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COMMENTS

TOWARD AN END TO CONSUMER FRUSTRATION— MAKING THE SONG-BEVERLY CONSUMER WARRANTY ACT WORK

INTRODUCTION

[T]here is a fair chance that his newly delivered color TV, or stereo equipment, or dishwasher, or car won't work. It probably won't explode or cut him, or electrocute him—nothing that dramatic. It will just have something wrong with it. The consumer may then discover that getting the difficulty taken care of is a time consuming and maddening experience. He may, in short, discover that frustration—not satisfaction—is his lot.¹

These words, written by a law professor in 1969, aptly described the predicament in which the average consumer was accustomed to finding himself after purchasing one of the countless products on the American consumer market. Professor Mueller's article is but one of several articles and comments published in recent years which have deplored the consumer's sorry lot with respect to product warranties and have advocated legislation geared to enhance consumer rights and remedies in a market flooded with substandard products.² As has been correctly pointed out, the average consumer has few remedies available to him when he finds that he has purchased a defective product, and none of these is satisfactory.³ Even more distressing perhaps

1. Mueller, *Contracts of Frustration*, 78 YALE L.J. 576 (1969) [hereinafter cited as Mueller].

2. See, e.g., Eovaldi & Gestrin, *Justice for Consumers: The Mechanics of Redress*, 66 NW. U.L. REV. 281 (1971); Furness, *Time is Now*, 4 TRIAL 17 (Aug./Sept. 1968); Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1971-72); Kessler, *Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262 (1964); Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529 (1971); Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, WISC. L. REV. 1006 (1968); Comment, *Consumer Protection and Warranties of Quality: A Proposal for a Statutory Warranty in Sales to Consumers*, 34 ALBANY L. REV. 339 (1970); Comment, *Law and the Ghetto Consumer*, 14 CATH. LAW. 214 (1968); Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966); Comment, *Restricting Disclaimer of the Warranty of Merchantability in Consumer Sales: Proposed Alternatives to the UCC*, 12 WM. & MARY L. REV. 895 (1971).

3. Mueller, *supra* note 1, at 576-77.

than the product itself is that the "law" — which to the consumer means expensive lawyers, indecipherable statutes, and endless waiting for a satisfactory result—"is of almost no use whatever."⁴

Since the appearance of Professor Mueller's article, California has enacted a major piece of legislation aimed at eliminating precisely the sort of frustration he described. This is the Song-Beverly Consumer Warranty Act, which took effect in 1971.⁵ The Act was designed to complement the California Commercial Code⁶ and provide remedies to buyers of consumer goods⁷ in addition to those already provided by the Commercial Code and in the case law.

The Background of the Act

Even before the California Commercial Code became law, it was recognized that its provisions respecting sales warranties would not be a panacea for the ills of warranty law.⁸ Even as comprehensively revised by the Commercial Code, sales law is not designed to encourage small, one-time claims nor offer protection for the contract expectations of the non-merchant buyer.⁹ Instead, "[t]he law of sales was developed to meet the needs of those with a substantial economic stake in the effective operation of agreement as a commercial tool."¹⁰ Because the consumer is

4. *Id.* at 577.

5. The Act (CAL. CIV. CODE §§ 1790-1795.5 (West 1973)) was introduced by Senate Bill 272, which became Cal. Stats. (1970), ch. 1333, § 1, at 2478 and took effect Mar. 1, 1971. The amendments were introduced by Senate Bill 742, which became Cal. Stats. (1971), ch. 1523, § 3, at 3002. These took effect on Jan. 1, 1972. The Act was further amended in 1974, to extend the scope of section 1795.5 of the Civil Code to include used goods "regardless of when such goods may have been manufactured." Cal. Stats. (1974), ch. 169, § —, at —.

6. The Uniform Commercial Code (U.C.C.) was adopted in California in 1963, and took effect in 1965, as the California Commercial Code. CAL. COMM. CODE § 1101 *et seq.* (West 1964) (Cal. Stats. (1963), ch. 819). Not all of the U.C.C. provisions were adopted. Notably absent from the California version is section 2-302 of the U.C.C. dealing with unconscionable contract clauses.

For an interesting article urging the adoption in California of a proposed statute on unconscionability see Hurd & Bush, *Unconscionability: A Matter of Conscience for California Consumers*, 25 HAST. L.J. 1 (1973) [hereinafter cited as Hurd & Bush].

7. CAL. CIV. CODE § 1791(a) (West 1973) defines "consumer goods" as any new mobilehome, motor vehicle, machine, appliance, like product, or part thereof that is used or bought for use primarily for personal, family, or household purposes. "Consumer goods" also means any new good or product, except for soft goods and consumables, the retail sale of which is accompanied by an express warranty to the retail buyer thereof and such product is used or bought for use primarily for personal, family, or household purposes.

8. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 282 (1961) [hereinafter cited as Ezer].

9. Mueller, *supra* note 1, at 590.

10. *Id.*

usually provided by the retailer or manufacturer with a printed-form contract, the terms of which he did not bargain for but to which he is required to "adhere",¹¹ the words "bargain" and "agreement" have no real application to consumer sales.¹²

Amidst an era of "consumer revolution" lawmakers saw a need to place the consumer in a more favorable legal position with respect to the superior bargaining power of manufacturers and sellers of consumer goods. It was recognized that the consumer must be put on an equal footing with the manufacturer and retailer. This means that at the very least he should have the opportunity to know the exact terms of his purchase and, more importantly, exactly what can be done if the product turns out to be faulty. In order to afford the consumer this opportunity, the legislation called for would need to clarify his rights under manufacturers' and sellers' warranties, which too often are merely sales gimmicks¹³ and instruments of unfair dealing.¹⁴ The Song-Beverly Consumer Warranty Act evolved in response to the call for an end to consumer frustration with products that do not work and warranties that promise much but deliver little.

Has the frustration ended? This comment examines the provisions of the Song-Beverly Act respecting the rights and remedies of the consumer who has purchased a defective product. In analyzing these provisions particular attention is focused on their practical applicability and on the problems the consumer faces in calling them to his assistance. Beginning with a discussion of the operative coverage of the Act and proceeding to an analysis of those provisions which most clearly attempt to change the law of consumer warranties in California, the question of whether the consumer is really better off now than he was prior to the enactment of the Song-Beverly Act will be examined. Although some suggestions are made for improving the Act, it is the principal

11. For a discussion of adhesion contracts see generally Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

12. Mueller, *supra* note 1, at 590.

13. See San Jose Post-Record, Oct. 29, 1969, at 1, col. 4. This article covers an anticipated hearing in Los Angeles before the California Senate Business and Professions Committee and reflects the testimony which Senator Alfred Song, co-author of the Song-Beverly Consumer Warranty Act, expected to receive.

14. The use of warranties as instruments of unfair dealing was a primary target of those who advocated a change in the law respecting consumer warranties. See Statement of the Association of California Consumers Before the Senate Committee on Business and Professions at Hearings on Warranty Protection at Los Angeles on 11/3/69, Prepared by Richard A. Elbrecht, at 1 [hereinafter cited as Statement].

concern of this comment to demonstrate how the Act can be an effective tool for consumers in its present form.

THE OPERATIVE COVERAGE OF THE SONG-BEVERLY ACT

The Song-Beverly Act was never intended to replace the California Commercial Code as the general law of warranties.¹⁵ Rather the provisions of the Act are cumulative and not restrictive of any remedy otherwise available to the consumer.¹⁶

The Act renders special assistance to consumers in three ways.¹⁷ First, it offers meaningful protection to the consumer who purchases a product which is accompanied by a written promise to repair, replace, or service that product, should it prove defective. Second, it provides assurance that goods sold by sample will conform to the sample. Third, it provides rigid standards for disclaiming the implied warranties of merchantability and fitness for purpose. This insures that the buyer will not be victimized by surprise disclaimers, particularly when he has purchased a complicated machine or appliance which he would normally expect to be fully warranted by the seller.¹⁸

There are some noteworthy limitations on the scope of the Song-Beverly Act. First, its present version¹⁹ applies only to consumer goods sold on or after January 1, 1972, and manufactured on or after March 1, 1971.²⁰ Second, it applies only to goods sold "at retail" and "in this state."²¹ Third, the Act distinguishes between new and used goods.²² Only one section of the Act

15. CAL. CIV. CODE § 1790.3 (West 1973) reads:

The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail.

16. *Id.* § 1790.4.

17. *Warranties—U.C.C. and the Song-Beverly Act*, Program Material, California Consumer Law Conference 172, 173 (California Continuing Education of the Bar, June, 1973) [hereinafter cited as California Consumer Law Conference].

18. As indicated, the California Code of Civil Procedure section 1791(a), in defining "consumer goods," distinguishes between goods falling into a certain classification (mobilehomes, motor vehicles, machines, appliances or like products) and goods which do not fit into this classification but are nonetheless accompanied by an express warranty. For the text of § 1791(a) see note 7 *supra*. The legislature evidently felt that goods of the first sort are deserving of the Act's protection even when they are not expressly warranted against defects. Compare this definition of "consumer goods" with the broad definition of "goods" in section 2105(1) of the California Commercial Code.

19. CAL. CIV. CODE §§ 1790-1795.5 (West 1973). For its legislative history see note 5 *supra*.

20. Cal. Stats. (1971), ch. 1523, § 18, at 3008.

21. CAL. CIV. CODE §§ 1792, 1792.1, 1792.2, 1793.2(a), 1793.3, 1795.5 (West 1973).

22. The Act's definition of consumer goods includes only *new* mobilehomes,

deals specifically with the sale of used goods. Under this section the applicability to used goods of any of the Act's Provisions respecting new goods is predicated upon the existence of an express warranty, made by a distributor or retailer, which accompanies the sale of such used goods.²³

Although these limitations may prove somewhat deflating to those seeking a complete cure for the warranty abuses inherent in the typical consumer transaction, there is still much within the Act from which consumers may derive considerable assistance. Where the Commercial Code is deficient in providing consumers with substantial rights, the Song-Beverly Act is designed to fill the gap or prevail where its provisions conflict with those of the Commercial Code.²⁴ The Act also provides for treble damages in the case of a willful violation by the manufacturer or seller.²⁵ The buyer may also recover reasonable attorney fees.²⁶ Except under express provisions, the Act declares void a waiver of any of the rights guaranteed under it.²⁷ The feature which most clearly distinguishes the Song-Beverly Act from other consumer-oriented legislation, however, is the special attention it devotes to

motor vehicles, machines, appliances and the like or any *new* good or product (bought for personal, family, or household use) which is accompanied by an express warranty. *Id.* § 1791(a).

23. *Id.* § 1795.5. If there is an express warranty on used goods, the warrantor has the same duties as those imposed on the manufacturer of new goods who gives an express warranty. Among other things this means that implied warranties are preserved and may not be limited, modified, or disclaimed.

