heating system. If that were found to be the case, the statute of limitations was deemed not to begin to run until that date.

The Magnuson-Moss Act reference to limitation of the duration of an implied warranty suggests that the drafters may have assumed that implied warranties are, or should be, prospective in character, having a duration beyond the time that a product is sold. In that event, the provision that such warranties may be limited to the duration of express warranties of reasonable duration might be appropriately labeled as

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148. *Id.* at 595.
150. *Id.* at 584, 360 P.2d at 903, 12 Cal. Rptr. at 263.
151. *Id.*
“curious.” As one commentator noted: “On the necessary assumption that terms implied by law are by nature reasonable, it is difficult to see what point is served by allowing them to be limited to the duration of express terms of reasonable duration. In both cases, a court will have to decide what is reasonable.” Indeed the California court used as its criterion for prospective breach a reasonable time.

One response to this critique might be that what constitutes a reasonable duration for an express warranty may be on the lower end of the spectrum of what constitutes a reasonable time to discover lack of merchantability. Liability for prospective breach of implied warranties may be limited by the selection of a period of time that is reasonable with regard to the warrantor’s express undertakings. For example, if the supplier of the radiant heating system had undertaken a limited obligation to repair or replace defective parts for a period of six months, under the Act the length of time during which the purchaser should discover unfitness of the system similarly could be limited to six months. This limited obligation could be reasonable under the Act even though it could be found that one year after the date of installation was not an unreasonably long time for discovering the leaks. Under this analysis, the cause of action would accrue when the breach was discovered or upon the expiration of the express warranty term, whichever first occurred.

This approach is not without its problems. As is true in the case of the statute of limitations theory, the proposition that the Act affects state statutes of limitation lacks support in the statutory language and legislative history. The Act makes no attempt to define when a breach occurs or when a cause of action accrues. In the absence of express provision or legislative history to the contrary, the Act must fairly be regarded as leaving unaffected state policy on the appropriate period of limitation.

If a different conclusion were reached, the statute would pose a dichotomy similar to that flowing from the statute of limitations theory. The accrual of causes of action for failure to tender conforming goods would be determined by reference to different aspects of the transaction. A cause of action for breach of a warranty that the goods are defect-free would ac-
Breach of an implied warranty that the goods are fit for ordinary purposes would occur at some later point in time, presumably when the purchaser discovered or should have discovered the breach. Since both warranties relate to the quality of the goods at the time of tender and breach of the express warranty may be equally as difficult to discover at that time as lack of merchantability, there is no strong policy supporting this result. This is true because the underlying reason for creating liability for prospective breaches of implied warranties would be to afford the purchaser of an unfit product a reasonable opportunity to discover latent defects before the statute of limitations begins to run.

A theory of required manifestation. If one subtracts from the preceding analysis the implications regarding the accrual of a cause of action and focuses on the first element, i.e., what constitutes a reasonable time to discover a malfunction, a fairly logical reading of the language may be gleaned. Examination of the problem from the perspective of consumer expectations may be helpful. A consumer who purchases a product, especially one on which the seller has chosen to warrant one component, is entitled to expect that the product will function reasonably well as a unit beyond the date of purchase. The UCC

153. See note 141 supra. A typical consumer product warranty might consist of a statement regarding product characteristics and the warrantor's agreement to make repairs if the product malfunctions. This is not a warranty which relates to the future performance of the goods, even though it designates a specified term during which the warrantor has assumed an obligation. The following automobile warranty presents a familiar example of this type of undertaking:

This vehicle is warranted against defects in material and workmanship in normal use as follows: The entire vehicle (except tires) is warranted for 12 months or 12,000 miles, whichever first occurs. Any part found defective will be repaired or replaced, at the seller's option, without charge.

