Magnuson-Moss Warranty Act: An Overview and Comparison With UCC Coverage, Disclaimer, and Remedies in Consumer Warranties

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The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act addresses the warranty problems of the consumer in the marketplace. Recent discussions of consumer problems with warranties have focused on three areas. First, the length and complexity of a typical consumer product warranty makes it too confusing for the average consumer. This is particularly true in light of the consumer's ignorance of the existence of implied warranties. Second, the "warranty," which is expressly made to the consumer, customarily disclaims all implied warranties under the Uniform Commercial Code and, consequently, takes away a great deal more than it gives. Third, a consumer warranty is frequently difficult or impossible to enforce, particularly against a recalcitrant seller. The amount involved is seldom sufficient to justify the pursuit of legal remedies and the consumer usually feels that no other effective remedies are available.

The problem is made more severe by the growth of the use of consumer products, the growth in the amount of spending for them, and the ex-
panded use of the warranty as a competitive sales device.\(^5\) As a result, the consumer feels misled, or even cheated when confronted with warranty problems which arise from the purchase of almost everything he buys. In addition, the consumer's weak bargaining position prevents him from bargaining for more meaningful warranty protection, even if he desires to do so.\(^6\)

On January 4, 1975, the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975 \(\text{[hereinafter the Act]}\) was signed into law, becoming effective six months from that date.\(^7\) It applies to goods manufactured after the effective date. The Act, as passed, contained provisions that were essentially similar to bills passed by the Senate in two previous Congresses, neither of which had been passed by the House. The legislative history indicates a continuing desire on the part of the Senate to provide some relief for the consumer problems addressed by this bill.\(^8\) The Act authorizes and requires the Federal Trade Commission to make rules in the areas of disclosure, pre-sale availability of warranties and dispute settlement mechanisms on or before January 4, 1976.\(^9\) As discussed below, proposed rules were issued on July 15, 1975 and final rules were issued on December 31, 1975.

This article will first present an overview of the Act and the rules which

\(^5\) House Committee Report, supra note 2, at 7705; Clark and Davis, supra note 2, at 567-69.

\(^6\) The consumer's situation was accurately stated by Senator Kennedy in the Senate debates on a predecessor to the Senate version of this bill:

> It is only when the item breaks down or does not work properly from the start that the purchaser carefully reads the fine print, assuming that he kept the certificate or container, only to discover that the particular defect is not covered by the warranty, or that he must pay service and handling charges to get it repaired or adjusted, or that at best he must pay for returning the item to some distant factory where months may ensue before the manufacturer is ever heard from again.


\(^7\) 15 U.S.C.A. §2312(a) (Supp. 1975). Rules promulgated pursuant to the title are to take effect six months after the final publication of the rules unless the Federal Trade Commission postpones their applicability until one year from such final publication. 15 U.S.C.A. §2312(b) (Supp. 1975).

\(^8\) Problems with consumer warranties have been studied at least since the middle of the 1960's; for a history of these studies, Federal Trade Commission Reports, and Presidential task forces, see House Committee Report, supra note 2, at 7707-11. The first bill introduced was S. 3074, introduced in the Senate in 1969 and passed that same session; the bill was reintroduced as S. 986 in the 92nd Congress and again passed the Senate, but again did not receive House action. The bill was reintroduced as S. 356 in the 93rd Congress and passed the Senate in that form. See Senate Committee Report, supra note 3, at 4-6; Senate Debate on S.356, 93rd Cong., 1st Sess. (1973) 119 Cong. Rec. 29472 et seq. (1973). See also Senate Debates, supra note 6, for consideration and passage of S. 986. The companion House bill to S. 356 was H.R. 7917. See the Joint Explanatory Statement of the Committee of the Conference, CONF. REP. NO. 93-1408, 93rd Cong., 2d Sess. (1974), 4 U.S. CODE CONG. & ADMIN. NEWS 7756 (1974) (hereinafter cited as Conference Report) for a discussion of the Conference Committee's solution to the differences between the bills.

The Act was passed in response to the specific consumer problems discussed above and to the generalized feeling of consumer helplessness in the face of warrantors' practice of using existing state law to effectively deny the consumer redress under consumer warranties. The Act was passed to make warranties more understandable to the consumer and to insure that obligations arising under either express or implied warranties are enforceable. As stated in the House Committee Report, the Act is designed to solve consumer warranties problems by:

1. Requiring that the terms and conditions of written warranties on consumer products be clearly and conspicuously stated in simple and readily understood language,
2. Prohibiting the proliferation of classes of warranties on consumer products and requiring that such warranties be either a full or limited warranty with the requirements of a full warranty clearly stated,
3. Safeguards against the disclaimer or modification of the implied warranties of merchantability and fitness on consumer products where a written warranty is given with respect thereto, and
4. Providing consumers with access to reasonable and effective remedies where there is a breach of a warranty on consumer products.

10. The FTC has stated that it "considers rulemaking under §101(12) regarding depreciation for purposes of refunds under the Act a priority matter" and consideration is also being given to rulemaking concerning: advertising, labeling and point of sale disclosure of information, exemptions from the statutory options of designation, disclosure of the terms and conditions of service contracts, rules to extend terms of warranties where consumers are deprived of the product for an excessive period of time while it is being serviced, the three reasonableness standards in sections 104(a) and (b), exceptions to the section 104(b)(2) requirements concerning liens and encumbrances on consumer products, detailed information of warrantor's duties under section 104(a) and warranty provisions for incorporation by reference into warranties. Magnuson-Moss Warranty Act: Implementation and Enforcement Policy, 719 ATRR D-3 (BNA 1975). One bill has been introduced to give special remedies to buyers of new cars, H.R. 10302, 94th Cong., 1st Sess. (1975), 743 ATRR A-i (BNA 1975). This article will not discuss that amendment. It is also anticipated that the FTC will issue a new enforcement policy in the near future.

11. House Committee Report, supra note 2, at 7702; Senate Debate on S. 356, supra note 8, at 29480.

12. House Committee Report, supra note 2, at 7711; Senate Debate on S. 986, supra note 6, at 39818.
The Senate consideration of the matter added consumer need for greater product reliability. This need would be met, it was thought, by making it economically rewarding for a manufacturer to build in better quality. Under the present system, to achieve a competitive price, a manufacturer must make products as cheaply as possible and then must disclaim all warranties possible. The Act rewards those manufacturers who make the more reliable products by giving them the competitive sales advantage of a “full” warranty. By making warranties more understandable, the Act will permit the consumer to make an informed choice between products on the basis of their warranties and will make consumer warranties a more important factor in the competition for sales. Thus, the legislation is an attempt to change the “rules of the warranty game.”

Only when the rules of the warranty game are clarified so that the consumer can look to the warranty duration of the guaranteed product as an indicator of product reliability (because all costs of breakdown have been internalized) will consumers be able to differentiate on the basis of price between more reliable and less reliable products. This ability to differentiate should produce economic rewards from increased sales and reduce service costs to the producer of more reliable products.

Only a warrantor giving this type of ‘full’ warranty is in a position to increase his profit, by making product reliability or service capability improvements. Furthermore, to the extent that consumer choice in the market place is guided by the desire for product reliability measured by the duration of the warranty, there will be an incentive for suppliers of consumer products to offer full warranties of relatively long duration. Therefore, there is a need to identify for the consumer which products are fully warranted and to create standards for ‘full’ warranties.

The Act also is designed to help the consumer by strengthening the enforcement powers of the Federal Trade Commission which is the consumer’s primary protector in the market place. This aspect of the Act is dealt with in Title Two and is beyond the scope of this discussion.

A. Disclosure

The heart of the Act is its disclosure provisions which are designed to make consumer warranties more understandable and to make manufacturers truly competitive in the warranties which they provide. Section 102,
the first disclosure section, requires that a warrantor "fully and conspicuously disclose in simple and readily understood language the terms and conditions of [a subsection (a)] warranty." 17 The precise disclosure rules are to be promulgated by the Federal Trade Commission but the Act furnishes guidance by specifying a number of items which may be included in those disclosure rules. As finally adopted, the rules of the Commission require disclosure of the following general categories of information:

1. the identity of the party or parties to whom the warranty is extended and any limitation on the parties who may enforce the warranty;
2. a description of the products, parts, or characteristics covered by the warranty;
3. a statement of what the warrantor will do if there is a defect, malfunction, or failure to perform in accordance with the written warranty;
4. the time when the warranty commences;
5. an explanation of the procedure which the consumer should follow to obtain performance of the warranty obligations;
6. information concerning an informal dispute settlement mechanism;
7. any permissible limitation on the duration of implied warranties, including specified statements which must be included;
8. any exclusion of or limitation on relief, including limitations on incidental or consequential damages; and
9. a prescribed statement that the warranty gives specific legal rights and that the consumer may have other legal rights which vary from state to state. 18

Such disclosure is required in the purchase of any consumer product which costs $15.00 or more; this $15.00 limit is a change from the $5.00 coverage provision which was originally stated in this section of the statute. 19 The statute provides that section 102 (as well as sections 103 and 104) "shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any special limitation." 20 The rules extend this limitation to such statements made.