Prior to a 1974 amendment (Cal. Stats. (1974), ch. 169, § —, at —) it was not clear whether used goods, like new goods, would have to be manufactured after March 1, 1971, in order to be covered under the Act. See Cal. Stats. (1971), ch. 1523, § 18, at 3008. The amended portion of section 1795.5 of the Civil Code reads:

The obligation of the distributor or retail seller who makes express warranties with respect to used goods that are sold in this state shall extend to the sale of all such used goods, regardless of when such goods may have been manufactured.

The amendment eliminates a potential source of uncertainty in the Act. Logically, it would seem that when used goods are concerned the important date would be the date of sale and not manufacture. This follows from the fact that the Act is of assistance to purchasers of used goods only when they have been expressly warranted by the *seller*. Since the manufacturer is not responsible for the goods once they have been resold (except for the case of personal injury), the date of manufacture should not be important. See Substantive Law Memo on Warranties and Remedies under U.C.C. and California Song-Beverly Consumer Warranty Act, September 18, 1973, at 30, Prepared for California Consumer Law Conference by Richard A. Elbrecht [hereinafter cited as Substantive Law Memo].

24. CAL. CIV. CODE § 1790.3 (West 1973).

25. *Id.* § 1794(a). See also CAL. CIV. CODE §§ 1791.1(d), 1794.2 (West 1973).

26. *Id.* § 1794(b).

27. *Id.* § 1790.1. This section provides:

Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void.

the various theories of warranty law and the attempt it makes to mold these theories to consumer needs.

THE EXPRESS WARRANTY

Definition

Aware of the increasing exploitation of express warranties in product advertising, the legislature made the Song-Beverly Act particularly applicable to the manufacturer or seller who chooses to give such a warranty.²⁸

Generally speaking, a warranty is said to be express when it is founded upon the seller's particular conduct or actual representations as to the nature or quality of a product.²⁹ It is important, however, to distinguish the specific definition of express warranty in the Commercial Code from that in the Song-Beverly Act.³⁰ The Commercial Code specifies three methods by which the express warranty may be created: (1) by an affirmation of fact or promise relating to the goods; (2) by a description of the goods; (3) by a sample or model.³¹ In each case the facts which give rise to the warranty must be a part of the "basis of the bargain" before there is an express warranty.³²

In the Song-Beverly Act there is no requirement that the warranty form a basis of the bargain,³³ a term which the authors of the Commercial Code have chosen not to define.³⁴ Instead, the Act designates two methods by which an express warranty may arise.³⁵ The first of these is a statement *in writing* by which

28. See Explanation of SB 272, August 12, 1970, at 1 (available from Senator Alfred H. Song's office) [hereinafter cited as Explanation].

29. Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sale Warranties*, 64 MICH. L. REV. 1430, 1431-32 (1966) [hereinafter cited as Comment, *Recent Developments*].

30. The Song-Beverly Act "defines" the express warranty. CAL. CIV. CODE § 1791.2 (West 1973). The Commercial Code refers only to the method of creating an express warranty. CAL. COMM. CODE § 2313 (West 1964).

31. CAL. COMM. CODE § 2313(1) (West 1964).

32. *Id.*

33. Compare CAL. COMM. CODE § 2313(1) (West 1964), with CAL. CIV. CODE § 1791.2(a) (West 1973). Regardless of whether the warranty arises by writing or sample, the Act makes no mention of "basis of the bargain."

34. Comment, *Consumer Protection: The Effect of the Song-Beverly Consumer Warranty Act*, 4 PAC. L.J. 183, 186 (1973) [hereinafter cited as Comment, *Song-Beverly*]. The author of this comment refers to Comments 3 and 8 to section 2-313 of the Uniform Commercial Code, which suggest that statements or affirmations of fact made by the seller become part of the bargain unless "clear affirmative proof" (Comment 3) or "good reason" (Comment 8) is shown to the contrary.

35. California Consumer Law Conference, *supra* note 17, at 175. The author of this section of the Conference Program Material asserts that for this reason the Song-Beverly Act's definition of "express warranty" is much narrower than the Commercial Code's. He emphasizes that statements such as "this shirt is

the manufacturer, distributor, or retailer "undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance. . . ." ³⁶ The second method by which an express warranty is created is by sample or model. ³⁷ This is similar to one of the methods permitted by the Commercial Code, ³⁸ except that the Act does not require that the warranty be shown to be part of the basis of the bargain. Only rarely would a consumer fare better by applying one of these provisions instead of the other; practically speaking, there is no difference between them. ³⁹

Creating the Express Written Warranty

To create an express written warranty the warrantor must have made a written promise to repair or replace defective goods or to refund the money paid for these goods, or, in the alternative, to service the goods to insure their continued utility. ⁴⁰

The requirement of a writing is, of course, a major difference between this definition of the express warranty and that set forth in the Commercial Code. The Act says that *pursuant to* the written statement the warrantor must undertake to preserve or maintain the utility of the good or compensate the buyer for a failure in utility or performance. ⁴¹ Strictly construed this section could render meaningless a written warranty of the following genre:

The manufacturer hereby warrants that this gadget will operate properly in normal usage for a period of one year from the date of sale.

The reason for nullifying such a warranty is that there is nothing in this writing by which the manufacturer has expressly promised to maintain the utility of the good or compensate the buyer in the event the good fails to perform! Of course, such a promise may seem implicit to the buyer, but does the Act's requirement of a written statement permit anything which is not in the written statement to be included as part of the express warranty? The

Sanforized," "this pen will write through butter," "this wood is mahogany," or "this unit can cool 2800 cu. ft." would not be express warranties under the Act (presumably because none of these assertions conveys a promise to maintain future utility of the goods in question). Under the California Commercial Code § 2313, however, statements like these would be express warranties since any affirmation of fact forming the basis of the bargain is an express warranty. *Id.* at 176.

36. CAL. CIV. CODE § 1791.2(a)(1) (West 1973).

37. *Id.* § 1791.2(a)(2).

38. CAL. COMM. CODE § 2313(c) (West 1964).

39. Comment, *Song-Beverly*, *supra* note 34, at 187 & n.45.

40. CAL. CIV. CODE § 1791.2(a)(1) (West 1973).

41. *Id.*

Act provides no clear answer to this question, but neither does it foreclose turning to other doctrines of law which may suggest an answer.

For example, we know that the provision in the Commercial Code concerning the use of parol evidence to prove the existence of terms not found in a written contract permits the inclusion of those terms if they are consistent with the written terms and there is no finding that the writing was intended as a final and exclusive statement of all terms.⁴² The California Supreme Court has taken an even more liberal approach to the parol evidence rule by allowing evidence of a prior oral agreement to modify terms reduced to writing whenever it can be shown that the collateral agreement might naturally be excluded from the written contract.⁴³

The California treatment of the parol evidence rule suggests that it is doubtful the legislature intended that the writing required to create an express warranty under the Song-Beverly Act would have to contain each and every term to be enforceable. Such a requirement would discourage manufacturers genuinely interested in warranting their products from using succinct and easily understandable language in the warranty. Worse yet, a requirement that everything must be in writing to be enforceable as part of the warranty would create a gaping loophole, through which the unscrupulous warrantor could escape his obligations on what would appear to the unwary buyer to be a genuine promise to repair or compensate for a defective product.

It is manifestly unfair and contrary to the spirit of the Act to permit a manufacturer to reap the advertising benefits of an express written warranty and then escape his obligations under the Act⁴⁴ on the specious ground that the manufacturer's own writing did not conform with the apparent requirements of the Act's definition of the express written warranty. That the Act, unlike the Commercial Code, requires a writing for an effectual express warranty (except where the warranty is by sample or model) is perhaps due to the legislature's desire to protect both manufacturer and consumer from the vagaries of the parol evidence rule. To interpret this requirement to preclude liability under the Act for a written warranty, such as the one just discussed, would do violence to the legislative intent to give maximum protection to the buyer under an express warranty.⁴⁵

42. CAL. COMM. CODE § 2202 (West 1964).

43. See *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); *Masterson v. Sine*, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

44. See text accompanying notes 130-184 *infra*.

45. See generally Explanation, *supra* note 28.

Prospective Character of the Express Written Warranty

The fact that, in order to satisfy the Act's definition of the express written warranty, the warrantor must have undertaken to preserve or maintain the *future* utility of the warranted product is another departure from the express warranty defined in the Commercial Code. It is true that the Commercial Code makes no mention of the need on the part of the warrantor to promise specific, prospective action should the goods sold prove defective.⁴⁶ In actual practice, however, the notion that an express warranty may be impliedly prospective—that is, violable by the failure to take specific remedial action after the date of sale—is not new to California. In the case of *Mack v. Hugh M. Comstock Associates*⁴⁷ an appellate court held that when a product is expressly or impliedly warranted against defects of workmanship of materials for a specific period of time and it proves defective, the warranty is prospective and the statute of limitations for recovery is tolled "during the time the seller honestly endeavors to make repairs . . . or at least until . . . it becomes reasonably apparent to the owner that the warranty cannot be met."⁴⁸

The *Mack* rule was extended one step further in the recent case of *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Manufacturing Co.*⁴⁹ In that case Kaiser purchased a motor from Allis-Chalmers to drive its cement mills. The motor came with an express warranty under which Allis-Chalmers promised to repair any defects and maintain the motor in proper working condition for a period of one year. During the period of the warranty the defendant was repeatedly called in to repair an apparent defect in the machine which caused it to overheat. The defendant concluded that the overheating resulted from Kaiser's inadequate ventilation system. On these assurances Kaiser installed a new ventilation system, only to discover three and one-half years later that poor ventilation had not been the cause of the excessive heat, and that in the meantime the motor's electrical winding had been damaged by deterioration of the wiring insulation resulting from overheating. The court, applying the prospective warranty doctrine espoused in *Mack* and the earlier case of *Aced v. Hobbs-Sesack Plumbing Co.*,⁵⁰ held that Allis-Chalmers had incurred legal responsibility for a breach of warranty to repair, which in-

46. See CAL. COMM. CODE § 2313 (West 1964). Neither the California Code Comment nor the Uniform Commercial Code Comment makes specific reference to the notion that express warranties may be prospective in nature.

47. 225 Cal. App. 2d 583, 37 Cal. Rptr. 466 (1964).

48. *Id.* at 589, 37 Cal. Rptr. at 470.

49. 35 Cal. App. 3d 948, 111 Cal. Rptr. 210 (1973).

50. 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961).

cluded the obligation flowing from nonperformance of the stated agreement to replace or properly adjust.⁵¹

The *Kaiser* case thus stands for the proposition that a warranty to repair, replace, or refund the purchase price is prospective in character and that responsibility under it does not necessarily end at the expiration of the stated warranty period. Where the defect is not reasonably discoverable by the buyer, and where the warrantor has the opportunity to discover it but fails to, the obligation under the warranty will survive the warranty period, at least for a reasonable time.