See, e.g., Voth v. Chrysler Motor Corp., 218 Kan. 644, 647, 545 P.2d 371, 374 (1976). This guaranty is not an affirmation that the automobile will perform without malfunction during the period of warranty coverage. Id. at 648, 545 P.2d at 375. See also Dennin v. General Motors Corp., 78 Misc. 2d 451, 357 N.Y.S.2d 668 (Sup. Ct. 1974); Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 354 N.Y.S.2d 778 (Sup. Ct. 1974); 8 U.C.C. Rep. 1257 (1971). Rather, this statement is an express warranty that the promise to repair will be honored. The underlying assumption of such a promise is that the product might malfunction. The statement simply establishes "a period during which a cause of action might accrue for failure to repair or replace." Dennin v. General Motors Corp., 78 Misc. 2d at 452, 357 N.Y.S.2d at 670. A cause of action for breach of an express warranty that the seller is not tendering defective goods would accrue at the time of tender. Thus, a distinction must be made between a suit involving a seller's breach of post-sale obligations and a seller's breach of an express warranty by failure to tender conforming goods.

154. Trebilcock, supra note 9, at 33.
imposes upon a purchaser an obligation to notify the seller of a breach "within a reasonable time after he discovers or should have discovered any breach." While the UCC scheme clearly contemplates that the nature of the defect and the circumstances surrounding the transaction will govern the triggering of this obligation, the parties are empowered to designate by agreement what constitutes a reasonable time for action to be taken, so long as the period agreed upon is not "manifestly unreasonable."

Viewing the federal act in this context, the limitation of duration language may be read as permitting the guarantor to fix the time within which lack of merchantability or fitness must appear. Noting the lack of clarity in the provision, one witness before the House Subcommittee on Commerce and Finance suggested that this interpretation was intended and urged amendment of the provision as follows: "Implied warranties may, however, be limited in application to defects becoming manifest within the period of an express warranty..." This interpretation provides a context in which it is possible to assess the concerns of industry spokesmen and consumer advocates alike. From the industry perspective, the shared concern arose from the prohibition against disclaimer and modification of implied warranties in conjunction with the giving of an express warranty. Disclaimer of these warranties altogether was a common practice. In exchange for the taking of a previously recognized right to disclaim implied warranties entirely, the warrantor retains the power to contractually specify the period of time during which the product must evidence unmerchantable quality. That period of time may not, in any event, be shorter than the express warranty term of reasonable duration. An express warranty of extremely brief duration may not be used as a vehicle for drastically limiting implied war-

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155. U.C.C. § 2-607(3)(a). The purpose of the notification requirement is to protect the seller from stale claims and to encourage pre-litigation settlement of disputes. Any notice which informs the seller that the transaction is "troublesome and must be watched" is sufficient to open the way for negotiation between the parties. Id., comment 4. Furthermore, the time in which consumers must act normally will be extended beyond that afforded merchants, as the rule is designed "to defeat commercial bad faith" rather than to deprive a good faith consumer of his remedy. Id.

156. U.C.C. § 1-204(1).


158. The Task Force on Appliance Warranties and Service concluded that virtually all major appliance warranties contained disclaimers of implied warranties. HOUSE REPORT, supra note 22 at 28.
A seller may, however, define the point at which all risks of product malfunction will shift to the purchaser.

Some consumer advocates viewed this exception as an unjustified dilution of the prohibition against disclaimer and modification of implied warranties. For example, the manufacturer of an expensive chair may provide a one year warranty against specified defects and limit the duration of implied warranties to that one year period. While "it is possible that after a chair has been used a year it has already served what one should reasonably expect to be its useful period," this proposition seems unlikely. Nevertheless, if the lack of merchantability did not become apparent during that period, there could be no remedy for breach. Those who opposed the exception expressed a preference for allowing the concept of reasonableness to govern. Retention of the standard of reasonableness would require a jury determination regarding whether or not an upholstery fabric, which wears out after fourteen months of moderate use, is fit for its intended purpose. This determination may be quite unrelated to the warrantor's express affirmation that the springs will be durable for a period of one year.