18. 16 C.F.R. §701.3 (1975).
19. Compare 15 U.S.C.A. §2302(e) (Supp. 1975) with 16 C.F.R. §701.3(a) (1975). Because the language of the statute only excludes certain consumer products (those costing less than $5.00) and does not require coverage of any particular product, it seems permissible for the FTC to exclude additional products (those costing from $5.00 to $15.00). It is questionable whether this exclusion is contrary to the intent of the statute.
20. 15 U.S.C.A. §2303(b) (Supp. 1975). The House Committee Report indicates that this provision could apply to statements such as "satisfaction guaranteed or your money back." House Committee Report, supra note 2, at 7719.
on emblems, seals or insignias issued by third parties promising replacement or refunds if a consumer product is defective, [and] which statements contain no representation or assurance of the quality or performance characteristics of the product, [if the disclosures set forth above] are published by such third parties in each issue of a publication with a general circulation [and] provided free of charge to any customer on request. 31

The apparent purpose of this exception is to permit guarantors such as Good Housekeeping to continue their operations, at least in a modified form. An amendment (known as the “Good Housekeeping” Amendment) which would have changed the definition of warrantor to accomplish this result, was proposed and rejected on the House floor at the time the Act was passed.22 The sentiment expressed by the bills’ sponsors in opposition to the amendment was that this is a voluntarily given warranty and that it should be subjected to the same rules as every other warranty. In view of this history, one must seriously question whether even this limited exception made in the rules is proper.

The final disclosure rules do omit three disclosure requirements which were contained in the original proposed rules. First, the proposed rules required disclosure of all duties required of a purchaser; the FTC determined that this information was fully addressed by requirements 3 and 5 of the final rule and was, for that reason, redundant.23 Second, the proposed rules required a disclosure of the limitation on time of day or days of the week when warranty work could be performed. The FTC felt that this provision was simply unworkable because of the large number of service facilities which a substantial warrantor will have, the fact that service facilities vary and that several different printed warranties would be required, and finally, that most warrantors would comply by adopting a very restrictive statement that listed only those hours that the warrantor could be certain every service facility would be open.24 Third, the proposed rules required that when a “life” or “lifetime” warranty is offered, the warranty must disclose what “life” is being referred to. The Commission felt that this information must be disclosed under other sections and specifically

21. 16 C.F.R. 701.3(b) (1975). This provision was not contained in the rules as originally proposed.


24. Proposed rules, §701.3(j), supra note 23, at 29893; FTC statement, supra note 23, at 60181. The Senate Committee Report on this Act states that such information is necessary for consumers to be able to make intelligent product selections. Senate Committee Report, supra note 3, at 15-16.
noted that the entire matter would still be subject to its jurisdiction under section five of the Federal Trade Commission Act.25

B. Pre-Sale Availability Of Warranty Terms

In addition to requiring disclosure, the Act directs the FTC to promulgate rules concerning the availability of the terms of a written warranty to a consumer prior to the sale and further requires that the information be "clearly and conspicuously presented or displayed so as not to mislead the reasonable average consumer."26 The final rule adopted by the Commission concerning pre-sale availability of terms requires that a warrantor either clearly and conspicuously display the text of the warranty "in close conjunction to each warranted product," or maintain a notebook available to the consumer which contains copies of the warranties.27 In addition, the seller must not remove the warranty prior to sale and the seller must provide all warranty materials required by the Act. These requirements are clearly necessary to effectuate the purposes of the Act.

C. Designation Of Warranties

In order to accomplish the disclosure envisioned by the Act, and to encourage a minimum standard of warranty protection and performance, the Act requires that every written warranty be designated as either "limited" or "full."28 A predecessor of the present act, passed by the Senate but never enacted by the House, called for labeling of warranties as "full" or "partial" rather than full or limited. This terminology was opposed on the ground that "there would be denigrating consequences associated with the phrase 'partial.'"29 The theory behind the designation is that competitive pressure will force many, if not most, merchants to use a "full" warranty. Where a "full" warranty is given, the manufacturer is required to comply with the minimum federal standards set forth in section 104 of the Act.30

25. Proposed rules, §701.3(m), supra note 23, at 29893; FTC statement, supra note 23, at 60181.
27. 16 C.F.R. 702.3(a)(1) (1975). The proposed rule had required a binder for every warrantor. Following the hearings, written comments submitted during the rulemaking proceedings convinced the FTC that this procedure was simply unworkable in view of the large number of warranties and great variety of kinds of products and sales techniques used. The proposed rule also required display of the warranty on the "primary display panel," a term taken from the Fair Products Labeling Act. This provision was omitted from the final rules.
30. 15 U.S.C.A. §2304(a) (Supp. 1975). In the only advisory opinion issued to date under the Act, the FTC required a warrantor giving a "full" warranty of an installed product to
These standards essentially require that a manufacturer: (1) remedy a defective consumer product, (2) not impose any limitation on the duration of any implied warranty, (3) not exclude or limit consequential damages unless that limitation conspicuously appears on the face of the warranty, and (4) permit the customer to collect a refund or replacement without charge if the defect is not corrected after a reasonable number of attempts. The section further regulates warrantors in providing that they shall not impose any duty other than notification on the consumer unless the warrantor has demonstrated that the duty is reasonable; in addition, the warrantor must remedy the defect "without charge." The warrantor may protect himself by requiring the consumer product to be made available to him free and clear of liens and encumbrances and by stipulating that he will not be liable if the failure of the consumer product is caused by damage resulting from unreasonable use of the product. Thus, to the extent that competitive pressures do in fact force warrantors to offer a "full" warranty on their products, the Act establishes a new standard for the content of consumer warranties—a standard which is much higher than the presently prevailing practice.

A warranty not designated as "full" must be designated as "limited." However, even in this situation a warrantor is not completely free of all restrictions. Presumably, if a document is labeled a "warranty," it must provide some effective remedy for the consumer and the Act implies that any so-called warranty which does not do so would be in conflict with the spirit of the Act, thereby being a violation of section five of the Federal Trade Commission Act as well. In addition, any limited warranty is subject to three requirements under the Act: (1) the disclosure requirements of section 102 as discussed above; (2) the remedies provision of section 110.
of the Act, discussed below, including the new provisions on consequential
damages for personal injury; and (3) the limitations on implied warranties.
Beyond these requirements, a limited warranty can contain any provisions
the warrantor desires as long as they are clearly and conspicuously dis-
closed and made comprehensible.

D. Disclaimer Of Implied Warranties

The disclosure and designation provisions of the Act apply only to writ-
ten warranties, as defined in the Act. However, the Act goes on to substan-
tially limit disclaimers of implied warranties and the remedies available
in section 108. As pointed out in the floor debates on the bill, implied
warranties are "what reasonable men would expect to believe the results
of the purchase and sale of items in the marketplace would imply." The
purpose of section 108(a) is stated in the House and Senate Reports on the
bill:

This subsection is designed to eliminate the practice of giving an express
warranty while simultaneously disclaiming implied warranties. This prac-
tice has often had the effect of limiting the rights of the consumer rather
than expanding them as he might be led to believe.

Thus, the purpose of the section was not to create new implied warranties
but simply to enforce those warranties already existing under state law.
To accomplish these purposes, section 108 changes existing state law and
provides that no supplier may disclaim or modify an implied warranty if
he makes a written warranty or gives a service contract with respect to
products sold. It does permit a written warranty to be limited to a reasona-
ble duration "if such limitation is conscionable and is set forth in clear and
unmistakable language and prominently displayed on the face of the war-
 ranty.

This provision is clearly in conflict with section 2-316 of the
Uniform Commercial Code and will prevail over it and any other contra-
dictory state laws which do not afford the consumer greater rights.
Thus, the provisions of the Uniform Commercial Code dealing with disclaimer
of warranties are clearly modified insofar as they apply to consumer war-

35. Senate debate on S. 356, supra note 8, 119 CONG. REC. at 29480-81 (remarks of Senator
Moss).
36. Senate Committee Report, supra note 3, at 21. A nearly identical statement is con-
tained in the House Committee Report, supra note 2, at 7722.
37. 15 U.S.C.A. §2308(b) (Supp. 1975) contains the limitation quoted; §2308(a) contains
the prohibition on disclaimer.
38. 15 U.S.C.A. §2311(c)(1) (Supp. 1975) provides that state requirements relating to
labeling or disclosure which are not identical to the provision of §§2302, 2303, and 2304 will
not be applicable to written warranties. As discussed in the legislative history presented
above, the limitation on disclaimer of implied warranties is a fundamental purpose of this
bill and Congress clearly intended it to prevail over contrary state laws. For this reason,
section 108 of the Act will be supreme.
ranties. For most states, this is a substantial change in the law and several jurisdictions have already adopted amendments to the UCC which change the law with respect to implied warranty disclaimer. To the extent that those state laws grant to consumers greater remedies than the Act grants, those state laws will control.

E. Other Provisions

Several other specific provisions of the Act must be considered here briefly. Section 110 of the Act, the remedies section, provides for a mandatory (but not binding) dispute settlement mechanism if the requirements of the Act and the rules are followed. These provisions give a warrantor the opportunity to avoid litigation if acceptable settlements can be achieved. In addition, the dispute settlement mechanism gives the warrantor a means of defusing a potential class action and thus avoiding substantial litigation. The remedies provision of the Act also provides for a federal cause of action for breach of state implied warranties, as well as for breach of the express written warranty regulated by the Act. (The remedies provision will be discussed below in section IV.)