Of course, the *Kaiser* case does not concern a sale of consumer goods, but the principle it espouses should be applicable to the sale of any goods under an express warranty to repair or replace. Cases like *Kaiser* and *Mack* give viability to the concept of a prospective warranty, perhaps to a greater extent than was intended by the draftsmen of the Commercial Code.⁵² In interpreting the Song-Beverly Act courts should not be afraid to integrate principles such as those formulated in *Kaiser* and *Mack* into the structure of the Act. To give full effect to its provisions the Act should be read as an attempt to synthesize, restate, and clarify existing principles of law. So construed, it can be an effective tool not only for assisting consumers in protecting their rights under product warranties, but also for re-emphasizing to merchants, manufacturers, and consumers the fundamental nature of these rights. By defining the express written warranty as a promise to preserve or maintain the utility of a consumer good or provide compensation for a failure in performance, the Act has focused on the fundamental principle that a warranty is of little value unless the warrantor is prepared to back it up with specific action.

The Express Warranty Distinguished from Affirmations of Value

Like the Commercial Code, the Act does not mandate the

51. 35 Cal. App. 3d at 959-60, 111 Cal. Rptr. at 217-18.

52. The Commercial Code does not specifically provide for prospective warranties (see note 46 *supra*), but there is evidence that to interpret an express warranty as a guarantee against defects occurring subsequent to the time of purchase would be acceptable under the Code. See CAL. COMM. CODE § 2313, Uniform Commercial Code Comment 2 (West 1964), wherein the draftsmen admit that the scope of this section defining the express warranty is limited and intended only as a "useful guidance" in deciding warranty cases. It was not intended to disturb, for example, "those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." *Id.*

Both *Mack* and *Kaiser* appear to be logical extensions of the proposition that an express warranty carries with it an implied promise to cure defects which did not exist at the time of sale.

use of the particular words "warrant" or "guarantee"—of talismanic importance to some judges⁵³—to create an express warranty. Nevertheless, mere affirmations of the value of the goods or a dealer's commendation, which is nothing more than his own high opinion of what he sells, are not sufficient to create an express warranty.⁵⁴

The Act avoids the problem of distinguishing affirmation of fact from mere opinion, or "puffing" as it is generally called,⁵⁵ by requiring a writing and by narrowly defining the express warranty as a promise to maintain continued utility of the goods. Under the Commercial Code, questions of affirmation of value or seller's opinion must be resolved by determining whether the statements made by the seller became, under the circumstances and based upon objective judgment, part of the basis of the bargain.⁵⁶ Written primarily with merchants and parties of relatively equal bargaining power in mind, the Commercial Code assumes a degree of commercial sophistication in the contracting parties. The experienced merchant or businessman may reasonably be expected to distinguish between affirmations of fact and "puffing,"⁵⁷ but the same cannot be said for the less sophisticated consumer. Part of the consumer's frustration is his inability to ascertain when the seller is asserting that he stands behind the product and when he is adroitly engaged in a sales pitch.

Although "puffing" is not a problem under the Act, it remains a problem for the consumer. If he has been led by a merchant to believe that a product is warranted when in fact the

53. See W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C., vol. I, at 57 (1964). California has done away with the requirement of special words such as "warrant" or "guarantee" to create an express warranty, substituting only the requirement that the buyer rely on the affirmation in good faith. *Steiner v. Jarrett*, 130 Cal. App. 2d Supp. 869, 280 P.2d 235 (1954); *Cole v. Weber*, 69 Cal. App. 394, 231 P. 353 (1924).

54. Compare CAL. COMM. CODE § 2313(2) (West 1964) with CAL. CIV. CODE § 1791.2(b) (West 1973). Under the Act statements of general policy concerning customer satisfaction, not subject to any limitations, do not create an express warranty. Under the Commercial Code, however, the affirmation that the seller will "stand behind the goods" is probably an express warranty. See California Consumer Law Conference, *supra* note 17, at 176. See also *Stott v. Johnson*, 36 Cal. 2d 864, 229 P.2d 348 (1951), where it was held that the defendant-paint retailer's assurance that the company would reimburse the buyer for labor and materials if the paint "goes bad" constituted an express warranty.

55. For a discussion of the nature of "puffing" and its relation to warranty law, see 1 WILLISTON ON SALES § 202 (rev. ed. 1948). See also Comment, *Express Warranties and Greater Consumer Protection from Sales Talk*, 50 MARQ. L. REV. 88 (1966).

56. CAL. COMM. CODE § 2313, Uniform Commercial Code Comment 8 (West 1964).

57. The cases have so held. See, e.g., *Perry v. Magee*, 116 Cal. App. 2d 155, 253 P.2d 488 (1953); *Alexander v. Stone*, 29 Cal. App. 488, 156 P. 998 (1916).

Act's requirements to create an express warranty have not been met, the consumer will be relegated to seeking redress under either the Commercial Code or a common law theory of fraud or misrepresentation. As to a breach of an oral warranty or abuses arising out of a dealer's "puffing," the Song-Beverly Act offers no protection.

Misleading Advertising and the Express Warranty

At the core of the consumer's frustration is the failure of both products and their manufacturers to live up to the reasonable expectations of the buyer. Often these expectations have been engendered by techniques of modern advertising.⁵⁸ Frequently the buyer is disappointed to discover that the warranty that was advertised is not in the fine print "agreement" he has signed. The consumer seldom reads the contract form until after he signs it and has become bound by its terms.⁵⁹ Then it is usually too late for him to complain that the advertisement he saw or read promised something more than what he bought. He will have difficulty in asserting the existence of an express warranty under the Song-Beverly Act, for he must show that the form contract he signed somehow incorporated by reference the terms of the advertisement and thereby satisfied the requirement of a writing.⁶⁰ In the usual case this is a difficult chore, for the form contract will undoubtedly contain a clause by which the buyer purports to agree that the form before him is an exclusive and exhaustive statement of the terms of the contract.⁶¹ Nevertheless, considering the significant role advertising plays in commercial transactions, some provision aimed at protecting the warranty expectations of consumers against misleading advertising is in order.⁶²

58. Statement, *supra* note 14, at 7.

59. Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) [hereinafter cited as Slawson].

60. CAL. CIV. CODE § 1791.2(a)(1) (West 1973). It has been suggested that the buyer might try to invoke the Act's protection by demonstrating that the advertising relied on was a "sample" of the product. California Consumer Law Conference, *supra* note 17, at 176-77. It is unlikely, however, that any court would be convinced by this argument.

61. It is a common procedure for sellers to insert in their form contracts a clause such as this:

This instrument is a complete and exclusive statement of all the terms of the agreement between the buyer and seller and of all the representations of the parties.

This is commonly referred to as a merger clause, and it poses no problem when all of the express representations and warranties are actually set forth in the written contract. Often there have been other representations not included in the written instrument, and the consumer has failed to read or understand the significance of the merger clause. Statement, *supra* note 14, at 2.

62. One of the proposals presented to the Senate Committee on Business and

Disclaiming the Express Written Warranty

The disclaimer has been the seller's principal answer to the warranty, whether express or implied.⁶³ By means of a disclaimer the seller seeks to limit the scope of his undertaking and notify the buyer that his expectations should be modified.⁶⁴ "Freedom of contract" traditionally has provided the doctrinal basis for the right to disclaim warranties.⁶⁵

Because an express warranty under the Commercial Code need not be in writing,⁶⁶ it was necessary for the draftsmen to grapple with the problem of clauses in sales contracts seeking to exclude warranties which might have arisen out of the oral dickering between the parties.⁶⁷ The product of the draftsmen's effort was an unfortunately worded section of the Commercial Code. It provides that words tending to create an express warranty, and words tending to limit or negate it, will be construed

Professions by the Statement of the Association of California Consumers, *supra* note 14, at 7-18, calls for an addition of a new Chapter 5 to Part 3 of Division 7 of the Business and Professions Code, commencing with section 17910. Regarding advertising, Article III of the proposal reads as follows:

Section 17940. General Rule. No person shall advertise, offer, publish or make a deceptive warranty, guaranty or other similar undertaking.

Section 17941. Warranty of Merchantability. Any advertisement of a warranty, guaranty or other similar undertaking shall conspicuously disclose that the product is warranted to be merchantable.

Section 17942. Prohibition if Merchantability Warranty Modified. No person shall advertise a warranty for the purpose or with the effect of aiding in the consummation of a sale of a product in which the warranty of merchantability is modified with respect to the product or any component part thereof.

Section 17943. Express Warranty. No person shall advertise a warranty under which the maker assumes or purports to assume any warranty obligations to the buyer other than or in addition to those existing under the warranty of merchantability, unless the advertisement contains all the information required to be disclosed under Sections 17926 and 17941.

Section 17944. Terminology. The information required to be disclosed in an advertisement under this article shall be in the exact terminology and shall comply with such other requirements (whether as to positioning, style and size of type, color or disposition of lettering or otherwise) as may be prescribed by regulations issued under this article. Such regulations may require or prohibit disclosure in such writing of any additional information which in the judgment of the (supervising agency) is necessary or proper to effectuate the purposes or to prevent circumvention or evasion of, or to facilitate compliance with, the provisions of this chapter.

Id. at 12-13.

None of the proposals aimed specifically at the problem of misleading or faulty advertising of warranties has yet been implemented by the legislature.

63. Comment, *Limitations on Freedom to Modify Contract Remedies*, 72 YALE L.J. 723, 725 (1963).

64. *Id.*

65. Comment, *Restricting Disclaimer of the Warranty of Merchantability in Consumer Sales: Proposed Alternatives to the UCC*, 12 WM. & MARY L. REV. 895, 900 (1971).

66. CAL. COMM. CODE § 2313 (West 1964).

67. *Id.* Uniform Commercial Code Comment 1.

as consistent when it is reasonable to do so, but that "subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable."⁶⁸ As one writer has put it, this language "says nothing; it means nothing."⁶⁹ The section was apparently included to protect buyers from the "unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . ."⁷⁰ It means only that it is probably difficult—though not impossible—to disclaim an express warranty under the Commercial Code.

Even though the Song-Beverly Act does not address itself to disclaiming the express warranty, such a disclaimer would clearly violate the spirit of the Act.⁷¹ It is difficult to comprehend how one could disclaim an express warranty under the Act without also violating the provision against the waiving of rights under the Act.⁷² Once an express warranty has been given which satisfies the definition under the Act, the provisions of the Act come into play and the buyer immediately acquires rights under them. There is no way a seller may then disclaim any part of the express warranty he has given,⁷³ since to elicit from the buyer a waiver of his rights under the Act is specifically forbidden.⁷⁴

THE IMPLIED WARRANTY OF MERCHANTABILITY

The Song-Beverly Act makes one of its most important contributions to consumer protection law by reviving the significance of the implied warranties of merchantability and fitness for purpose in the sale of consumer goods. The Commercial Code recognizes the existence of implied warranties,⁷⁵ but their import in the consumer arena has been undermined by the relative ease with which the Commercial Code permits implied warranties to be

68. CAL. COMM. CODE § 2316(1) (West 1964).

69. Ezer, *supra* note 8, at 311.

70. CAL. COMM. CODE § 2316, Uniform Commercial Code Comment 1 (West 1964). Since § 2313 of the Commercial Code permits oral express warranties which are part of the basis of the bargain, the disclaimer problem arises either when the consumer has been led to believe by advertising, sales brochures, or oral communications by a salesman that there is more protection in the warranty than actually appears in the signed contract, or when the written instrument (if there is one) specifically excludes (as in a merger clause) prior extrinsic communications. See note 61 *supra*.