The result of the statutory ambiguity. The preceding discussion illustrates the lack of precision with which some sections of the Magnuson-Moss Act were drafted. The absence of an articulated policy underlying the provision permitting the limitation of duration of implied warranties compounds the interpretive problems. Regardless of which proffered interpretation of the language is correct, it is clear that this provision substantially diminishes the impact of the prohibition against disclaimer and modification of implied warranties.

The problems posed by the statutory ambiguity are twofold. The most obvious problem is that of determining to what extent, if any, Congress intended to broaden consumer rights when implied warranties are "limited in duration." Equally troublesome is the lack of guidance provided the agency

159. 1971 Warranty Protection Hearings, supra note 25, at 278 (statement of Edward Berlin, Gen. Counsel, Consumer Fed'n of America). Congressman Eckhardt also expressed concern and a preference for allowing the concept of reasonableness to govern. One who contractually modifies the warranty of merchantability in this manner may, "in effect, very severely limit that implied warranty to the extent of destroying it." Id. at 284.

160. Warranties Hearings, supra note 5, at 85 (statement of Wallace Breuner, Director & Chairman, Warranty & Guaranty Comm., Nat'l Home Furnishings Ass'n). The quoted example is that of Congressman Eckhardt.
charged with the responsibility of interpreting and implementing the Act. In the absence of clear statutory language or legislative history, an aggressive regulatory policy is not likely to be adopted. The FTC’s dilemma recently emerged when it was asked to rule on the effect of the federal legislation on state law governing implied warranties.

**Implied Warranties and State Law**

The Act contains what has been described as “perhaps the most complex formula for federal-state interaction in the consumer field.” 161 Notwithstanding provisions specifying that state law governing implied warranties is modified to a limited extent,162 the federal legislation expresses a policy of non-preemption insofar as the Act might appear to abrogate consumer rights or remedies under state law or other federal laws.163 Any state law which is within the scope of federal requirements relating to labeling, disclosure or performance obligations and which is within the scope of a requirement under sections 102, 103 and 104 of the federal act, is inapplicable to written warranties which comply with the requirements of the Act unless the state requirement is identical to that of the federal law.164 An exception is made, however, for state laws pertaining to written warranties which provide greater consumer protection than the terms of the Act. If the FTC determines, upon application of a state, that a state law does provide a higher measure of protection and that recognition of the state requirement would not unduly burden interstate commerce, then the more protective state law shall be applicable so long as the state effectively enforces it.165 It is this exception which provides some insight into the Commission’s viewpoint regarding the effect of the federal act upon implied warranty liability.

**Application of the formula.** California was the first juris-

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163. *Id.* § 2311(b)(1). The FTC has interpreted § 111 to mean that the federal act will not render a state requirement inapplicable to warranties meeting federal standards unless the state requirement relates to warranty labeling or disclosure of terms. The statutory reference to performance obligations thereunder is construed as applicable only to “state requirements which relate to labeling or disclosure with respect to performance under written warranties.” 42 Fed. Reg. 54,004, 54,005 (1977).
165. *Id.* § 2311(c)(2).
diction to apply to the Commission for a determination that several provisions of its warranty law afforded greater protection than those of the Magnuson-Moss legislation. The California law, the Song-Beverly Consumer Warranty Act, parallels its federal counterpart in many respects. Like the federal law, the Song-Beverly Act forbids sellers who make written warranties covering consumer products from limiting, modifying or disclaiming implied warranties, and it requires certain disclosures when written warranties are made. A major point of departure between the two laws is a provision of the California act which requires the duration of an implied warranty to be coextensive with that of an express warranty if the duration of the latter is reasonable. Under the federal act, the stated duration of an express warranty generally has no bearing on the duration of implied warranties.