The Act broadens the definition of "consumer" to include any person to whom the product is transferred during the term of an implied or written warranty and any other person covered under applicable state law. The Act defines a remedy to mean repair, replacement, or refund. It further provides that consumer products may have both full and limited warranties if the warranties are clearly and conspicuously differentiated. It covers service contracts as well as warranties, permits designation of representatives by the warrantor to perform duties under written and implied warranties, and specifies where the ultimate responsibility for those duties will rest. The Act also requires that the FTC initiate rulemaking proceedings concerning used cars within one year after January 4, 1975.

39. 15 U.S.C.A. §2311(b) (Supp. 1975) does provide that this Act shall not "invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." For a discussion of the state laws which have either amended the relevant UCC provisions or enacted separate statutes, see Clark and Davis, supra note 2, at 584-605; Leete, supra note 2, at 375-78.

40. 15 U.S.C.A. §2311(b) (Supp. 1975). A recent study of the case law in this area indicates that most courts will find a way to avoid application of a disclaimer of implied warranties in a consumer situation if the consumer will pursue his remedies through trial to the appellate levels. Clark and Davis, supra note 2, at 577-84.


Although more specific provisions of the Act will be dealt with in the remainder of this article, one can see from the above overview that the Act is a substantial change in the law governing consumer warranties. When combined with the broadened powers of the Federal Trade Commission for enforcement and rulemaking provided in Title II, the potential of the FTC for assuming a greatly expanded role in the consumer warranty area is vast.

II. COVERAGE

The Act is designed to modify and supplement provisions of the UCC and other relevant state laws where those provisions are applicable to consumer warranties. The Act can achieve these purposes only to the extent that its coverage is either identical to or broader than that of the UCC. In dealing with coverage, it should be noted that one is talking about two distinct questions: (1) what products are within the definition of the substantive regulations of the statute, and (2) what warranties or potential warranties are within the coverage of the statute? The coverage provisions of the UCC and the Act will first be generally reviewed. Next, this section will apply those provisions to determine the coverages of various warranties that may arise in a given hypothetical fact situation, and in variations of that situation.

The UCC applies only to "transactions in goods" and, by their terms, the relevant warranty sections apply only to sales transactions. The UCC definition of goods focuses on things "which are movable at the time of identification to the contract for sale." The UCC provides that an express warranty is created by an affirmation of fact or promise "which relates to the goods," and which becomes "a part of the basis of the bargain." It further provides, however, that while there need not be a specific intention to make a warranty, a statement merely of the value of the goods or of the seller's opinion or commendation of the goods will not create a warranty. In addition to the provisions on express warranties, the UCC provides for the creation of two kinds of implied warranties. First, if the seller is a merchant, there is an implied warranty that the goods are to be merchantable. The essential requirement of the definition of merchantability is that the goods will be fit for the ordinary purpose for which such goods are

50. Uniform Commercial Code §2-105(1). Section 2-107 discusses the treatment of things to be severed from reality.
51. Uniform Commercial Code §2-313. This section also provides that warranties may be created by descriptions of the goods or by samples or models, if those descriptions become part of the basis of the bargain. For purposes of this article, the term warranty means warranty of quality only. Uniform Commercial Code §2-312 covers warranties of title, which will not be discussed in this paper.
normally used. Second, the UCC provides that an implied warranty that the goods will be fit for a particular purpose arises when three requirements are met: (1) the seller has reason to know of the buyer's particular purpose for which the goods are to be used, (2) the seller has reason to know that the buyer is relying on the seller's skill or judgment in selecting or furnishing the goods, and (3) the buyer does in fact so rely. As will be discussed below, the UCC also provides that warranties may be modified or disclaimed. Under the UCC, any party in the sales or distribution chain can become a warrantor. Indeed, it is quite likely that the retail seller will create implied warranties, and may create express warranties as well. The UCC provides that a warranty may be enforced by any natural person in the family or household of the buyer; however, this section has been subject to local modifications and three alternatives are now proposed with the official draft.

The Act applies to consumer products as defined. The definition focuses on tangible personal property which is "normally used for personal, family or household purposes." The legislative history clearly indicates that the Act is intended to apply to the seller of used items as well as new items, where a written warranty is offered. It is also clear that the Act is to apply to consumer products which are attached to realty, even if those products eventually become "fixtures" for purposes of state law. A much more

53. UNIFORM COMMERCIAL CODE §2-315. The requirement of actual reliance by the buyer is implicit in the section, see comment 1 section 2-315.

54. UNIFORM COMMERCIAL CODE §2-316.

55. UNIFORM COMMERCIAL CODE §2-318, Alternative A. Alternatives B and C drop the requirement that the third party beneficiary of a warranty be in the family or household of the buyer and require only that such a person "reasonably be expected to use, consume or be affected by the goods" and that they be injured by the breach of warranty. The reason for the change, as stated by the draftsmen, is that "[t]here appears to be no national consensus of the scope of what warranty protection is proper, but the promulgation of alternatives may prevent further proliferation of separate variations in state after state." Comment 3 provides that the section is not intended to restrict the class of potential plaintiffs under a warranty and is not intended to enlarge or restrict the developing case law in this area.

Beyond this brief summary, it is assumed that the reader is familiar with the UCC coverage and warranties. See J. WHITE and R. SUMMERS, UNIFORM COMMERCIAL CODE chs. 9 and 10 (West, 1972); NORDSTROM, LAW OF SALES §§20-22 and ch. 4 (West, 1970); Clark and Davis, supra note 2, at 572-75; Leete, supra note 2, at 353-60.


58. The Act expressly states that a consumer product includes property "intended to be attached to or installed in any real property without regard to whether it is so attached or installed." 15 U.S.C.A. §2301(1) (Supp. 1975). See House Committee Report, supra note 2, at 7717; Senate Committee Report, supra note 3, at 11. This is also the interpretation which the FTC has given the Act, FTC Implementation and Enforcement Policy, 719 ATRR at D.1.
difficult problem is presented by the consumer product which is used for business purposes. The language of the Act focuses on the "normal use" and would appear to cover products which are used by a business if their normal use is for consumer purposes. The legislative history is contradictory, however. The House Committee Report states:

There are many products which fall within this definition which are also used for other than personal, family, or household purposes. . . . Such items are consumer products for purposes of this legislation. 59

The Senate Committee Report, on the other hand, states:

To the extent there is any necessary ambiguity in the term "consumer product," the ambiguity should be resolved in favor of coverage . . . . Of course, the Federal Trade Commission could exempt a warrantor from the disclosure and labeling provisions of the bill to the extent that he sells consumer products to persons for use in their businesses . . . . The definition of consumer is not intended to include persons who utilize consumer products for commercial purposes. 60

In the final rules, the FTC has excluded "products which are purchased only for commercial or industrial use. . . . " 61 from both the disclosure rules and the rules concerning presale availability of terms. Thus, at least for purposes of these sections of the Act, a product purchased for business use will not be a "consumer product" even if it is normally used by consumers.

The Act goes on to specify that it applies to written warranties only. A written warranty is defined as a written affirmation of fact or written promise "made in connection with the sale of a consumer product . . . which relates to the nature" of the product; the definition also covers a written undertaking to refund, repair or replace the product. 62 Such affirmations or undertakings become written warranties only if they are part of the basis of the bargain between the parties. The basis of the bargain test here is presumably the same as that under the UCC. While the Act does require that the affirmation or undertaking be in "connection with" the sale as well as "relate to the goods," the UCC has only the second of these requirements. 63 Although it is nominally an additional requirement, it does not appear likely that many cases will arise where there are affirmations which "relate to the goods" which are not also "in connection with" the sale, where the basis of the bargain requirement is also fulfilled. An

59. House Committee Report, supra note 2, at 7717.
60. Senate Committee Reports, supra note 3, at 11-12.
61. 16 C.F.R. §§701.1(b) and 702.1(b) (1975). However, such goods are not excluded from the operation of an informal dispute mechanism. 16 C.F.R. §703.1(b) (1975).
express warranty created by description or model will be covered by section 2-313 of the UCC, but would not be covered by the Act. An implied warranty is defined in the Act as one which arises by operation of state law and these will quite likely be warranties which arise under sections 2-314 and 2-315 of the UCC.

A warrantor is defined in the Act as a person who either gives a written warranty or who may be obligated under an implied warranty. As discussed below, the retailer who sells directly to a consumer typically will be liable under the UCC implied warranties. While these warranties may be enforced under section 110(d) of the Act, a written warranty may be enforced only against the warrantor giving it, and, thus, separate claims will be necessary. Unlike the Act, the rules adopted under the Act define “warrantor” to include only the person who gives or offers to give a written warranty. The written warranty is typically made by the manufacturer and, under the Act, it can be enforced only against the manufacturer. Because the Act provides that it is not to be construed as restricting existing consumer warranties, presumably these warranties can still be enforced under the UCC but not under the Act.

Through its definition of “consumer,” the Act appears to broaden the class of persons who will be entitled to enforce the provisions of the warranty. The Act defines consumer to include not only the original buyer, but also any person to whom the product is transferred during the duration of an implied or written warranty. The Act goes on to provide that such a consumer may bring suit for damages or other legal or equitable relief, subject to the provisions of the Act on informal dispute settlement procedures and class actions. Thus the Act extends to subsequent purchasers the right to enforce the warranty. However, the Act and the rules do permit a warrantor to limit or exclude any obligation under the warranty to subsequent purchasers, thus permitting a warrantor to effectively negate this provision. Of course, persons permitted to enforce the warranty under the provisions of section 2-318 of the UCC or other state laws will still have the right to do so in a cause of action under the UCC or those laws.