71. California Consumer Law Conference, *supra* note 17, at 178.

72. CAL. CIV. CODE § 1790.1 (West 1973).

73. The absurdity of permitting a manufacturer or seller to warrant his product in one clause of a written contract and to negate all or part of that warranty in another clause should be obvious.

74. CAL. CIV. CODE § 1790.1 (West 1973).

75. CAL. COMM. CODE §§ 2314, 2315 (West 1964). Under section 2314 (implied warranty of merchantability) the seller must be a merchant with respect to the goods sold if the warranty is to arise.

disclaimed.⁷⁶ Arguably a buyer's most important warranty rights, even under the Commercial Code, are those arising out of implied warranties.⁷⁷ Since these rights are broader and of potentially greater significance to the consumer under the Act than under the Commercial Code or case law, the strength of the remedies available to him will often depend on the extent to which he can show that his implied warranty rights have been violated.⁷⁸

A warranty is said to be implied when it arises by operation of law from the nature of a particular transaction.⁷⁹ The concept of an implied warranty developed from a recognized need to afford greater protection to buyers of goods of inferior quality.⁸⁰ The courts evidently felt that the express warranty, the only one recognized at common law,⁸¹ was insufficient to afford this protection, since its existence was primarily dependent upon the initiative of the seller. The implied warranty of merchantability thus arose out of the need to assure the buyer that even without an express warranty the goods he purchased would meet certain minimum standards of quality.⁸²

Creation of the Warranty

Under the Song-Beverly Act the implied warranty of merchantability may arise by one of two methods, each corresponding to the alternative definitions of "consumer goods."⁸³ Section

76. See notes 95-99 and accompanying text *infra*.

77. Substantive Law Memo, *supra* note 23, at 34-35 citing J. WHITE & S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-6 (1972), wherein it is stated that "[t]he implied warranty of merchantability . . . is by far the most important warranty in the Code."

78. Substantive Law Memo, *supra* note 23, at 35.

79. Comment, *Recent Developments*, *supra* note 29, at 1431-32.

80. Comment, *Song-Beverly*, *supra* note 34, at 188.

81. *Id.*

82. The erosion of the doctrine of *caveat emptor* began in the landmark case of *Gardiner v. Gray*, 4 Camp. 144, 171 Eng. Rep. 46 (K.B. 1815), in which the implied warranty of merchantability was first applied. Lord Ellenborough described merchantability as the minimum quality a buyer could be expected to tolerate in any product he buys:

I am under the opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.

171 Eng. Rep. at 47.

For a discussion of this and other cases involving a breach of the implied warranty of merchantability, see Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

83. California Consumer Law Conference, *supra* note 17, at 188-89.

1792 of the Act requires that "... every sale or consignment for sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's implied warranty that the goods are merchantable."⁸⁴ Thus the implied warranty of merchantability will arise either when the consumer good is a new mobilehome, motor vehicle, machine, appliance, or like product sold for personal, family or household uses,⁸⁵ or when it is any other new good or product bought for personal, family, or household purposes, the retail sale of which is accompanied by an express warranty.⁸⁶

Although it is not clear how inclusive terms like *appliance*, *machine*, or *like product* are meant to be,⁸⁷ it would appear that section 1792 is applicable to virtually all products which the average consumer might be expected to purchase for his personal or household use and which by reason of their complicated design and mechanical or electrical parts are prone toward sudden and inexplicable malfunction. The fact that household goods of this sort are necessarily accompanied by the implied warranty of merchantability is one of the most innovative features of the Song-Beverly Act.⁸⁸ This feature is of particular importance to the consumer when the manufacturer attempts to disclaim any of the implied warranties.⁸⁹

The Act gives renewed vitality to the implied warranty of merchantability in two ways. It imposes liability under this warranty directly on the manufacturer, and it makes it both difficult and commercially unwise for the manufacturer to disclaim the warranty.

Liability of the Manufacturer under the Implied Warranty of Merchantability

In deference to the notion that the seller should bear respon-

84. CAL. CIV. CODE § 1792 (West 1973).

85. *Id.* § 1791(a).

86. *Id.* Excluded from coverage under this section are soft goods and consumables. For different rules concerning soft goods and consumables, built-in heating and air conditioning units, and used goods, see CAL. CIV. CODE §§ 1793.35, 1795.1, and 1795.5 (West 1973).

87. California Consumer Law Conference, *supra* note 17, at 188. In the early case of *Ross v. Tabor*, 53 Cal. App. 605, 611, 200 P. 971, 973 (1921), for example, the word "appliance" was construed very broadly to include "anything that is used as a means to an end."

88. Senator Song's Explanation of SB 272, *supra* note 28, indicates that it was the main thrust of the Act to insure the effectiveness of express warranties. Section 1792 of the Civil Code was designed to provide the consumer with the assurance that certain goods would be guaranteed to meet a minimum standard of merchantability, even if they are *not* accompanied by an express warranty.

89. See text accompanying note 104 *infra*,

sibility for any defective goods he sells,⁹⁰ the draftsmen of the Commercial Code adopted the implied warranty of merchantability.⁹¹ However, the Commercial Code sets limitations on the applicability of this warranty, which the Song-Beverly Act has corrected in order to insure the warranty's usefulness to the consumer.⁹² Under the Commercial Code the implied warranty of merchantability arises in a contract for the sale of goods "if the seller is a merchant with respect to goods of that kind."⁹³ Liability under the warranty thus depends upon privity of contract between seller and buyer.

The Song-Beverly Act fixes responsibility for its implied warranty of merchantability directly upon the manufacturer, even though he may not be in privity of contract with the consumer. In abolishing the necessity of privity of contract for the implied warranty of merchantability⁹⁴ the Act imposes ultimate responsi-

90. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 122 (1943).

91. CAL. COMM. CODE § 2314 (West 1964). Section 2314(2) of the Code provides that for goods to be merchantable they must be at least such as:

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label, if any.

92. The Commercial Code's implied warranty of merchantability is functionally identical with the Song-Beverly's. Compare CAL. COMM. CODE § 2314 (West 1964), with CAL. CIV. CODE § 1791.1 (West 1973), which states that for goods to be merchantable they must be such as:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

Note that under the Act adequate packaging and labeling are absolute requirements for merchantability.

93. CAL. COMM. CODE § 2314 (West 1964).

94. See Thornton, *The Song-Beverly Consumer Warranty Act: New Commandments for Manufacturers*, 46 L.A. BAR BULL. 331 (1971) [hereinafter cited as Thornton]. See also Comment, *Song-Beverly*, *supra* note 34, at 196 & n. 100, wherein it is suggested that the language of section 1792 of the Civil Code is broad enough to extend the manufacturer's warranty to any user or consumer.

California had already abolished the requirement of privity of contract to recover for a personal injury resulting from a defective product. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). See also Prosser, *The Assault Upon the Citadel (Strict Liability to the*

bility for the quality of the goods upon the one who has caused them to be placed on the market. It may reasonably be expected that this responsibility will result in greater care taken in the manufacture of many consumer items.

Disclaiming the Implied Warranty of Merchantability

Although the Commercial Code provides for the implied warranty of merchantability in a contract for the sale of goods,⁹⁵ the Code contains a loophole which has permitted the exclusion of all implied warranties by the use of expressions like "as is," "with all faults," or similar language which in "common understanding" clearly notifies the buyer that the basic implied warranties have been disclaimed.⁹⁶ A comment to section 2316 of the Commercial Code⁹⁷ explains that the phrases "as is," "with all faults," and the like are commonly understood in the commercial world to mean that the buyer accepts the entire risk as to the quality of the goods involved. This seems fair enough where buyer and seller are presumably acquainted with the common parlance of business transactions and sophisticated enough to comprehend the niceties of contract language.⁹⁸ But when, as often happens, the seller includes a clause in an express warranty under which a *consumer* "agrees" to surrender the basic implied warranties, he effectively renders nugatory the law of merchantability.⁹⁹

Consumer), 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

95. CAL. COMM. CODE § 2314 (West 1964). "Goods" in this section includes "food or drink to be consumed either on the premises or elsewhere."

96. *Id.* § 2316(3)(a).

97. *Id.* § 2316, Uniform Commercial Code Comment 7.

98. Section 2316(2) of the Commercial Code requires that the seller who seeks to exclude the implied warranty of merchantability must, if by a writing, make his disclaimer "conspicuous," and he must mention "merchantability." "Conspicuous" is not defined, and the Code necessarily presumes that any buyer knows the legal definition of merchantability. Section 2316(2) also provides that the implied warranty of fitness for purpose may be disclaimed by general language, but to do so a writing is necessary. See CAL. COMM. CODE § 2316, Uniform Commercial Code Comment 4 (West 1964).

99. Statement, *supra* note 14, at 1. Typical of such clauses is one reproduced in Professor Mueller's article, *supra* note 1, at 581 & n.24:

This product is precision built, inspected and tested before leaving our factory. It is guaranteed against defects in materials and workmanship for one year, cord set and plastic container excluded. If found defective it must promptly be returned post-paid to the factory or an authorized service station, *not to the dealer* [emphasis in original], and it will be repaired without charge. *It is expressly agreed that our total liability is limited to such repair* [emphasis added]. If used according to instructions, it should give years of satisfactory service.

Professor Mueller admits that a repair and replacement clause such as this is a . . . superb product. For by generously admitting a sole (and minimal) obligation to keep trying until the promised defect-free product

The Song-Beverly Act makes one of its most significant contributions to consumer protection law by addressing itself to the practice of disclaiming implied warranties. It sets forth a strict procedure which must be followed if an effective disclaimer is to be made. Two methods are available for disclaiming the warranty. Whether one method or the other is used depends on the circumstances under which the implied warranty could have arisen. If it arose out of a sale of goods covered by the Act,¹⁰⁰ to disclaim the warranty the manufacturer must comply with the requirement that a *writing* be

attached to the goods which, clearly informs the buyer, prior to the sale, in simple and concise language each of the following:

- (1) The goods are being sold on an "as is" or "with all faults" basis.
- (2) The entire risk as to the quality and performance of the goods is with the buyer.
- (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.¹⁰¹

The purpose of this procedure is to delineate for the buyer exactly what has been disclaimed and on whom rests the responsibility for remedying defects. Because the expressions "as is" or "with all faults" are not sufficient alone to disclaim the implied warranty of merchantability under the Act, the buyer is afforded a fairer opportunity to understand the extent of his implied warranty protection than he is under the Commercial Code.¹⁰²

The second method by which the manufacturer may disclaim the implied warranty of merchantability is to be inferred from section 1793 of the Act.¹⁰³ This section prohibits manufacturers or sellers who make express warranties from disclaiming the applicable implied warranties. Thus, if the implied warranty is one

is delivered it continues to deny—either expressly or by necessary implication—all other responsibility. And it does all of this in a virtuous and reassuring tone that is much appreciated by sales managers.