The FTC staff analyzed the California duration provision in the context of the Magnuson-Moss federal-state formula. This analysis focused on the definition of implied warranty which is contained in the federal act. The Commission staff found no clear legislative intent to govern the duration of implied warranties under state law, especially insofar as the federal act might be construed to extend coverage beyond the

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166. 41 Fed. Reg. 28,361 (1976). Two provisions of the California legislation relating to mobile home warranties ultimately were determined to be inapplicable to warranties complying with the federal act. 42 Fed. Reg. 54,004 (1977).
169. Id. § 1793.1 (West 1973 & Supp. 1977). A warrantor is required to clearly state the warranty in readily understood language and to identify himself as the warrantor. There is no provision in the California act for the designation of warranties as “full” or “limited.”
170. Id. § 1791.1(c) (West 1973). Unlike the federal act, the California legislation did not require the seller to specify the duration of an express warranty. In the absence of a specified duration, the duration of implied warranties would be one year. Id. Section 1791.1(c) also imposes a minimum duration of sixty days and a maximum duration of one year for implied warranties that arise in connection with a sale in which a written warranty is given. However, these designated durations apply only to new goods. Express warranties made in conjunction with the sale of used goods give rise to an implied warranty having a minimum duration of thirty days and a maximum duration of three months. Id. § 1795.5(c) (West Supp. 1977).

The warranty period for both express and implied warranties must be tolled while the product is being repaired. Id. § 1795.6(a).
171. A warrantor may, however, limit the duration of an implied warranty to no less than that of the express warranty of reasonable duration and must state this additional limitation in unmistakable terms. 15 U.S.C. § 2308(b) (Supp. IV 1974).
point in time when implied warranties otherwise would be cut off. The Magnuson-Moss provisions relating to duration of implied warranties contain prohibitions against "warrantors" and "suppliers" disclaiming, modifying or limiting implied warranty coverage, but the staff could find no analogous prohibition applicable to the states. The conclusion drawn was that "the language of Section 101(7) stating that implied warranties 'arise' under state law is evidence of Congressional intent to allow state law to govern creation and duration of implied warranties."\textsuperscript{173}

This staff analysis de-emphasized the language of several key provisions of the federal act. The Act provides that "[t]he term 'implied warranty' means an implied warranty arising under State law (as modified by sections [108 and 104(a)] . . . ) in connection with the sale by a supplier of a consumer product."\textsuperscript{174} The "as modified" language makes clear an intention to affect state law insofar as it conflicts with the two provisions referred to in the definition. Moreover, section 108(c) provides: "A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law." Thus, even though the Act deferred to the states regarding when implied warranties were created, it retained control of when these warranties, once created, could be modified. The staff's conclusion on the California provision fails to incorporate this crucial distinction.

Problems in the application of the formula. The problems raised by the staff analysis may be illustrated by the following warranty provisions. First:

\begin{quote}
FULL SIX MONTH WARRANTY: This product is warranted against defects in material and workmanship for six months. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
\end{quote}

\textsuperscript{173} Id. at 28,362. In its final findings and determination of the extent to which the Magnuson-Moss Act preempts the California legislation, the FTC limited its consideration to § 111 of the federal act. The final findings did not address the staff analysis of §§ 101, 104 & 108, discussed in the text of this article. The Commission did not determine, therefore, whether the provision of the Song-Beverly Act regulating the duration of implied warranties is modified by the federal act. 42 Fed. Reg. 54,004 (1977).

In this example, the seller has purported to give a full warranty and contemporaneously to disclaim all implied warranties. In most jurisdictions this practice is permitted by UCC section 2-316, but it clearly is prohibited by the federal act. The Act specifies that no supplier may disclaim implied warranties if he has made a written warranty and that any such disclaimer shall be deemed ineffective for purposes of federal and state law. UCC section 2-316 is modified and no longer can be read to authorize disclaimers when a written warranty which is governed by the federal act is given. Second:

FULL SIX MONTH WARRANTY: This product is warranted against defects in material and workmanship for a period of six months. ALL IMPLIED WARRANTIES ARE LIMITED IN DURATION TO A PERIOD ENDING SIX MONTHS FROM THE DATE OF PURCHASE.