The operative provisions of the Act cover only goods which cost at least

67. 16 C.F.R. §§701.1(g), 702.1(d), 703.1(d) (1975).
68. Leete, supra note 2, at 367.
69. 15 U.S.C.A. §2301(3) (Supp. 1975). Earlier drafts of the Act had limited “consumer” to “any person to whom such a product is transferred for use for person, family or household purposes.” S. 356, 93d Cong., 1st Sess. §101(3) (1973). Because this provision was deleted in the final version, one can infer that the use limit was not intended to apply to a subsequent purchaser. Clark and Davis, supra note 2, at 607, n. 256.
the minimum amount.\textsuperscript{72} Unfortunately, the different provisions have different dollar minimums and the final rules have changed some of these dollar amounts. The disclosure provisions are stated in the Act to apply to consumer products costing more than $5.00,\textsuperscript{73} whereas the final rules change this to $15.00.\textsuperscript{74} The designation of warranty section applies only to consumer products costing more than $10.00 which are not covered by "full" warranties.\textsuperscript{75} The provision on disclaimer of implied warranty and the remedies provision have no specific dollar limit.\textsuperscript{76} Thus, the question of which section of the Act applies will depend upon the cost of the product.

A. Coverage In A Typical Consumer Goods Sale

Coverage of both the Act and the UCC can be most easily understood by analyzing what warranties arise and what statute controls in a typical consumer goods sale. (The typical case will then be varied to expand specific coverage problems.) In what is a typical case, Manufacturer makes and sells a one cubic foot refrigerator, which is intended primarily for home use by consumers and is in fact normally used in that way. Manufacturer nationally advertises the product as being of high quality and free of defects in material and workmanship. At the point of sale to the consumer, Manufacturer gives a warranty which promises repair, replacement, or refund, at Manufacturer's option, for a period of one year from the date of purchase and Manufacturer distributes this product through local retailers who sell directly to consumers. In this case, we will assume that Consumer has purchased the refrigerator from Retailer, that Consumer was given a copy of Manufacturer's written warranty at the time of purchase, and that this written warranty became part of the basis of the bargain. In addition, we will assume that Retailer made oral representations concerning the quality and suitability of a refrigerator for Consumer and that these oral representations were part of the basis of the bargain.

The Act will apply to the written warranty made by Manufacturer. It is an affirmation of fact in connection with the sale of the consumer product which relates to the nature of the goods and it is also an undertaking in writing to refund, repair, or replace; furthermore, both of these have become part of the basis of the bargain.\textsuperscript{77} Thus, Manufacturer will be re-

\textsuperscript{72} House Committee Report, supra note 2, at 7718 indicates that "actually costing $5 or more" means cost of the goods, exclusive of any applicable tax.
\textsuperscript{74} 16 C.F.R. §7013(a) (1975).
\textsuperscript{76} 15 U.S.C.A. §§2308 and 2310 (Supp. 1975). Of course, there will be dollar limitations and other limits for federal court jurisdiction of the remedies in both individual and class suits. This will be discussed below.
\textsuperscript{77} 15 U.S.C.A. §2301(6) (Supp. 1975). It has been assumed that the warranty became part of the basis of the bargain. This is an assumption that will not be justified in all cases.
quired to comply with the provisions of the Act. The UCC also will apply to this written express warranty, to the extent that its absence would "restrict any right or remedy of any consumer . . . ."78 A state may not enforce any law that deals with labeling or disclosure if the requirements of that law are inconsistent with sections 102, 103, and 104 of the Act.79 As discussed above, the Act will apply only if this warranty is made in connection with the sale and relates to the nature of the material or workmanship. The UCC requires only that the affirmation "relate to the goods." It does not appear that these different standards will be relevant to coverage of the written warranty.

In this transaction there are also express oral warranties which arise under the provisions of section 2-313 of the UCC. Here, the statements by Retailer will probably give rise to such a warranty, assuming that such statements constitute an affirmation of fact which relates to the goods and which becomes part of the basis of the bargain.80 This express nonwritten warranty will not be covered under the Act, and any enforcement of it will have to be pursuant to the UCC. Thus, the remedies available under the Act would not be used to enforce such an oral nonwritten warranty.81 It is also possible that the advertising of either the manufacturer or the retailer may give rise to an express nonwritten warranty.82 Such advertising, even if in writing, is probably not "in connection with" the sale and, for this reason, will probably not be covered by the Act. If it is not in writing, the Act will not cover it as a written warranty. The problem under the UCC will be to determine whether the advertising was part of the basis of the bargain between the parties; if so, it will be covered by the UCC and enforceable under it. As can be seen from the above, the express, nonwritten warranties typically given by Retailer will not be enforceable under the Act although the express written warranty of the Manufacturer will be covered. In addition, a warranty given by Retailer cannot be enforced against Manufacturer under the Act, even though it may be so enforceable under the UCC.83

79. 15 U.S.C.A. §2311(c)(1) (Supp. 1975). Such state laws may be enforced if the FTC determines that they afford greater protection to the consumer than the Act and that they do not unduly burden interstate commerce. 15 U.S.C.A. §2311(c)(2) (Supp. 1975); Senate Committee Reports, supra note 3, at 25.
80. Uniform Commercial Code §2-313(1)(a). Where a product is simply stated to be "guaranteed," the content of such a warranty may appropriately be determined by the content of the warranty of merchantability. Uniform Commercial Code §2-314, Comment 4.
81. The Senate version of this Act originally extended its remedies provisions to the breach of an oral express warranty. This revision was taken out in the Conference Committee. Conference Committee Report, supra note 8, at 7758; Senate Committee Report, supra note 3, at 24.
82. The UCC comments provide that an affirmation of fact which meets the UCC requirements will normally be presumed to be part of the basis of the bargain. Uniform Commercial Code §2-313, Comment 3. This presumption does not appear to be appropriate where the affirmation of fact is made in advertising.
83. Leete, supra note 2, at 367.
In this typical fact situation, implied warranties will be created by the UCC and will be enforceable against Manufacturer under the Act. An implied warranty of merchantability exists in any sale of goods by a merchant.\textsuperscript{84} A merchant, with respect to certain goods under the UCC, is one who either deals in goods of that kind, holds himself out as having knowledge or skill about the goods of that kind, or one to whom the buyer can attribute such knowledge and skill by virtue of the merchant's agent.\textsuperscript{85} This will certainly cover the typical seller of consumer goods, and will probably cover his manufacturer, so each will have made an implied warranty of merchantability. It is not difficult to imagine facts under which the implied warranty of fitness for a particular purpose will arise here. In our fact situation, if Consumer is diabetic and wishes to use the small refrigerator to store insulin, this would have quite likely been communicated to Retailer. If Retailer knew of this use, i.e., knew the buyer was relying on him to select a suitable refrigerator, and the buyer did so rely, there would be an implied warranty of fitness for this particular purpose.\textsuperscript{86} This implied warranty is usually made by Retailer but not by Manufacturer.

Thus, in our typical consumer sale, the written warranty will be enforceable only against Manufacturer. The implied warranty of merchantability will be enforceable against both Retailer and Manufacturer.\textsuperscript{87} If an implied warranty of fitness for a particular purpose arises, it will probably be made by Retailer and, as discussed immediately below and elsewhere, Retailer will be permitted to disclaim these implied warranties, effectively negating the consumer's remedy from him.

\textit{B. Written Warranty By Retailer}

For this example, it is necessary to make one modification in the typical fact situation presented above. Here Retailer gives his own written warranty, in addition to the oral representation he made above. In this situation, the written warranties of both Manufacturer and Retailer will be covered by the Act, as that coverage was discussed above. Coverage of express nonwritten warranties of Retailer, and Manufacturer, if any, will remain the same.

In this situation, the real difference arises with enforcement of the implied warranties discussed above. The Act provides that implied warranties may not be disclaimed or modified if Retailer "makes any written

\begin{footnotes}
\item[84.] Uniform Commercial Code §2-314.
\item[85.] Uniform Commercial Code §2-104. Comment 2 states that the qualification in §2-314 "restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods." See generally J. White and R. Summers, Uniform Commercial Code §9-6 (West, 1972).
\item[86.] Uniform Commercial Code §2-315.
\item[87.] As discussed below, there will be prohibitions on disclaimer or implied warranties which will be applicable to the manufacturer but not the retailer.
\end{footnotes}
warranty to the consumer with respect to such consumer product . . . .”88
In the typical case presented above, this restricts disclaimer of implied warranties by Manufacturer but not by Retailer. In this modification, Retailer will be subject to the same limitation on his disclaimer of implied warranties that Manufacturer is subject to under the Act. Thus, Retailer is placed under substantially greater restrictions if he makes a written warranty. The sophisticated retailer will avoid making a written warranty in order to avoid these limitations. This anomalous result is caused by the Act’s adoption of the UCC implied warranties without extending the coverage, for implied warranty purposes, to all UCC warrantors. It clearly discourages Retailer from making written warranties.

C. Sale Of Consumer Goods Which Become “Fixtures”

Problems also arise when the typical fact pattern is modified by the refrigerator being built-in or otherwise attached to the realty in such a fashion that it becomes a fixture.89 In this situation, the Act applies even though the consumer goods are now real estate as a matter of state law.90 Whether the UCC will apply depends on the nature of the particular fixture. In defining goods, the UCC avoids the use of the word “fixtures.” The comments state that things attached to realty are covered by the UCC if they are “capable of severance without material harm thereto.”91 Often, fixtures are such an integral part of the realty that this requirement cannot be met, and the UCC will not apply. Where the consumer purchases goods which become fixtures, there will typically be no regulation of express nonwritten warranties. To the extent that the UCC does not apply, there will be no UCC remedy for express nonwritten warranties. As discussed above, the Act does not cover these warranties.