Id. at 581-82.

100. CAL. CIV. CODE § 1791(a) (West 1973).

101. *Id.* § 1792.4(a).

102. In Hurd & Bush, *supra* note 6, at 41, the point is made that, notwithstanding the Act's requirement that the disclaimer be made by a "conspicuous writing" containing the necessary disclaimer language, the consumer will likely be unaware of the significance of the "as is" language. This perhaps is an unfair evaluation of section 1792.4. It is precisely because consumers are not likely to be familiar with the legal significance of the "as is" sale that the Act requires strict adherence to the three-step method of disclaiming implied warranties.

103. CAL. CIV. CODE § 1793 (West 1973).

which would arise only by virtue of the presence of an express warranty, the only way the manufacturer may disclaim it is by *not* giving the express warranty.¹⁰⁴

These provisions should work to the advantage of the consumer. No longer are manufacturers permitted to couple express warranties with disclaimers of implied warranties.¹⁰⁵ They are put to the choice between selling goods minus *all* warranties—a decision which will do little to enhance customer confidence and much to diminish the value of warranty advertising—or living with the implied warranty of merchantability so eagerly disclaimed in the past.¹⁰⁶

A question arises as to the effect of these provisions on the warranty practices of manufacturers of certain consumer items. For example, it is quite common for a manufacturer to expressly warrant only part of the product he turns out,¹⁰⁷ and nothing in the Act prohibits this practice. Any part¹⁰⁸ which is expressly warranted will then automatically be accompanied by the implied warranty of merchantability.¹⁰⁹ Since "manufacturer" under the

104. If an express warranty is given which is successfully waived or negated, then any implied warranty arising with it would probably vaporize. California Consumer Law Conference, *supra* note 17, at 190-91. But see text accompanying notes 63-74 *supra*.

105. Compare CAL. CIV. CODE § 1793 (West 1973), with CAL. COMM. CODE § 2316 (West 1964) (wherein disclaimers of implied warranties are permitted when an express warranty is given) and CAL. COMM. CODE § 2317(c) (wherein the express warranty is permitted to displace the implied warranty of merchantability when the two are inconsistent).

Unfortunately there is little evidence that manufacturers are complying with the letter of section 1793 of the Civil Code. For example, the express warranty given by the International Harvester Company on its 1973 three-quarter ton pickup truck, sold in California, still came with a clause reading as follows:

THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES,
EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION,
WARRANTIES OF MERCHANTABILITY AND FITNESS
FOR PARTICULAR PURPOSE. . . .

International Harvester Co. Warranty, 1973, copy on file with the Santa Clara Lawyer.

106. Thornton, *supra* note 94, at 333.

107. The partial express warranty is perhaps most widely used in the automobile industry. Anyone who has observed, for example, the American Motors Corporation TV commercial extolling the virtues of the A.M.C. "Buyer Protection Plan" is aware of the specific exclusion of tires from coverage under this warranty. Other auto manufacturers are even less generous with the scope of their express warranties. The Chrysler Corporation, for example, exempts eleven "items" not normally considered defects in materials or workmanship from coverage under its 1972 passenger car warranty. Chrysler Corporation's Warranty and Limitation of Liability for New 1972 Model Passenger Cars, copy on file with the Santa Clara Lawyer.

For a thorough treatment of the shortcomings in automobile warranty protection in recent years see FTC, REPORT ON AUTOMOBILE WARRANTIES (1970).

108. CAL. CIV. CODE § 1791(a) (West 1973) includes any "part thereof" in its definition of "consumer goods."

109. *Id.* § 1792.

Act includes anyone who assembles consumer goods,¹¹⁰ it may be illegal for any manufacturer to disclaim or limit the implied warranty of merchantability as to any parts which he assembles but which do not carry *his* express warranty.¹¹¹ This interpretation is consistent with the intent of the legislature to insure that the consumer can turn to someone within California in whom responsibility is reposed for the entire product.¹¹²

Duration of the Implied Warranty of Merchantability

Because the implied warranty of merchantability has been so often disclaimed, there is a dearth of case law concerning how a breach may occur, at least in regard to consumer goods.¹¹³ Obviously, if the new toaster fails to toast or the new tire explodes for no apparent reason, a presumption arises that these goods were not of merchantable quality. Every case, however, is not that clear, and proving when or how a warranty was breached is often difficult. The Act makes one potentially significant contribution toward solving this problem by prescribing the duration of the implied warranty.¹¹⁴ If the implied warranty of merchantability accompanies an express warranty, they will be of equal duration, so long as this is a reasonable time. In no event will the implied warranty endure less than sixty days nor more than one year following the sale of new consumer goods.¹¹⁵

Significantly, the Commercial Code makes no express provision for the duration of any implied warranty beyond the time of sale.¹¹⁶ The Song-Beverly Act, on the other hand, holds the

110. *Id.* § 1791(c).

111. California Consumer Law Conference, *supra* note 17, at 183.

112. See Thornton, *supra* note 94, at 333. The "someone" in this case would be the manufacturer's established repair facility or authorized service center in California or the merchant (dealer) who sold the defective item. See text accompanying notes 130-184 *infra*.

113. Cases such as *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954) and *Moore v. Hubbard & Johnson Lumber Co.*, 149 Cal. App. 2d 236, 308 P.2d 794 (1957), have granted relief for breach of implied warranties of merchantability where the goods were found not to be reasonably suitable for the ordinary uses and purposes of goods of the general type described by the terms of the sale. A similar position was taken in *Eichler Homes, Inc. v. Anderson*, 9 Cal. App. 3d 224, 87 Cal. Rptr. 893 (1970). None of these cases, however, involved a sale of consumer goods as defined in the Song-Beverly Act. Yet another reason for the paucity of consumer cases brought for breach of an implied warranty of merchantability has been a general "lack of consumer power in cases involving no great monetary damage" to the individual. Mueller, *supra* note 1, at 596.

114. CAL. CIV. CODE § 1791.1(c) (West 1973).

115. Where an express warranty accompanies used goods, a shorter duration—not less than 30 days nor more than 3 months—is prescribed for the implied warranty of merchantability. *Id.* § 1795.5(c).

116. CAL. COMM. CODE § 2314 (West 1964). But see text accompanying

manufacturer or seller liable for a prospective breach of the implied warranty of merchantability, just as it does for a prospective breach of an express warranty.¹¹⁷ This is a major development in the law of merchantability. Now the consumer is protected against a subsequent defect which he could not reasonably have been expected to discover at the time of sale.¹¹⁸ Because appellate courts have had to deal only infrequently with breaches of implied warranties in consumer sales (except where physical injuries have occurred), the question remains open whether the Act will have a significant effect upon the practices of manufacturers with regard to honoring and disclaiming the warranty of merchantability.¹¹⁹

The Implied Warranty of Fitness for Purpose

This warranty, as defined in the Song-Beverly Act, is virtually identical with its counterpart in the Commercial Code.¹²⁰ The warranty arises when the retailer, distributor, or manufacturer has reason to know the particular purpose for which the consumer goods are required and that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods.¹²¹ For example, when a buyer purchases an electric shaver, it will normally be accompanied by an implied warranty that it is fit for the ordinary purposes to which such items are put¹²²—that is, shaving human beings. However, if the buyer has indicated to the seller that he wants a shaver suitable for trimming his dog's hair, and the buyer is relying on the seller's judgment to provide him with an instrument fit for that purpose, then the shaver will be accompanied by that implied warranty of fitness for purpose. This will occur even though the particular purpose is not one for which electric shavers of the type described are ordinarily used.

The Act further provides that when a manufacturer *does* have reason to know of the buyer's purpose and reliance *at the time of*

notes 47-52 *supra*. The cases discussed therein concerned both express and implied warranties.

117. CAL. CIV. CODE § 1791.1(c) (West 1973).

118. If the case of *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.*, 35 Cal. App. 3d 948, 111 Cal. Rptr. 210 (1973), is deemed applicable to the sale of consumer goods, the buyer may also be protected against defects discovered after the expiration of the warranty period.

119. It is clear that the Act has had little effect on methods used by some manufacturers to disclaim the implied warranty of merchantability. See note 105 *supra*.

120. Compare CAL. CIV. CODE § 1791.1(b) (West 1973), with CAL. COMM. CODE § 2315 (West 1964).

121. CAL. CIV. CODE § 1792.1(b) (West 1973).

122. *Id.* § 1791.1. See also CAL. CIV. CODE § 1792 (West 1973).

the retail sale, the implied warranty of fitness necessarily accompanies a sale of such goods *at retail by the manufacturer*.¹²³ The language of this section seems to imply that in order for the manufacturer to become liable for the implied warranty of fitness for purpose, he must also be the one who sells the item at retail. However, in view of the section which immediately follows,¹²⁴ this interpretation is illogical. In the subsequent section the Act provides that the implied warranty of fitness for purpose necessarily accompanies the sale of consumer goods by a *retailer* or *distributor* who has the requisite knowledge of the consumer's purpose and reliance on his skill and judgment. If the manufacturer must also retail the goods in order to be liable under the warranty of fitness, then the preceding section is superfluous, its provisions being subsumed in section 1792.2. Presupposing that section 1792.1 must have been intended to contribute something to the Act, it can only be concluded that the manufacturer will be liable if he has reason to know of the buyer's purpose and reliance at the time of sale, even if he does not retail the goods himself. A manufacturer who advertises a particular use for the goods he sells should become liable for the implied warranty of fitness for that purpose, even if the purpose advertised is not an "ordinary" one for goods of that description.¹²⁵

The Act is silent as to what constitutes sufficient notice to the seller or manufacturer of the particular use the buyer has in mind for the goods. Likewise, the Commercial Code does not set forth specific provisions for imparting notice, but in a comment to section 2-315 the view is expressed that the buyer need not convey to the seller actual knowledge of his purpose or reliance on the seller's skill and judgment, so long as these may reasonably be inferred from the circumstances.¹²⁶ Thus, in the shaver example, if the manufacturer advertised that his product may be used for any one of a number of purposes, it would not be unfair to impute constructive knowledge that the buyer had one of these purposes in mind and relied on the manufacturer's skill and judgment to create a suitable product. Likewise, if the buyer indicates to the seller that he wants a product which will perform task A, the seller will become liable under the implied warranty of fitness for purpose if he represents that prod-

123. *Id.* § 1792.1.