This example poses similar problems. Sellers who give full written warranties may not limit the duration of any implied warranty on the product. Even though such modifications would otherwise be permitted by the UCC, the limitation is ineffective for purposes of federal and state law and the UCC is modified to that extent. Third:

FULL SIX MONTH WARRANTY: This product is warranted against defects in material and workmanship for six months.

This example raises the problem posed by California's Song-Beverly Act, which provides that express and implied warranties shall be of coextensive duration. This provision of the state law permits a warrantor indirectly to limit the duration of implied warranties by selecting a reasonable duration

175. But see note 133 supra.
   The issuance of a limited express warranty while simultaneously disclaiming implied warranties has become an increasingly common practice which results in many cases in a document which could be more accurately described as a limitation on liability rather than a warranty. Therefore, there is a need to prohibit the disclaimer of implied warranties when a supplier of consumer products guarantees his products in writing. S. REP. No. 151, 93d Cong., 1st Sess. 7 (1973). See HOUSE REPORT, supra note 22, at 40.
178. Id. § 2304(a)(2).
179. This provision, of course, is subject to the requirement that implied warranties may not be shorter than the minimum duration of sixty days or longer than the maximum duration of one year in the case of new goods. CAL. CIV. CODE § 1791.1(c) (West 1973). See note 170 supra.
for express warranties. While this result clearly would be permissible under the federal act if a limited written warranty were given, this result may not have been intended when a full written warranty has been given. There is no apparent reason for permitting a warrantor indirectly to achieve the result he is forbidden from directly achieving in the preceding example.

Although legislative history on this point is obscure, it is believed that the intent of the federal act was to preserve recourse against the seller if a product is not fit for ordinary purposes, even though the term of a full express warranty may have expired. The Senate bill contained an absolute prohibition on the limitation of the duration of implied warranties. The Senate report explained the provision as one which "clarifies the relationship between express and implied warranties on consumer products, by maintaining the independence of one from the other." This provision was intended to put consumers on equal footing with warrantors. "[A] consumer whose warranty in writing for one year is unenforceable because the warranted product malfunctioned one year and six days after the time of purchase might still have recourse against the supplier for warranty of fitness for ordinary use." Although the House amendment permitting those giving limited express warranties to limit the duration of implied warranties was adopted, the injunction against full warrantors remained. Hence, the reasoning of the Senate committee should remain applicable to full warranties.

An interpretation that the California consumer law governing implied warranties is modified to this extent would be consonant with the federal statutory scheme, which clearly imposes greater obligations on those who choose to give full warranties. It is unreasonable to permit a seller, under the guise of providing full warranty protection for a short period, indirectly to limit the duration of the implied warranty to that period. The underlying thesis of the federal act is that the consumer who procures a product covered by a full warranty has bargained for more protection than would be afforded by a limited warranty. Insofar as unmerchantable products are concerned, this is not the case under the Song-Beverly legislation,
which makes no provision for independent operation of express and implied warranties.

The FTC's treatment of the preemption question demonstrates again a cautious approach toward interpreting and implementing the federal legislation. While general policy may be divined from the overall structure of the Act, the Commission is hindered by statutory ambiguities and the lack of meaningful legislative history regarding the provision permitting limitation of the duration of implied warranties. As long as the statutory policy remains obscure, the regulatory policy will also be uncertain.

Given the fact that the consumer may enforce both express and implied warranty obligations under the Act, the question remains whether the consumer can also collect damages which flow from a breach of warranty.

**Limitations of Liability**

*Disclaimer of Damages*

As is true in the case of other disclaimers, contract terms which purport to limit or exclude consequential damages are not subject to bargaining. Both forms of risk avoidance have been employed routinely in express warranty documents which create the impression that the seller has undertaken to extend, rather than limit, his obligation to the purchaser.184 Similarly, the allocation of these risks is couched in legalistic jargon that is meaningless to the average consumer.185 It is obvious that both types of exclusionary terms have a capacity to deceive, particularly if they are incorporated in what is touted to be a full warranty. In light of the parallel problems generated by the practices of disclaiming implied warranties and of excluding consequential damages, it might be assumed that the drafters of the Act would adopt parallel approaches regarding their regulation. To the distress of consumer advocates, this is not the case.186