In addition, and more seriously, there will be no UCC implied warranty. The Act does not create implied warranties and only seeks to enforce implied warranties created by state law. Because the UCC does not apply,

88. 15 U.S.C.A. §2308(a) (Supp. 1975). § 2308(b) does permit the duration of implied warranties to be limited to a reasonable period if such limitation is conscionable. Where the retailer has not given a written warranty, he could disclaim implied warranties with a statement that qualified as a disclaimer under the relevant provisions of the UCC but did not create an express warranty under section 2-313. Such a form might provide that “this product is sold without any express warranty, oral or written.” See Clark and Davis, supra note 2, at 595.

89. “Fixture” here is used in its usual sense to mean a chattel which has become real property by being attached to the land with the requisite intent. See C. Smith and R. Boyer, Survey of the Law of Property 222 (2d ed. 1971); Teaff v. Hewitt, 1 Ohio St. 511 (1853).


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state law implied warranties will usually not be created and the Act will have no implied warranties to protect. Thus, unless there are other state law warranties created outside the UCC, or unless the UCC is applied by analogy as a matter of state law, the Act will not regulate disclaimer of implied warranties in this situation. There is no indication in the legislative history of the Act that the draftsman intended to provide less warranty protection for goods which become fixtures than for other goods. To the extent that it reaches this result, the Act is not well drafted. This result is caused, as with the problems above, by the Act's adoption of the UCC definition of implied warranties without also adopting its coverage. In this respect, the Act would be materially improved if it defined its own implied warranties.

D. Sale Of Consumer Goods For A Business Use

Other difficulties arise when the typical fact situation is varied by assuming that the refrigerator is sold to a laboratory which uses it to refrigerate chemicals for test samples. Because the refrigerator is normally used as a consumer product, the Act applies by its own terms. The FTC is authorized to exempt such products as this from the disclosure and pre-sale availability requirement of the Act, and it has done so in this case. However, some provisions of the Act will still be applicable; specifically the Act's requirement that warranty terms be "fully and conspicuously" disclosed "in simple and readily understood language." The limitations

92. For a discussion of other state law warranties created either outside the UCC or through modifications to it, see Clark and Davis, supra note 2, at 584-605; Leete, supra note 2, at 359. Courts have increasingly avoided the doctrines of caveat emptor and merger to find a warranty of habitability in the sale of a residence by a builder-vendor. See generally S. Williston, 7 Williston on Contracts §926(a) (3d ed. W. Jaeger 1963); Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 Fordham L. Rev. 447 (1971); Comment, Development in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses, 10 Tulsa L.J. 445 (1975). For a discussion of warranties of habitability under lease agreements, see Comment, Landlord-Tenant Law Reform—Implied Warranty of Habitability: Effects and Effectiveness of Remedies for Its Breach, 5 Texas Tech L. Rev. 749 (1974).

93. See, e.g., Murray, supra note 92. Certainly, the Code does not prohibit such extension by analogy:

Although this section is limited in its scope and direct purposes to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties of such a contract.

Uniform Commercial Code §2-313, Comment 2.


96. 15 U.S.C.A. §2302(a) (Supp. 1975). While this section does authorize the Commission to make disclosure rules, the requirements quoted in the text apparently are not made subject to those rules. In view of the conflicting legislative history, it is difficult to solve this interpre-
of the Act on disclaimer or modification of implied warranty will still be applicable, as those limitations govern any "implied warranty to a consumer with respect to such consumer products." The remedies provisions of the Act will continue to apply as well.

The UCC does not distinguish between consumer and nonconsumer goods and so its coverage of express non-written warranties and implied warranties remains the same. To the extent that other state laws or modifications of the UCC do make such a distinction, it will be necessary to see whether the particular statute in question covers consumer goods sold for a nonconsumer use.

E. Lease of Consumer Goods

Where consumer goods are leased rather than sold, the Act does not apply. Similarly, by their terms the UCC warranties apply only to sales of goods. This will be true for written express warranties, nonwritten express warranties, and implied warranties. Some jurisdictions have extended the UCC to lease transactions by analogy. To the extent that the jurisdiction in question has done so, the UCC provisions would still be applicable even though the Act would not. Although consumer leasing of consumer goods is less prevalent than business leasing of business goods, it does occur. Presumably, the Act does not cover leases of consumer goods because its primary focus is on the manufacturer who gives the written warranty rather than on the retailer. However, from a consumer's point of view, the Act preserves the anomalous result of the UCC in extending its protections to a sale of consumer goods but not extending them to a lease of consumer goods.

F. Sale of Nonconsumer Goods

In this situation, the Act will not apply and the provisions of the UCC will control. This will be true for written express warranties, nonwritten express warranties, and the implied warranties in sections 2-314 and 2-315. This is certainly in keeping with the purposes of the Act which are to afford additional warranty protection and remedies only to consumers purchasing consumer goods.

97. 15 U.S.C.A. §2308(a) (Supp. 1975). Of course, those limitations only apply to a supplier who makes a written warranty.
98. See Uniform Commercial Code §§2-313 through -315.
G. Coverage Summary

Coverage of the Act is similar to the coverage of the UCC and this is usually sufficient; however, where the retailer gives a written warranty and where consumer goods which become fixtures are sold, some problems develop. These problems are caused by the failure of the Act to create its own implied warranties and its resulting reliance on state law (UCC) implied warranties. Because the rules adopted alter the definition of consumer product and consumer, some difficulties arise in the coverage of the sale of consumer goods to a business. Presumably as a policy choice, the Act does not extend its warranty protections to a lease of goods. To the extent that it relies on state law implied warranties, the Act cannot provide effective implied warranty coverage of leases except in those states which have extended such warranties by analogy to the UCC.

The remainder of this article will assume that the Act applies unless the context clearly indicates otherwise. The article will now explore the operation of the Act in light of and as effected by relevant UCC provisions.

III. Disclaimer Of Warranties

For purposes of this discussion, a disclaimer is defined to be words or conduct of any person liable under a warranty which attempt to accomplish any one of three objectives: (1) complete negation of any implied or express warranty; (2) withdrawal of substantive rights of the consumer purchaser arising under an express or implied warranty (including the right to enforce the warranty for a specific period of time); and (3) placement of substantial procedural obligations on the consumer buyer as a condition of enforcement of his remedy. This section will deal with two questions that arise under the subject of disclaimer. First, how may disclaimer be accomplished, assuming that it is permissible? Second, what may be disclaimed? In treating the latter question, only the general categories of obligations which cannot be disclaimed will be discussed. Incidental or consequential damages disclaimer will be treated as a remedies problem in the following section. This section will treat disclaimer problems of written warranties and then discuss those of implied warranties.

A. Written Warranties

The Act is designed to require a warrantor to disclose the terms of his written warranty. It is not intended to prohibit disclaimer of a written warranty or, except in a case of a “full” warranty, to require that any particular standard of warranty protection be afforded under a written warranty. For this reason, the Act does not contain express disclaimer rules for written warranties. However, the Act does require that the written warranty...
“fully and conspicuously” disclose all the “terms and conditions of such warranty,” but only to the extent the FTC may require. The FTC requires that the disclosure be in a single document which is “simple and readily understood.”

The FTC rules require disclosure of a number of specific items which will inform the consumer of substantial limitations on his rights under the warranty. Specifically, the warranty must describe and identify the product covered and, “where necessary for clarification,” must describe and identify those products which are excluded from the warranty. Second, the written warranty must specify which persons can enforce the warranty if that group is limited to persons other than every consumer-owner during the period of the warranty. Third, the warranty must disclose items or services for which the warrantor will not pay where such disclosures are necessary for clarification; all items or services which the warrantor will provide must be disclosed. The warranty must also disclose the period of its duration, the step by step procedure for enforcing the warranty, and whether resort to any informal dispute settlement mechanism is required under the terms of the warranty. When all of these disclosures have been made in the requisite simple and readily understood single document, the consumer will have adequate information concerning the nature and scope of his warranty. Once consumers understand the terms of their warranties, it is assumed that competitive pressures of the marketplace will operate to prevent a manufacturer from substantially limiting the buyer’s rights because such a limitation would have to be disclosed.

Unlike the situation with implied warranties, the UCC does not specify rules for disclaimer of written warranties; however, it does provide rules of construction. Specifically, negation or limitation of express warranty is to be construed, wherever reasonable, as consistent with the creation of express warranty. Where the negation or limitation of an express warranty could not be construed as reasonable with the creation of the warranty, the UCC provides that such “negation or limitation is inoperative.” Section 2-316:

102. 16 C.F.R. §701.3(a) (1975). For a general discussion of the FTC’s disclosure requirements, see text accompanying note 18, supra.
103. 16 C.F.R. §701.3(a)(2) (1975).
104. 16 C.F.R. §701.3(a)(1) (1975).
105. 16 C.F.R. §701.3(a)(3) (1975). The proposed rules had required the disclosure of all duties placed on the consumer. Proposed Rules, §701.3(g) supra note 23, at 29893.
108. 16 C.F.R. §701.3(a)(6) (1975). Limitations on incidental or consequential damages must also be disclosed. 16 C.F.R. §701.3(a)(8) (1975).
[S]eeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . . .110

Thus, where there is an express warranty which cannot be construed as consistent with a purported disclaimer of it, the express warranty will prevail. The Act will apply only to written express warranties and, under the Act, negation or limitation of such a warranty would have to be in the written document and could not be made orally by the retail seller.