124. *Id.* § 1792.2.

125. Clearly the manufacturer has "reason to know" of the buyer's purpose and reliance when his own advertising is used to create the purpose and induce the reliance.

126. CAL. COMM. CODE § 2315, Uniform Commercial Code Comment 1 (West 1964).

uct X will do the job, even if the manufacturer's brochure advertises that product X is suitable only for tasks B, C, and D.

In summary, the Song-Beverly Act does not greatly change the law with respect to the implied warranty of fitness for purpose. However, by making applicable to this warranty the same provisions respecting duration,¹²⁷ method of disclaiming,¹²⁸ and damages for breach¹²⁹ as are applicable to the warranty of merchantability, the Act gives added vitality to the implied warranty of fitness for purpose in the sale of consumer goods.

THE OBLIGATIONS OF THE WARRANTOR UNDER THE SONG-BEVERLY ACT

When a consumer buys a product he naturally expects to receive a certain degree of satisfaction from it. If the product is designed to perform a certain function, he is entitled to expect satisfactory performance for a reasonable amount of time. A written warranty, to the consumer, is an insurance policy—which he hopes never to use. He may even prefer not to think about it when making his purchase (and the seller doubtless will not encourage him to do otherwise). But when the product breaks down, the frustrated consumer will likely turn to his "insurance policy" to read, probably for the first time, about his obligations and those of the manufacturer or seller. Often the consumer will be shocked to discover that in order to have the product repaired, he will have to bear the cost of shipping it hundreds—perhaps thousands—of miles to the manufacturer's home office. He may also learn to his dismay that the actual obligations of the warrantor are so minimal as to be of no real value. The Song-Beverly Act attempts to deal with these frustrating realities by establishing and clarifying minimum obligations for all warrantors under various types of warranties, and by providing remedies to the consumer for a violation of these obligations.

Obligations and Remedies under the Express Warranty

The Act does not oblige the manufacturer to give express warranties, but if he does, he is faced with the obligation to set forth the terms of the warranty in clear, readily understandable language, and to clearly identify himself as the warrantor.¹³⁰ The manufacturer is then faced with a choice between maintain-

127. CAL. CIV. CODE § 1791.1(c) (West 1973).

128. *Id.* §§ 1792.3, 1792.4(a).

129. *Id.* § 1791.1(d).

130. *Id.* § 1793.1(a) (West Supp. 1974).

ing his own service and repair facilities within California¹³¹ or reimbursing retailers on whom he must rely to repair, replace, or refund the purchase price under the warranty.¹³²

If the manufacturer chooses to set up his own system of repair facilities, these must be fully equipped to repair or service the malfunctioning whole or part of the goods expressly warranted.¹³³ The warranty work done in these facilities must commence within a reasonable time, and unless the buyer agrees in writing to the contrary, the goods must be made to "conform to the applicable express warrant[y]" within thirty days.¹³⁴

If the manufacturer's facility cannot effect the necessary repairs, the manufacturer is duty-bound either to replace the goods or to refund the purchase price.¹³⁵ In imposing upon the manufacturer who gives an express warranty the legal obligation to choose one of only two ways by which he can honor the warranty, the Act makes its most significant contribution to the law of sales warranty.¹³⁶ The consumer now has at his disposal a body of law designed specifically to insure that the warranty to repair, replace, or refund has real value, not just advertising value.¹³⁷

The buyer is not without his own obligations. He must deliver the defective goods to one of the service facilities, unless to do so would be unreasonable in view of the size, weight, method of installation or attachment, or nature of the defect.¹³⁸ If such

131. *Id.* § 1793.2 (West 1973). CAL. CIV. CODE § 1793.1(b) (West Supp. 1974) provides in part that if the manufacturer elects to maintain his own service facilities in California, he must, at the time of sale, provide the buyer with (1) the name and address of each in-state repair facility, or (2) the name, address and telephone number of a service and repair facility central directory within California or the toll-free telephone number of such central directory located out of state, or (3) maintain with the retail sellers of his warranted goods a current listing of either the authorized in-state service and repair facility or retail sellers to whom the consumer goods are to be returned for service and repair.

132. *Id.* § 1793.5 (West 1973).

133. The manufacturer is not liable for defects caused by the buyer's unauthorized or unreasonable use of the goods following sale. *Id.* § 1794.3.

134. *Id.* § 1793.2(b). The thirty-day period may be extended by conditions causing delay which were "beyond the control of the manufacturer or its representative in this state." *Id.*

135. *Id.* § 1793.2(d). This section also provides that the manufacturer may deduct from any refund "that amount directly attributable to use by the buyer prior to the discovery of the nonconformity." The potential for abuse by manufacturers in such a provision should be obvious.

136. The value of this contribution is enhanced by the requirement that the express warranty be honored in timely fashion.

137. For an interesting and lively discussion of the contract as a commodity itself, which suggests that there may be developing a law of merchantability with respect to the drafting of contracts and the warranties they contain, see Leff, *Contract as a Thing*, 19 AM. U.L. REV. 131 (1970) [hereinafter cited as Leff].

138. CAL. CIV. CODE § 1793.2(c) (West 1973).

delivery is unreasonable, the buyer must notify the manufacturer in writing. The latter may then choose to repair the goods on the buyer's premises or pay to have them shipped to the repair facility.

How much effort the manufacturer must expend in establishing repair facilities is not clear from the Act. It says only that every manufacturer of consumer goods sold in California, who gives an express warranty, shall "maintain or cause to be maintained . . . sufficient service and repair facilities to carry out the terms of such warranties . . ."¹³⁹ Manufacturers are permitted to select certain retailers and dealers from among those who sell their products to handle warranty work.¹⁴⁰ This permits flexibility in deciding how to effect warranty repairs. However, smaller companies which do not already have a system of authorized repair facilities might be at a disadvantage in having to deal with a large number of independent retailers.

The requirement that "sufficient service and repair facilities" be maintained poses a problem of interpretation. If "sufficient" means sufficiently dispersed throughout the state, then a consumer in San Francisco who purchases a product, the nearest repair facility for which is in San Diego, may have a just complaint that the existing service facilities are insufficient. However, if "sufficient" means enough facilities to handle all of the warranty work, then the fact that most facilities are located in the large metropolitan areas will not necessarily mean that they are insufficient, even for a remote rural buyer. Since the Act acknowledges that the buyer may have to send the defective goods to the repair facility at his own expense,¹⁴¹ it is reasonable to assume that "sufficient" refers to quantity and not dispersion of repair facilities.¹⁴² The buyer who is understandably reluctant to ship the goods hundreds of miles at his own expense may be justi-

139. *Id.* § 1793.2(a)(1).

140. Explanation, *supra* note 28, at 1. The Explanation affirms the procedure already used by manufacturers such as R.C.A., Sony, Sunbeam, and others who have established "authorized service facilities." Manufacturers such as these, Senator Song explains, will not have to "rent one foot of space or . . . hire one employee." *Id.*

141. CAL. CIV. CODE §§ 1793.2(c), 1793.3(c) (West 1973). In each of these sections the buyer's duty to return the nonconforming goods to the manufacturer's service and repair facility is set forth. The manufacturer is obligated to bear the cost of shipping the goods to the repair facility only when the buyer is "unable to effect return" (for reasons of size, weight, method of attachment or installation, or nature of the nonconformity) and after he has notified the manufacturer of the nonconformity. Thus the purchaser of a defective steam iron or other small appliance will not reasonably be permitted to claim that he is "unable to effect return" and will have to bear the cost of shipment himself.

142. California Consumer Law Conference, *supra* note 17, at 181-82.

fied in feeling that the Act has failed in its essential purpose.¹⁴³

If the manufacturer declines to establish a system of repair facilities, he is obligated to reimburse any retailer who sells his goods for the costs borne by the retailer in giving effect to the manufacturer's express warranty.¹⁴⁴ The buyer has two options in this situation. He may return the defective goods to the original seller,¹⁴⁵ or he may return them to any retail seller in California who carries like goods of the same manufacturer.¹⁴⁶ The party chosen by the buyer to honor the warranty has the option of repairing or replacing the goods. If he opts to repair, he must commence work within a reasonable time and complete the repairs within thirty days, unless the buyer waives this requirement in writing.¹⁴⁷ If the seller attempts to repair the goods and finds that he is unable to do so, he must refund the purchase price to the buyer, less depreciation for the buyer's use.¹⁴⁸

This option arrangement raises several problems. First, the Act provides that the thirty-day repair limit may be extended by conditions "beyond the control of the retail seller or his representative,"¹⁴⁹ but it offers no clue to the meaning of "beyond the control." Since the thrust of the provisions dealing with service facilities and repairs by sellers is that the goods are to be made to conform as quickly as possible to the manufacturer's warranties,¹⁵⁰ the provisions for delay should be narrowly interpreted and should be applied only where it would be grossly unfair not to do so.

A second problem is found in the waiver provision. The Act generally disapproves of any attempt by manufacturers or sellers to limit, modify, or disclaim any warranty provisions. Particularly forbidden is the surprise disclaimer or unclear provi-

143. It is also possible for the consumer to be misled by the manufacturer's warranty card into believing that he must bear the cost himself of shipping a defective product to an out-of-state facility for repairs. Hurd & Bush, *supra* note 6, at 40-41. This possibility serves to emphasize the need for a provision in the Act requiring warrantors to inform consumers of their rights under the Act. See notes 185-91 and accompanying text *infra*.

144. CAL. CIV. CODE § 1793.5 (West 1973).

145. *Id.* § 1793.3(a). Since "retail seller" is defined under section 1791(e) to include "any individual, partnership, corporation . . . which engages in" selling consumer goods to retail buyers, it may be possible for the buyer to return the goods to any outlet of the same retail chain.

146. *Id.* § 1793.3(b). If the buyer is unable to return the goods, the retailer, upon receiving written notice to this effect, must bear the cost of shipping or of repairing at the buyer's residence. CAL. CIV. CODE § 1793.3(c) (West 1973); see also note 141 *supra*.

147. CAL. CIV. CODE § 1793.4 (West 1973).

148. *Id.* § 1793.3(a). See note 135 *supra*.

149. CAL. CIV. CODE § 1793.4 (West 1973).

150. See CAL. CIV. CODE §§ 1793.2(b), 1793.4 (West 1973).

sion by which a buyer unknowingly agrees to waive his rights to speedy repair. This would be a violation of section 1790.1, since any contract clause which intentionally obscures what the buyer is waiving would clearly not be one of the waivers expressly provided for in the Act.¹⁵¹

One of the unique features of the Act—and one which enhances its viability—is the provision requiring manufacturers who choose not to maintain their own repair facilities to be liable to their retailers for the fair market value of express warranty work.¹⁵² Retailers, confident that they will be paid the going rate for repairs by an established firm, will not hesitate to accept warranty work. Manufacturers will be less likely to delay reimbursing a retailer, himself an experienced businessman, than they would be to satisfy the isolated claims of frustrated consumers. The Act firmly establishes the manufacturer's liability for his own express warranties; evasion of this responsibility is theoretically no longer possible.