The Act contains no prohibition against exclusion or limitation of incidental or consequential damages. It does, however, prohibit one who gives a full warranty from excluding or limiting consequential damages unless the exculpatory lan-

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184. See text accompanying notes 125-127 supra.
185. See text accompanying notes 8-13 supra.
186. See Rothschild, supra note 29, at 364.
guage conspicuously appears on the face of the warranty.\textsuperscript{187} Although there is no similar statutory provision applicable to limited warranties, the FTC promulgated a disclosure rule that applies to both full and limited warranties. Any limitation or exclusion of relief must be clearly and conspicuously disclosed.\textsuperscript{188}

\textit{Disclosure and deference reconsidered.} The requirement that warrantors conspicuously state the full extent of their obligations obviously is designed to enable consumers to understand their warranty rights, but its effect may be only marginal. While bold face type may draw attention to the warrantor's limitation of liability, only a small percentage of consumers understand the effect of disclaimer clauses.

Moreover, the requirement is illustrative of the caution with which Congress approached the regulation of warranties. The focus is on governing the manner in which warrantors may condition and limit their obligations, and the Act clearly is less progressive than much state legislation. Some jurisdictions prohibit limitations of damages for breach altogether,\textsuperscript{189} and most declare any limitation of consequential damages for personal injuries in connection with the sale of consumer goods prima facie unconscionable.\textsuperscript{190} Conflict between the limited federal approach and more expansive state legislation is avoided by provisions in the Act which specify that the federal legislation shall not: "invalidate or restrict any right or remedy of any consumer under State law . . .\textsuperscript{191} nor shall it] supersede any provision of State law regarding consequential damages for injury to the person or other injury."\textsuperscript{192}

In light of the Act's non-preemption of state consumer legislation, it is clear that compliance with the federal disclosure requirements may create deception. A warranty document conspicuously excluding incidental and consequential damages

\textsuperscript{188} 16 C.F.R. § 701.3(a)(8) (1977) (only applies to products "actually costing the consumer more than $15.00").
\textsuperscript{190} See U.C.C. § 2-719(3). Similarly, a few jurisdictions prohibit disclaimer, modification or limitation of implied warranties in consumer transactions. See statutes cited in note 133 supra.
\textsuperscript{192} Id. § 2311(b)(2)(B).
will lead the consumer to believe that the warrantor has accurately stated his obligations. That belief would be erroneous if the product were sold in a jurisdiction in which such exclusions are ineffective. In express recognition of the relatively high degree of protection afforded in some jurisdictions, the FTC promulgated a disclosure rule designed to prevent such deception. The rule requires that warranty documents clearly indicate that limitations or exclusions asserted by the warrantor may not be effective in some jurisdictions.

As in the case of warranty registration cards, promulgation of the disclosure rule may offset the possible "chilling effect" of declarations that deceptively appear to limit the liability of the warrantor. More importantly, the statutory provision implemented by the rule reflects congressional deference to state protective legislation. Congress has undertaken to assure only minimal safeguards against warranty abuses. Rather than attempting to deal with the legal consequences flowing from the sale of a defective product, the Act focuses narrowly on the legal consequences flowing from a warrantor's failure to honor fully his express undertakings. In light of this focus, Congress wisely chose a supplemental scheme of legislation. The Act leaves undisturbed state consumer law and the more comprehensive remedial provisions of the Uniform Commercial Code.

194. The Commission noted that California, Maine, Maryland, Massachusetts, Oregon, Washington, and West Virginia had made disclaimers or exclusions unenforceable. Id. at 60,177 n.120. See note 133 supra.
195. 16 C.F.R. § 701.3(a)(8) (1977). A similar rule applies to limitations of the duration of implied warranties. Id. § 701.3(a)(7).