A warrantor giving an express written warranty covered by the Act will be bound by these UCC provisions to the extent that they grant to the consumer greater rights or remedies.111 As a result, the warrantor giving a written warranty will, as a practical matter, find it very difficult to limit or disclaim obligations created by the warranty unless the limit or disclaimer is consistent with the obligations created.

Subject to two qualifications, neither the Act nor the UCC purport to establish minimum standards of written warranty protection, except where a “full” warranty is given. The first qualification concerns minimum requirements for a document called a warranty. As argued above, it is submitted that a document cannot be called a warranty unless it provides the consumer with some remedy and also complies with disclosure provisions.112 Secondly, the UCC does provide that any exclusive or limited remedy will not be applied where the circumstances cause that remedy to “fail of its essential purpose.”113 If a transaction is considered a contract of sale, the drafters of the UCC felt that some “fair quantum” of remedy should be available for the breach of the obligations of the sales contract. Beyond this, no standard of warranty protection is required.

B. IMPLIED WARRANTIES

In contrast to its approach to disclaimer of express warranties, one of the primary purposes of the Act is to regulate disclaimer of implied warran-
ties. To accomplish this purpose, the Act expressly provides that any warrantor who makes a written warranty will not be permitted to completely disclaim the state law implied warranty. This requirement applies to both "full" and "limited" written warranties and is a dramatic change from the UCC. Under the terms of section 2-316 it was possible to disclaim an implied warranty of merchantability if the disclaimer mentioned merchantability and was conspicuous (if in writing) and it was possible to disclaim warranties of fitness for a particular purpose if the disclaimer was in writing and conspicuous. Alternatively, all implied warranties could be disclaimed by expressions such as "as is," "with all faults," or "other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty..." This change in the law for all warranties covered under the Act is based on a policy decision that disclaimers should not be permitted in the sale of consumer goods. The coverage problems discussed above permit some consumer warranties to avoid the effects of this policy decision.

There is one potential interpretation problem in the conclusion reached in the paragraph above. The implied warranties upon which the Act is intended to operate are those which arise under state law—usually the UCC warranties provisions. Yet it can be argued that the implied warranties that come into existence under state law are disclaimed implied warranties under section 2-316, as well as 2-315 and 2-314. The Act creates no implied warranties and only regulates those created under state law. Yet, the argument runs, state law does not simply create an unlimited implied warranty of merchantability (§2-314) or fitness for a particular purpose (§2-315); state law creates these implied warranties as they are limited by state law disclaimer provisions (§2-316). The Act regulates not unlimited state law implied warranties, but rather the limited state law warranties which arise under the disclaimer provisions of section 2-316 as well as the warranty creating provisions of sections 2-314 and 2-315. If this argument is accepted, state law implied warranty disclaimer would be permissible. This argument is strengthened by the language of section 2-314 which provides that the warranty of merchantability comes into existence only if it is not excluded or modified. It can be argued that this limitation is an

114. See House Committee Report, supra note 2, at 7711; Senate Debate on S. 986, supra note 6, 117 Cong. Rec. at 39818.
115. 15 U.S.C.A. §2308(a) (Supp. 1975). As discussed below, some limitation on these warranties is permitted.
117. Uniform Commercial Code §2-316(3)(a). Section 2-316(3)(b) deals with disclaimer of implied warranties by the buyer's examination of the goods or by examination of a sample or model, and section 2-316(3)(c) deals with disclaimer by course of dealing, course of performance or usage of the trade.
118. Uniform Commercial Code §2-314(1).
implicit qualification in the warranty of fitness for a particular purpose. The Act sought to remedy this interpretation problem by defining implied warranty as one "arising under state law (as modified by §§2308 and 2304(a) of this title)." This language in the statute is supported by the fact that control of disclaimer of implied warranties was a primary purpose of the Act. In view of the statutory language and the legislative purpose, the argument that only a disclaimed implied warranty arises under state law should be rejected. As is true elsewhere, this problem could have been avoided by including a definition of at least a minimum standard of implied warranty in the Act.

While the Act does not permit complete disclaimer of implied warranties, it does permit limitations on the duration of an implied warranty where a "limited" written warranty is given. In this situation, implied warranties may be limited to the duration of a written warranty if this period is reasonable and "if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty." Such a limitation must still comply with the UCC requirements that it not cause the warranty to fail of its essential purpose. The requirements of UCC sections 2-316(2) and (3), as discussed above, would also be applicable to any such limitation to the extent that those requirements expand the rights or remedies available to a consumer. Thus, the careful draftsman wishing to limit the duration of his warranty should comply both with the terms of the Act and with the terms of the UCC.

If the warrantor chooses to make a "full" warranty, he may not limit the duration of any implied warranty and "may not exclude or limit consequential damages unless such exclusion or limitation conspicuously appears on the face of the warranty." Some states have enacted legislation which will prohibit disclaimer of implied warranties in sales of consumer goods. Because these statutes afford the consumer greater rights than the Act, these laws will continue to be effective and in most states will give the consumer greater protection.

The disclaimer limitations of the Act apply not only to a warrantor, but also to any "supplier" making a written warranty. A supplier is defined to include "any person engaged in the business of making a consumer product directly or indirectly available to consumers." The disclosure limitations will apply to the typical retailer thus further deterring him from giving a

120. See House Committee Report, supra note 2, at 7711; Senate Debate on S. 986, supra note 6, 117 Cong. Rec. at 39818.
123. See note 39 supra. It appears that at least one state, Kansas, has used such a prohibition as a substitute for strict liability in tort in products liability cases. Clark and Davis, supra note 2, at 597-605.
written warranty. In addition, the usual consumer suit must separate claims for breach of the implied warranty from claims for breach of the disclaimer provisions of the Act. This complexity is caused in part by the Act's coverage of the typical retailer's implied warranties in the remedies provisions but not in its regulation of implied warranty disclosure.

The consequences of a purported disclaimer which does not comply with the provisions of the Act are serious. First, the disclaimer is ineffective, both for purposes of the chapter and for purposes of state law. The Act provides that it is a violation of section 5 of the Federal Trade Commission Act to fail to comply with a requirement imposed by the Act or to violate any of its prohibitions. In its enforcement guidelines, the FTC stated:

Use of express limitations or exclusions which are unenforceable will be viewed by the Commission as deceptive under section 110(c) of the Act or under section 5 of the Federal Trade Commission Act.

In such a situation, the Act authorizes an action to restrain such conduct and the full enforcement powers of the FTC, including civil penalties, would be available.

IV. Remedies

A. Warranty Limitations On Consumer Remedies

The sophisticated warrantor who wishes to minimize his liabilities to consumers may be able to achieve this with remedy limitations even though such a result would be otherwise prohibited either by limitations on disclaimer of warranties or by competitive pressure in giving warranties. For this reason, it is necessary to examine what limitations of consumer remedies are permissible under the Act and the UCC to determine what minimum standards of protection the consumer is actually guaranteed.

125. In the fact situation presented, the following claims are possible under the Act. First, against the manufacturer: (1) a claim for breach of the provisions of the written warranty, (2) a claim for breach of implied warranty of merchantability, and (3) a claim for breach of the disclaimer regulations of the Act. Where the retailer does not give a written warranty the claims against the retailer under the Act are as follows: (1) a claim for breach of the implied warranty of merchantability, and (2) a claim for breach of the implied warranty of fitness for a particular purpose. If the retailer gives a written warranty, there are also potential claims for (1) breach of the written warranty, and (2) breach of the disclaimer provisions of the Act. In addition, there is a potential claim against the manufacturer or the retailer or both for breach of expressed nonwritten warranties; this claim must be pursued under the UCC and is not covered by the Act. In addition, the consumer might raise in defense the UCC objections to disclaimers which are permissible under the Act.

128. FTC Implementation and Enforcement Policy, 719 ATRR at D-2.
Under the terms of the Act, a warrantor giving a “full” warranty must “remedy” the consumer product, and it can also be argued that some minimum standard of performance will be required even of a partial warrantor. The term “remedy” is defined to require repair, replacement, or refund, although there are some restrictions on when the warrantor may insist upon a refund.

The Act does not require a minimum level of compensation for persons incurring consequential damages for personal injury as a result of warranty breach. A “full” warrantor is permitted to exclude or limit such consequential damages if the exclusion or limitation conspicuously appears on the face of the warranty. The final rules also require disclosure of exclusions or limitations on relief “such as incidental or consequential damages,” and have a prescribed statement which must be included in such a limitation. Beyond this, the Act does not prohibit such limitations. It specifies that it is not intended to (1) impose liability on any person for personal injury, (2) affect the liability of any person for personal injury, or (3) supersede any state law regarding consequential damages for personal injury. Thus, any limitation on the warrantor’s power to exclude or limit incidental or consequential damages must arise from the UCC, and any such limitation contained in the UCC will be effective.