There are some uncertainties in the Act which must be clarified if the consumer is to know exactly where he stands with regard to an express warranty. In his article Professor Mueller indicated that the typical repair-or-replace warranty usually meant that

what a consumer really buys from his dealer is not a properly operating TV, stereo, dishwasher, or car. He buys a promised opportunity to get one sooner or later if in the meantime he cooperates with the manufacturer-wholesaler-dealer establishment.¹⁵³

The Act attempts to deal with this problem by requiring that repairs or replacement be made within thirty days.¹⁵⁴ However, the Act does not specifically command that if the goods are not repaired within that time they must be replaced or the purchase price refunded. Rather the mandate for replacement or refund arises only if the manufacturer or retailer is *unable* to repair the goods within the thirty-day period.¹⁵⁵ The result is that unless the individual charged with repair admits that he cannot effect a permanent repair, the buyer may be subject to limitless delays on the supposition that the serviceman is *able* to repair and only "one more adjustment" is necessary.¹⁵⁶ Under recent case law a

151. See CAL. CIV. CODE § 1790.1 (West 1973), which deems such waivers to be contrary to public policy, unenforceable and void. See also Comment, *Song-Beverly*, *supra* note 34, at 199.

152. CAL. CIV. CODE § 1793.5 (West 1973).

153. Mueller, *supra* note 1, at 582. See also note 99 *supra*.

154. CAL. CIV. CODE §§ 1793.2(b), 1793.4 (West 1973).

155. *Id.* §§ 1793.2(d), 1793.3(a).

156. California Consumer Law Conference, *supra* note 17, at 184-85.

failure to effect repairs under a warranty may result in the warrantor's liability for damages flowing naturally from the breach,¹⁵⁷ but what the consumer wants in most instances is a properly functioning product, not damages.

This construction, permitting the serviceman to continue to attempt repairs on the claim that he is *able* to fix the product, does not square well with the thirty-day requirement. That such a loophole should appear to exist in view of the Act's intent to insure that warranties will be honored is unfortunate. After a reasonable time, an inability to repair the goods should become obvious; when this occurs, it should be incumbent upon the repair facility or dealer to admit it and to replace the goods or refund the buyer's money. The expressed supplemental nature of the Act¹⁵⁸ makes it possible to apply other doctrines of law to fill apparent gaps in the Act's coverage and to close loopholes. In this instance it might be appropriate to apply the rule, codified in section 1657 of the California Civil Code, that where no time for performance is specified in a contract, a reasonable time is allowed.¹⁵⁹ By definition an express warranty is made part of a contract for sale, and the buyer has every right to expect that the aleatory performance he has bargained for will be carried out within a reasonable time.¹⁶⁰ If it is not, then a fortiori the buyer has the right of replacement or refund purported to exist when the warrantor is "unable" to repair.¹⁶¹

Another doctrine that may aid the consumer faced with service delay tactics is the maxim of jurisprudence which demands that interpretation—whether of statute or contract—be reasonable.¹⁶² It has been held in California that where the purpose of a statute is apparent, a court will not blindly follow the letter of the law where to do so would be inconsistent with the primary intention of the legislature.¹⁶³ It is clear the legislature did not intend to permit escape routes by which manufacturers or

157. See notes 49-51 and accompanying text *supra*.

158. See text accompanying notes 15-16 *supra*.

159. CAL. CIV. CODE § 1657 (West 1973). What constitutes a reasonable time is always a question of fact. *Palmquist v. Palmquist*, 212 Cal. App. 2d 322, 27 Cal. Rptr. 744 (1963). In order to place the manufacturer or retailer in default for failing to make repairs or replacement within a reasonable time, the buyer may be required to demand performance first. *World Sav. & Loan Ass'n v. Kurtz Co.*, 183 Cal. App. 2d 319, 6 Cal. Rptr. 655 (1960).

160. The buyer has this right even though he is not in privity of contract with the manufacturer. See note 94 *supra*.

161. CAL. CIV. CODE § 1793.2(d) (West 1973).

162. *Id.* § 3542 (West 1970).

163. *Jordt v. California State Bd. of Educ.*, 35 Cal. App. 2d 591, 595, 96 P.2d 809, 811 (1939). *Accord*, *Estate of Wilcox*, 68 Cal. App. 780, 784, 158 P.2d 32, 34 (1945); *Kauke v. Lindsay Unified School Dist.*, 46 Cal. App. 2d 176, 185, 115 P.2d 576, 581 (1941).

dealers could avoid their duties to consumers under the Song-Beverly Act.

The ultimate question for the consumer is what to do when someone—manufacturer, retailer or other warrantor—has evaded his responsibilities under an express warranty. All the consumer knows is that the product he purchased is now defective, and, although accompanied by a warranty to repair or replace, it is not being fixed. If the manufacturer has elected to provide service and repair facilities, the buyer will have been informed of the names and locations of such facilities.¹⁶⁴ Under these circumstances the buyer's claim is clearly against the manufacturer if the repair or replacement provisions of the Act have been violated. But if the manufacturer has elected to reimburse the retailer for warranty work, does the buyer have an immediate claim against the manufacturer if the retailer fails to honor his obligation? The Act is not absolutely clear on this point.

The possibility always exists that the manufacturer or seller charged with duties under the warranty will simply refuse or otherwise evidence his unwillingness to carry them out. This would be a willful violation of the Act, for which treble damages may be awarded,¹⁶⁵ unless, as the seller or manufacturer might argue, the Act imposes sanctions only for a violation of its own provisions, not for a violation of the terms of a particular warranty. The Act, however, establishes definite and minimum procedural requirements which must be adhered to by anyone giving an express warranty on consumer goods.¹⁶⁶ Where the terms of a particular express warranty relate to the future utility of performance of the product, they necessarily set into operation the provisions of the Act respecting the duty to repair, replace, or refund,¹⁶⁷ which constitute the procedural requirements to which the warrantor must adhere. It follows that the buyer should be able to sue the warrantor under the Act for a breach of any terms of the warranty, such as those respecting the duty to repair, replace, or refund, which are also covered under the Act's procedural requirements. Additionally, the buyer should have a claim against the manufacturer, who is the real warrantor, even if the unwillingness or refusal to repair is evidenced by the retailer designated to perform the warranty work.

164. CAL. CIV. CODE § 1793.1(b) (West 1973). *See also* CAL. CIV. CODE § 1793.3. The Act does not require the manufacturer to notify the buyer that he does *not* maintain his own system of repair facilities within California. Perhaps the legislature assumed that this would not be necessary, since the buyer's natural inclination upon finding that the product he bought has a defect is to return it to the dealer with whom he has had direct contact.

165. *Id.* § 1794(a).

166. *Id.* §§ 1793.1, 1793.2, 1793.3, 1793.35, 1793.4, 1793.5.

167. *Id.* §§ 1793.2, 1793.3.

Given the proper construction, the Act can also be looked to for damages. The only section dealing specifically with that issue provides for treble damages for a willful violation of any provision in the Act.¹⁶⁸ It cannot reasonably be concluded that this section was meant to foreclose the possibility of collecting damages for a non-willful violation of the Act.¹⁶⁹ Rather it is logical to presume that the section was added to provide stiff penalties for a flagrant disregard of legislative intent, while permitting recovery of ordinary damages under other doctrines of law or statutes.¹⁷⁰

To the extent that the Act creates certain minimum procedural obligations for the manufacturer (and, where applicable, the retail merchant) under an express warranty the consumer is in a better position than he was under the Commercial Code. To the extent that the Act may be interpreted to subject the manufacturer giving an express warranty to certain minimum legal requirements apart from the bare terms of the warranty, the consumer has won a major round in his fight to obtain equal footing in the marketplace.

The Obligations under the Implied Warranties

The Song-Beverly Act's treatment of buyers' rights under the implied warranties of merchantability or fitness for purpose fails to make provision for honoring these warranties. The manufacturer's duty to repair or reimburse the retailer for the warranty work he performs pertains only to the "applicable express warranties."¹⁷¹ To obtain redress for a breach of *implied* war-

168. *Id.* § 1794(a). Section 1794(b) permits reasonable attorney fees as well as treble damages. It also limits the application of the treble damage provision to judgments *not* based solely on a breach of the implied warranties of merchantability or fitness for purpose.

169. *But see* California Consumer Law Conference, *supra* note 17, at 186.

170. *See, e.g.,* CAL. CIV. CODE § 3281 *et seq.* (West 1970). *See also* Laczkó v. Jules Meyers, Inc., 276 Cal. App. 2d 293, 295, 80 Cal. Rptr. 798, 799 (1969). In that case the court spoke of the doctrine of "tort in essence", which confers a private right of action for damages upon a person injured as a result of the violation of a statute embodying a public policy, even though no specific civil remedy is provided in the statute. In such an action the measure of damages is normally that amount which will compensate for all the detriment proximately caused by the breach, whether it could have been anticipated or not. CAL. CIV. CODE § 3333 (West 1970). Where the breach of the statutory duty is material, the consumer should have the option to cancel the entire transaction. *See* CAL. CIV. CODE § 1689(b)(2) (failure of consideration) and (b)(6) (prejudice to the public interest) (West 1973). When the product is seriously defective, cancellation of the transaction may be the consumer's only effective remedy. If there is a breach of the implied warranty of merchantability, the Commercial Code provisions on revocation of acceptance and cancellation may be applicable. CAL. COMM. CODE §§ 2608 and 2711(1) (West 1964).

171. CAL. CIV. CODE §§ 1793.2, 1793.3, 1793.5 (West 1973).

warranties, the buyer is referred to the general remedies for breach of contract under sections 2601 through 2616 and 2701 through 2725 of the California Commercial Code.¹⁷² Among the buyer's remedies are the following:

(1) he may retain the unmerchantable or unsuitable goods and recover damages for breach;¹⁷³ or

(2) he may reject or revoke acceptance of the goods, cancel the contract, and recover "so much of the price as has been paid" plus incidental or consequential damages.¹⁷⁴

The buyer may also recover reasonable attorney fees in a successful action for breach of an implied warranty.¹⁷⁵

When the obligation under an implied warranty falls on someone other than the seller, the buyer may retain the non-conforming goods and sue the obligor for damages, as in (1) above. But may he alternatively cancel the contract, return the goods to the *seller* and demand refund as in (2) above, even though the implied warranty obligation is that of the manufacturer? It has been suggested that an affirmative answer to this question is implicit in the Act.¹⁷⁶ This implication arises out of the general intent, evident throughout the Act, to include the manufacturer, distributor, and any other warrantor among those having a direct obligation to the buyer.¹⁷⁷ This is the reason the seller automatically becomes obligated on an express warranty when the manufacturer elects not to establish repair facilities of his own. In interpreting some of the Act's more troublesome provisions courts should remember that under the Act the buyer is paramount.¹⁷⁸

By referring the consumer to the Commercial Code remedies for breach of implied warranties, the Act creates still an-

172. *Id.* § 1791.1(d).