As originally proposed, the rule would have required that warrantors who sought to limit or exclude recovery or incidental or consequential damages name the specific jurisdictions in which the limitation or exclusion would be inapplicable. Id. Proposed Rules, § 701.3(k)(1), 40 Fed. Reg. 29,892, 29,893 (1975) (to be codified in 16 C.F.R. § 701). The proposal drew sharp criticism from industry spokesmen, who characterized the requirement as onerous. Compliance would require constant monitoring of state law, would impose an obligation to interpret unsettled law in some jurisdictions, and would "unduly lengthen warranties." 40 Fed. Reg. 60,168, 60,177 (1975). The objections clearly were inapposite insofar as they related to limitation or exclusion of consequential damages for personal injuries. Such limitations uniformly are treated as being prima facie unconscionable. U.C.C. § 2-719(3). In response to industry objections, the Commission amended the rule by deleting the requirement that jurisdictions in which disclaimers and limitations are prohibited must be identified. 40 Fed. Reg. 60,168 60,177 (1975).

196. Preservation of the variety of post-breach options afforded the buyer under the UCC is extremely important. U.C.C. § 2-719(2) specifies that if circumstances cause an exclusive remedy to fail of its essential purpose, the aggrieved party may
CONCLUSION

As a tool for achieving consumer protection, the Magnuson-Moss Warranty Act is flawed. It is unfortunate that the legislation is not drafted with the clarity demanded of warranty documents. Much of the Act is obscure in purpose and effect, and this factor has hindered the FTC in its efforts to develop a cohesive regulatory policy.

To the extent that the Act represents an intrusion on the operation of free market forces, the intervention is limited. The approach of the legislation is one of providing minimal protection against warranty abuses. It does not require that sellers warrant their wares. Sellers who refuse to give written warranties avoid the reach of the disclosure requirements and the prohibition against disclaimer of implied warranties. Sellers who do provide written warranties are required to disclose information that may assist purchasers in understanding their warranty rights, but it is unlikely that the information provided will enable consumers to make more intelligent purchasing decisions. Those giving limited written warranties still may include onerous terms and conditions of warranty coverage. In this regard, the legislation cannot be characterized as “landmark.”

On the other hand, the Act should not be dubbed a total failure. Candor has not been an attribute of many warranty documents. Warrantors openly have misrepresented their intentions and have stated the terms of their contracts in language that is incomprehensible to consumers. Moreover, express obligations of limited efficacy consistently have been used to strip away the protection that is afforded by operation of law. The gilt-edged guarantee given “expressly in lieu of all resort to any other Code remedy. A seller who limits the buyer’s remedies to repair or replacement of defective components may not rely upon that limitation if the product remains useless after identifiable malfunctioning parts are replaced. See Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

Depending on the circumstances surrounding the failure of an exclusive remedy, the buyer may be provided alternatives under the U.C.C. that enable him to thrust the product back on the breaching seller, to determine the manner in which damages will be computed, and to recover incidental and consequential damages which the seller may have attempted to disclaim. See U.C.C. §§ 2-608, 2-711 to 716. The federal act does not contain analogous remedial provisions, but it does permit the purchaser of a “lemon” which carries a full warranty to force the goods back on the warrantor. After a reasonable number of unsuccessful efforts to correct a malfunction, the purchaser of the fully warranted product may elect replacement or refund of the purchase price. 15 U.S.C. § 2304(a)(4) (Supp. IV 1974).
other warranties" often diminishes the rights of purchasers while increasing their expectations. Even though the Act does not require that express obligations be more meaningful than they have been heretofore, it does prevent deceptive statement of such obligations and reinstate the purchaser's right to receive a merchantable product in return for the contract price when a written warranty has been given. Hence, a larger measure of protection, albeit implied by law, is in fact afforded.

Thus, it appears that the Act will rectify some injustices in the marketplace. It will require a clear and accurate statement of the terms of warranty coverage, and it will forbid those who give written warranties effectively to shift all risks of product malfunction to the consumer at the moment of purchase. To that extent, the Magnuson-Moss Act may serve as a beneficial adjunct to state consumer protection legislation.