The UCC does provide that “[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.” Otherwise, the UCC normally permits remedy limitations and allows the parties to make those remedies exclusive. Therefore, a warrantor must be concerned with three different types of incidental or consequential damages limitations. First, the warrantor will probably not be permitted to exclude or limit consequential damages for personal injury as this is prima facie unconscionable. Second, a warrantor may be permitted to limit or exclude nonpersonal injury consequential damages, such as consequential

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130. See 15 U.S.C.A. §2304(a)(1) (Supp. 1975) for full warranties. A partial warranty is deceptive if the terms and conditions of such warranty so limit its scope and application as to deceive reasonable individuals. 15 U.S.C.A. §2310(c)(2) (Supp. 1975). See note 112 supra. Presumably a reasonable individual will believe that some meaningful compensation for warranty violations is available as a remedy.


132. 15 U.S.C.A. §2304(a)(3) (Supp. 1975). The FTC has interpreted the Act to require the same conspicuous disclosures for limited warranties as are required in the case of full warranties. FTC Implementation and Enforcement Policy, 719 ATRR at D-2. This interpretation was issued before the final rules.

133. 16 C.F.R. §701(3)(a)(8) (1975). The prescribed statement is: “Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.”


135. Uniform Commercial Code §§2-719(3). This point is discussed in Leete, supra note 2, at 373.

136. Uniform Commercial Code §§2-719(1) and (2).
damages for economic loss.\textsuperscript{137} However, the UCC clearly contemplates that the general unconscionability provisions of UCC §2-302 will apply to the question of warranty limitation.\textsuperscript{138} Thus, a limitation or exclusion of economic consequential damages might be impermissible if it was held to be unconscionable under the general unconscionability section. Third, the warrantor can exclude or limit incidental damages, again subject to the operation of the general unconscionability section of the UCC.\textsuperscript{139} It has been suggested that, to the extent that a warrantor is still permitted to limit or exclude any incidental or consequential damages, this problem should be resolved by state law prohibitions.\textsuperscript{140}

The Act does not prohibit shortening of the period of limitations during which an action for breach of warranty can be brought. However, the more protective provisions of the Uniform Commercial Code would apply and the period of limitations could not be shortened to less than one year.\textsuperscript{141}

\textbf{B. Informal Dispute Settlement Mechanisms}

The policy of Congress, the Act declares, is to encourage the creation and use of informal dispute settlement mechanisms to decide consumer disputes.\textsuperscript{142} To accomplish this policy, Congress has provided that resort to such a mechanism can be required of a consumer if this requirement is stated in the written warranty and if the mechanism meets the requirements of the rules authorized to be promulgated under the Act.\textsuperscript{143} The rules require disclosure of certain specific information concerning the mechanism on the face of the written warranty and specify that the warrantor is not to incorporate into the terms of a written warranty required resort to a mechanism that fails to comply with the requirements of the rules.\textsuperscript{144} The

\textsuperscript{137} Clark and Davis, \textit{supra} note 2, at 611-12. This is true, even though the warrantor gives a written warranty and would not be permitted to disclaim implied warranties in this situation.

\textsuperscript{138} \textit{Uniform Commercial Code} §2-302, Comment 1. This comment uses disclaimer of implied warranties as an example of a potentially unconscionable provision.

\textsuperscript{139} See \textit{Uniform Commercial Code} §2-715 where the distinction between incidental and consequential damages is explained.

\textsuperscript{140} Clark and Davis, \textit{supra} note 2 at 613, 616.

\textsuperscript{141} \textit{Uniform Commercial Code} §2-725(1). Clark and Davis, \textit{supra} note 2 at 611, question whether the UCC limitation would apply as being more protective of the consumer's rights, since the warranties could have been disclaimed. For a discussion of why the courts should not interpret the term implied warranty to mean disclaimed implied warranties, see text accompanying notes 119 and 120, \textit{supra}.

The Act does permit limitations on the duration of a written warranty, if they are disclosed, 15 U.S.C.A. §2302(b)(2) (Supp. 1975), except where the consumer has been deprived of the use of the goods due to repairs for an extended time during the warranty time period, 15 U.S.C.A. §2302(b)(3) (Supp. 1975). For the disclosure rules, see 16 C.F.R. §701.3(a)(4) (1975).


\textsuperscript{144} 16 C.F.R. §§703.2(b) and 703.2(a) (1975), respectively. The rules in 16 C.F.R. §703 (1975), govern the details of creation and operation of an approved informal dispute settle-
primary value of such a mechanism, other than settlement of consumer disputes, is to defuse a class action. If a mechanism does exist and resort to it is required, then the named plaintiffs in a class action must resort to the mechanism before pursuing their class claims beyond a court determination of their representative capacity. Thus, the warrantor will have the opportunity to attempt amicable settlements with individual class representatives before the action has proceeded to litigation on the merits.

Where submission of consumer dispute is required by the terms of the warranty, the mechanism’s decision is not binding, but “any decision in such procedure shall be admissible in evidence.” This is obviously an attempt to encourage parties to abide by the decision of the dispute settlement mechanism. Because there is no presumption or other procedural status accorded the decision of the dispute settlement mechanism, no procedural problems are encountered in evaluating this evidence. However, it is difficult to weigh the probative value of such evidence. Admission of the evidence will encourage parties to relitigate the composition and impartiality of the dispute settlement mechanism as well as the result actually obtained.

Under the Act, the FTC has the power to review the bona fide operation of any dispute settlement mechanism to which resort is required. This, combined with the detailed rules for the operation of such a mechanism which the FTC has issued, gives it substantial regulatory power over the operation of such a mechanism.

Warrantors who establish informal dispute settlement mechanisms under the Act receive some protection from consumer suits and class actions. However, these protections are substantially weakened by the coverage of this section of the Act. The consumer is required to submit disputes “only when pursuing rights or remedies newly created by Section 110(d), such as the class action under Section 110(d)(3), attorney fees, under Section 110(d)(2), or, by reference, any right or remedy newly created by Title 1 of the Act . . . .” If the consumer wishes to pursue other remedies, such as those granted by the UCC or other state law, he would not be required to submit the matter to the dispute settlement mechanism. Consequently, the warrantor is not assured that all disputes will be channeled through the mechanism before litigation. This certainly decreases the attractiveness of establishing a mechanism to the warrantor. However, if the
warrantor's primary reason for establishing the mechanism is to defuse a class action, the mechanism may serve the warrantor's purposes. It is quite likely that the only kind of federal consumer class action which can be brought is the one authorized in Section 110(d) of the statute and hence, it would be subject to submission. 148 Of course, this would not protect the warrantor against a state class action based upon state law and seeking remedies other than those provided in the Act.

C. Right Of Action And Remedies In The Consumer Suit

The Act authorizes a federal cause of action for breach of the obligations arising under the Act, subject to one condition. 149 In such a suit, the warrantor must be offered the opportunity to cure the defect unless the dispute is required to be submitted to an informal dispute settlement mechanism. 150 A class action may proceed, prior to this opportunity to cure, only "to the extent the court determines necessary to establish the representative capacity of the named plaintiffs . . . ." 151 Where a class action is contemplated, the opportunity to cure is to be afforded by the named plaintiffs and they are to notify the warrantor that they are acting on behalf of the class. Although the Act does not specify, presumably the plaintiffs would be entitled to insist on enforcing the rights of all class members, rather than simply to pursue their individual claims. To do otherwise would permit the warrantor to accommodate the claims of the named plaintiffs without resolving the claims of the class. 152

The Act authorizes suit against a supplier or warrantor for breach of any written warranty or implied warranty obligation, or any of its requirements. 153 Such a suit may be brought in the court of any state of competent jurisdiction or in the District of Columbia. In addition, a non-class action suit may be brought in the federal district courts if the amount in controversy in any individual claim is greater than $25.00 and if the amount in controversy on all claims is greater than $50,000. 154 While the statute is not particularly clear on this requirement, the legislative history makes clear

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148. See text accompanying notes 162 and 163 infra.
150. 15 U.S.C.A. §2310(e) (Supp. 1975). "The provisions of subsection e [2310(e)] would be inapplicable in any case in which the consumer has initially resorted to an informal dispute settlement procedure prescribed in the warranty." House Committee Report, supra note 2, at 7725. Presumably, the draftsmen considered the right to require resort to a dispute settlement mechanism to be equivalent to the right to cure.
152. If suit has not been filed and no judicial determination of the representative capacity of the plaintiffs has been made, then presumably approval and notice would not be required before the amicable settlement of claims by the class members. Certainly if suit has been filed, such approval and notice will be necessary. See Fed. R. Civ. P. 23(e).
that it was the intent of Congress to impose both of these requirements on any federal court non-class action suit.\textsuperscript{155} Since the Act is a statute regulating trade or commerce, these jurisdictional limitations are constitutional.\textsuperscript{156} It will be a rare consumer non-class action suit which will meet these requirements. In order to aggregate $50,000 worth of consumer complaints, the action would require a great many named plaintiffs. Yet it will be difficult for such a group to form without the information disclosure which modern discovery would require after suit is filed. Potential plaintiffs will not know of each other so no single individual can contact the others to form such a group. Of course, if the amount in controversy is in excess of $10,000 for a particular claim, the plaintiff could proceed under the general federal question jurisdiction statute.\textsuperscript{157} It seems extremely unlikely that such a consumer complaint will arise. Thus, federal jurisdiction over a non-class suit brought under the Act is unlikely.