173. CAL. COMM. CODE § 2714 (West 1964).

174. *Id.* § 2711(1).

175. CAL. CIV. CODE § 1791.1(d) (West 1973) refers the injured buyer to the attorney fees provision in section 1794.2(b).

176. Substantive Law Memo, *supra* note 23, at 36.

177. *Id.*

178. A court might be constrained, however, to discount time-honored principles of the marketplace solely to protect the consumer. Section 2607 (3)(a) of the Commercial Code requires the buyer to give notice to the seller of a breach of an implied warranty before bringing suit. It is likely that the courts would hold a consumer to this same requirement under the Act, since it is one way of encouraging the parties to settle their differences out of court. Some well-known California cases have looked with disfavor upon notice requirements absent a statutory provision, but these cases have generally concerned personal injuries resulting from the defective product. *See, e.g.,* *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

other problem of statutory interpretation. Section 2719 of the Commercial Code permits the contracting parties to limit or modify the remedies under other provisions of the Code.¹⁷⁹ The Act, however, expressly prohibits limitations or modifications of implied warranties whenever an express warranty has been given.¹⁸⁰ If section 2719 is read to permit limitations on *damages* for breach of an implied warranty, it would undercut the purpose of this provision in the Act, which is clearly intended to preserve the full effect of implied warranties in consumer transactions. This conflict may be resolved by returning to the intent of the draftsmen. It is absurd to suggest that they would have taken such care to preserve the rights of the buyer under implied warranties and at the same time leave him with a remedy that manufacturers and sellers could modify or avoid by a waiver. It is here that section 1790.3,¹⁸¹ which provides that the Act's provisions shall prevail if in conflict with those of the Commercial Code, could be employed to void an attempt by a warrantor to escape his responsibilities under the Act. Still one more problem is apparent. An implied warranty disclaimer which is clearly illegal under the Act may be perfectly acceptable under the Commercial Code.¹⁸² Yet if the buyer wishes to bring an action for breach of implied warranty under the Act, he must under section 1791.1(d)¹⁸³ go to the Commercial Code for his remedy. The Code, however, recognizes the validity of the disclaimer, placing the buyer in the anomalous position of seeking redress under the Commercial Code even though none of its provisions has been violated! Unless section 1791.1(d) is interpreted to allow incorporation into the Act of the Commercial Code remedies for breach of implied warranty without also requiring a violation of the Code provisions, the buyer may have a right without a remedy—clearly *not* the intent of the legislature.¹⁸⁴

179. The modification must not cause the remedy "to fail of its essential purpose." CAL. COMM. CODE § 2719 (West 1964). The Uniform Commercial Code Comment 1 to this section explains that

where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

180. CAL. CIV. CODE § 1793 (West 1973). The Act also prohibits the waiving of any rights under it, including those arising out of an implied warranty. *Id.* § 1790.1.

181. *Id.* § 1790.3.

182. Compare CAL. CIV. CODE §§ 1792.4 and 1793 (West 1973), with CAL. COMM. CODE § 2316 (West 1964).

183. CAL. CIV. CODE § 1791.1(d) (West 1973). See text accompanying note 172 *supra*.

184. *Id.* Section 1790.3 of the Civil Code provides further support for this position by resolving conflicts between the Act and the Commercial Code in favor of the Act.

CONSUMER AWARENESS OF THE ACT

Clearly the provisions of the Act could have revolutionary impact on the field of consumer protection. Since it is unique among attempts to deal with consumer warranties,¹⁸⁵ and since it has been in effect now for three years, it is curious that the Act has not achieved greater renown. Compared with other legislation in the consumer arena, such as the Federal Truth in Lending Act¹⁸⁶ and California's Unruh Act,¹⁸⁷ the Song-Beverly Act has received only minimal publicity. It is perhaps possible that manufacturers and retailers of consumer goods have begun *en masse* to adhere to the provisions of the Act, both in form and substance.¹⁸⁸ The more logical conclusion, however, is that the vast majority of California consumers are unaware of the Act, and manufacturers and merchants are not likely to inform them of it.

Given the problems highlighted by this comment, it is difficult to conclude that the provisions of the Act are so clear that no interpretation by a court might be required. And yet, as of this writing, no reported decision in any case arising under the Act has been decided on an appellate level. Unfortunately, it appears that the practicing bar, like the consumer, is unfamiliar with the potential of the Act.¹⁸⁹

185. As of this writing the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (originally passed by the United States Senate as the Magnuson-Moss Consumer Warranty Act, S. 986, 92nd Cong., 1st Sess. (1971)) has not become law. The most recent version of this legislation (S. 356, 93rd Cong., 1st Sess., reported in 119 CONG. REC. 16,439 (Daily ed. Sept. 12, 1973)) would provide minimum national standards for written consumer warranties. A supplier of consumer goods writing such a warranty would be required to undertake the minimum duties of repairing or replacing the defective product within a reasonable time and without charge.

Unlike the Song-Beverly Act the Magnuson-Moss Act does not require specificity as to location of service facilities, nor does it provide for treble damages for a willful violation of its provisions. It specifies only a reasonable time for warranty repairs instead of a thirty-day limit as in the Song-Beverly Act. The federal act does, however, provide that either the Attorney General or the FTC may intervene to seek an injunction against any supplier of consumer goods deemed to be in violation of any of the Act's provisions, where the goods concerned "affect" interstate commerce.

186. 15 U.S.C. § 1601 *et seq.* (1970).

187. CAL. CIV. CODE § 1801 *et seq.* (West 1973).

188. *But see* note 105 *supra*.

189. Interview with Richard A. Elbrecht, attorney at law and author of Substantive Law Memo on Warranties, *supra* note 33, in Santa Cruz, California, January 31, 1974.

As one commentator has observed, members of the private bar are not likely to be motivated to vindicate the relatively minor claim of an aggrieved consumer by the promise of recovering only a token fee. *See* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 335 (1973). However, assuming the legislature intended by section 1794 of the Act that attorney's fees

If legislation such as this is to be meaningful to the consumer, he must know of its existence and import. Unfortunately, the Song-Beverly Act does not contain provisions for self-education of the consumer. Provisions of this type requiring signs in conspicuous locations informing the consumer of his rights under certain other legislation are not new to California and have worked well.¹⁹⁰ Such a provision or one by which the manufacturer or other warrantor is required to inform the consumer of his rights in clear language conspicuously positioned within the text of the warranty would be a welcome addition to the Act.¹⁹¹

CONCLUSION

Professor Mueller observed that perhaps the most frustrating fact of life for the consumer who has purchased a faulty product is the inadequacy of the existing legal remedies to provide a meaningful solution to his problem.¹⁹² Neither the sales laws presently on the books nor our machinery of justice are designed with the little man or his minor claim in mind. Unless he is injured by the product, permitting him to recover sizable damages in tort, he is relegated to pursuing contract remedies, which have been weighted against him from the start by the pervasive, merchant-oriented doctrine of "freedom of contract."¹⁹³ The

be awarded based not upon the amount the consumer recovers but upon the reasonable value of the services rendered, private attorneys will have an economic incentive to take consumer cases and, more importantly, will be motivated to familiarize themselves with the Act in the hope of representing consumers in future cases.

190. Typical of the self-education provisions is the one contained in the Automotive Repair Act, CAL. BUS. & PROF. CODE § 9880 *et seq.* (West Supp. 1974). Section 9884.17 of the Business and Professions Code provides, in part:

The [B]ureau [of Automotive Repair] shall design and approve of a sign which shall be placed in all automobile repair dealer locations in a place and manner conspicuous to the public. Such sign shall give notice that inquiries concerning service may be made to the bureau and shall contain the telephone number of the bureau. Such sign shall also give notice that the customer is entitled to a return of replaced parts upon his request therefor at the time the work order is taken.

191. In Slawson, *supra* note 59, at 566, the point is made that with better legislative control of what is permissible in a standard form contract, the consumer may at least gain the assurance that the document he signs has been reviewed for fairness by a legitimate higher authority—the legislature—ultimately responsible to him. It would seem that requiring the warrantor to inform the consumer of what the legislature has ordained in his behalf would be an important step toward eliminating the unfairness inherent in a form contract.

See also Leff, *supra* note 137, at 155-57, wherein the solution proposed for the problem of form contracts is to treat the contract, "the paper-with-words which accompanies the sale of a product," as part of that product and to regulate its quality just as the quality of the product itself is regulated for the public good.

192. Mueller, *supra* note 1, at 578.

193. *Id.* at 578-79.

Song-Beverly Act is a bona fide legislative attempt to ease some of the difficulties inherent in pursuing minor contract claims arising out of warranties. Whether or not it will succeed depends upon many factors, not the least of which is how courts will interpret some of its provisions.

The Act provides the consumer with procedural and substantive rights heretofore largely ignored. It gives meaning to the traditional "repair-or-replace" express warranty by establishing minimum procedural requirements which the consumer may enforce against the manufacturer in the event the product fails to conform to the warranty. Beyond this, the Act affords some prospective protection to the consumer when goods under an express warranty become defective within a reasonable time after the date of purchase.

At least as important to the consumer is the Act's attempt to revive the significance of implied warranties by making it difficult and, in most instances, impractical for the manufacturer to disclaim them. Furthermore, the fact that merchantability under the Act has become a prospective guarantee is a significant innovation. That the requirement of privity of contract between manufacturer and consumer has been eliminated, with respect to either express or implied warranties, clearly inures to the benefit of the consumer. In addition, the provisions permitting recovery of reasonable attorney's fees and treble damages for willful breach of the Act's procedural requirements will help the consumer by encouraging private attorneys to accept cases on a non-charitable basis and by discouraging those liable under the warranties from avoiding their duties.¹⁹⁴

It has been the purpose of this comment to examine the Song-Beverly Act's potential for eliminating the contracts of frustration described in Professor Mueller's article.¹⁹⁵ To be sure, there are difficulties with the Act. Many of its provisions are unclear and subject to widely different interpretations. It does not address itself to some of the problems consumers face when purchasing warranted products, the most notorious of which is the problem of warranty advertising. What is required is a system of "counter-advertising" which would develop consumer awareness of the Act's provisions. The Act should be amended to provide for a variety of consumer education techniques.¹⁹⁶ Despite the loopholes, uncertainties, and other problems common

194. See Comment, *Song-Beverly*, *supra* note 33, at 210. See also note 189 *supra*.

195. See note 1 *supra*.

196. See notes 190-91 and accompanying text *supra*.

to all legislative enactments, however, the Song-Beverly Consumer Warranty Act is a useful and innovative piece of legislation, which, if reasonably interpreted, can work for the benefit of all California consumers.

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