It is equally unlikely that the requirements of federal court jurisdiction for class actions will be met under the Act. In order to bring a class action, the two requirements specified above must be met; it will be as difficult to meet these requirements in a class action as in the non-class suit discussed above. In class actions, the additional requirement that there be more than 100 named plaintiffs is imposed.\textsuperscript{158} The requirement of 100 named plaintiffs is an unusual one and will be difficult to meet. This is particularly true in view of the opportunity to defuse the class action which a warrantor has either under a qualifying dispute settlement mechanism or under the cure provisions discussed above. As stated by Congress, "[t]he purpose of these jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts."\textsuperscript{159}

In making it virtually impossible to bring a federal court class action under the provisions of the Act, this purpose appears to have been accomplished with a vengeance. Presumably, Congress intended that most of the class actions brought under the Act would be brought in state court. This assumes that the state courts afford the same or similar opportunities to bring a class action which the Federal Rules of Civil Procedure afford. Such an assumption is not necessarily well founded.\textsuperscript{160} Clearly, if the Act

\textsuperscript{155} This interpretation of the Act to require that both conditions be met in an individual suit is clearly supported by the legislative history. House Committee Report, supra note 2, at 7723-24. The statute is difficult to interpret because the section is stated in the disjunctive, but the disjunctive requirements are negative ones.

\textsuperscript{156} This is a statute regulating commerce, so jurisdiction is to be determined under 28 U.S.C.A. §1337. House Committee Report, supra note 2, at 7724. The additional jurisdictional limits of the Act are constitutional. 1 J. Moore, Moore's Federal Practice ¶.06[.8-3] at 624 (1975). The Senate version of the Act had used the general federal question jurisdictional limits of 28 U.S.C.A. §1331 (Rev. 1966). Senate Committee Reports, supra at note 3, at 23.


\textsuperscript{159} House Committee Report, supra note 2, at 7724.

\textsuperscript{160} See, e.g., Ga. Code Ann. §81A-123 (Rev. 1972). This section enacts federal Rule 23
is designed to permit consumers new remedies, it should do so directly, rather than through the assumption about state law. To the extent that the Act was designed to encourage consumer class actions, it clearly has not achieved this purpose. If the class qualifies, a class action could be brought to enforce the Act under the general federal question jurisdictional statute. In order to bring a class action under this statute it would be necessary, under recent Supreme Court decisions, for each member of the class to have a $10,000 claim and for the class to bear the burden of notice to all members. The typical consumer claim is considerably less than $10,000 and few consumer class plaintiffs can afford to invest large sums in giving notice to what will probably be a large number of class members. Thus, these requirements are much too strict to provide this as a meaningful remedy to consumers.

The Act does not change the strict notice requirements placed on class plaintiffs by the recent Supreme Court case of Eisen v. Carlisle & Jacquelyn. Discussing the notice problem, the House Committee reporting on the Act stressed its remedial nature and asked the courts not to use notice requirements to frustrate the purposes of the Act: "[T]he particular circumstances of the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the financial burden of such identification and notification would be likely to deny them relief." This argument is, however, addressed to the reasonable notice requirements of Eisen and is not an attempt to change that requirement. In view of the class action requirements discussed immediately above, and in view of the notice requirements which the courts have placed on class action plaintiffs, it must be concluded that the implicit promise of a federal court

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as it was written prior to the 1966 Amendments. Under the older federal Rule 23, a consumer class action would typically have been a "spurious" one in which several rights are sought to be enforced, there are common questions of law and fact, and a common relief is sought. Georgia appears to limit a class action to enforce several rights to situations where "the object of the action is the adjudication of claims which do or may affect specific property involved in the action." GA. CODE ANN. §81A-123(a)(2) (Rev. 1972). See 2 H. Kooman, FEDERAL CIVIL PRACTICE, §23-1 at 69 (Rev. 1969).

161. See House Committee Report, supra note 2, at 7723; House Debate, supra note 22, 120 CONG. REC. at 9407. In a separate statement, several members of the House Committee disagreed with the class action provisions. The basis of the disagreement was that since 1966, no single consumer class action has been tried and decided on the merits. Lack of promptness makes the class action an unrealistic remedy for the typical consumer. "Thus, while we continue to question the effectiveness of class actions as a viable remedy for breach of warrant, we feel that we have, in this legislation, done little to encourage them . . . ." House Committee Report, supra note 2, at 7754. In view of the restrictions discussed in the text, this statement certainly appears to be correct.


164. House Committee Report, supra note 2, at 7724.
class action is not a particularly meaningful one for most consumer purchasers.

Where a consumer does qualify for federal court jurisdiction under the provisions discussed above, or where a state court action is brought as authorized by the Act, the consumer is entitled to recover court costs and attorney's fees, with the attorney's fees based on time expended rather than the amount of recovery secured. This method of measuring attorney fees is intended to make consumer actions economically feasible for attorneys even if the amount in question is not large. This remedy is available in the discretion of the court. As demonstrated above, it is quite likely that most consumer enforcement actions under the Act will be brought in state court and, in view of the fact that most state courts are not accustomed to awarding attorney's fees, this remedy of the Act is open to question. For the consumer who wishes to assert warranty rights arising under state law or another federal statute and who does not base his cause of action on the Act, these remedies are not available.

In a consumer action based on the Act, or in a dispute prior to institution of a legal action, all state law provisions which afford the consumer greater remedy than are afforded under the Act are also applicable. Typically, these will be the UCC buyer's remedies. In the consumer situation, a buyer is most likely to resort to the remedies provided under sections 2-714, 2-715, and 2-717. (Of course, these remedies are available only where the warranty does not limit available remedies, or where such limitation is not permissible.) Under section 2-714, the "usual standard and reasonable method of ascertaining damages" for a breach of warranty is the difference in value between the goods as accepted and the value they would have had if they had been as warranted. This section also authorizes recovery of incidental and consequential damages, as provided by section 2-715. The typical consumer may have a cause of action for damages under section 2-715(1) and, if not limited, consequential damages under section 2-715(2)(b). In addition, if the buyer gives notice to the seller, he may deduct from the price all or any part of his damages resulting from the breach of contract under section 2-717. This last remedy will be practically available only to the credit buyer; in view of the FTC's recent abolition of the holder in due course doctrine in consumer transactions, this remedy is a much more meaningful one. The other UCC buyer's remedies are: (1) cover, (2) market price damages for non-delivery or repudiation, and (3) specific

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165. 15 U.S.C.A. §2310(d)(2) (Supp. 1975). Of course such an action is permitted as the Act is not to be the exclusive remedy.

166. FTC Implementation and Enforcement Policy, 719 ATRR at D-3.


168. Uniform Commercial Code §2-714, Comment 2. Of course, this remedy is not exclusive.

performance or replevin. These are potentially available to the consumer buyer although they are, practically, less likely to be meaningful remedies to him.\textsuperscript{170}

The FTC is also authorized by the Act to sue in federal district court to restrain deceptive warranties or any other failure to comply with the Act.\textsuperscript{171} In such a suit, a temporary restraining order or temporary injunction is authorized where the court finds it appropriate by weighing the equities, considering the likelihood of ultimate success, and considering the public interest. However, the Commission apparently is only authorized to enforce the Act and would not be empowered to restrain a violation of UCC warranty provisions except as they are adopted in the Act. In addition, Title II of the Act authorizes the FTC to sue for equitable relief on behalf of the consumer.\textsuperscript{172} While an extended discussion is beyond the scope of this article, it should be noted that this provision perhaps compensates for the weakness of the class action provisions of the Act. Even though the typical consumer may not be able to bring his own class action, the FTC can pursue individual or group remedies for him.

V. CONCLUSION

The Act was intended to give the consumer a better understanding of the warranties on the things he purchases and to require a certain minimum level of implied warranty performance. In the usual sale on consumer goods, the Act's coverage will tend to accomplish these purposes. However, there are many instances where problems develop with the coverage of the Act because it is not identical to the coverage of implied warranties created under the UCC. These coverage problems can best be solved by amending the Act to create its own implied warranties, perhaps supplemented by state law implied warranties. A second possible solution, although a less desirable one, is to amend the Act to make its coverage synonomous with that of the law of the state where it is being enforced. Typically, this will be the UCC, and where there are state variations in the UCC or other state laws, this would cause a warrantor great difficulty in planning national warranties to comply with different local coverages. Overall, the Act

\textsuperscript{170} Uniform Commercial Code §2-712 provides for the buyer to cover when there has been a rejection or revocation of acceptance. Here, a revocation of acceptance (UCC §2-608) is possible but not likely. A rejection (UCC §§2-601, -606) is possible. Damages awarded would only be the cost of cover, less the contract price, plus incidental and consequential damages. UCC §2-713 applies to measure damages where there has been nondelivery or repudiation. This is less likely to happen in a consumer situation although there might be a repudiation which arises after rejection or after a number of attempted repairs. UCC §2-716 covers specific performance or replevin. In view of the fungibility of most consumer goods, this remedy is not likely to be particularly helpful to the consumer.


should be changed to work more harmoniously with the UCC wherever a combination of state and federal regulation is deemed desirable.

The Act's attempt to create a federal cause of action for breach of most consumer warranties is successful, but its promise that such an action can be brought in federal court is largely illusory. Thus, the new remedies envisioned in the Act must be pursued in state courts which are, for the most part, unaccustomed to granting many of them. For this reason there is a very real question with the practical availability of these remedies.

The consumer needs increased regulation of warranties on the products he buys. As a first step in meeting this need the Act is commendable. Its theory is to use the market mechanism, through required disclosure, to encourage better warranty protection and, consequently, better product reliability. However, there are additional steps which remain to be taken before the consumer's needs will be fully protected.