COMMENT

CONSUMER WARRANTY LAW IN CALIFORNIA UNDER THE COMMERCIAL CODE AND THE SONG-BEVERLY AND MAGNUSON-MOSS WARRANTY ACTS

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"The purchaser cannot be supposed to buy goods to lay them on a dunghill."[1]

INTRODUCTION

Imagine, if you will, the typical caveman. He decides to try out his newly purchased hunting club on an unsuspecting prehistoric beast. Unfortunately, the club does not perform quite the way the bludgeon salesman said it would and the caveman goes without supper. While removing the splinters from his person, he notices one with the words "Not for Hunting" finely engraved at the edge. The caveman is not amused. He thinks there ought to be a law . . .

In 1969 Professor Addison Mueller described the attempts of the average consumer to get his newly purchased automobile, TV, or dishwasher fixed when it simply stops working properly, as opposed to blowing up or injuring him,[2] as a "time-consuming and maddening experience."[3] Probably less in response to trenchant criticisms from the academic community[4] than to the public pressure of what has come to be known as the "Consumer Protection Movement," the federal and state legislatures have enacted a wide variety of consumer protection statutes, many of them attempting to reform consumer warranty law.

This Comment begins by discussing the significant causes of consumer frustration as well as some of the possible generic solutions. It then proceeds to analyze in detail those statutes which currently define the law of consumer warranties in California: the California Commercial Code,[5] the Song-Beverly Consumer Warranty Act,[6] the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,[7] and the manner in which they interact. Attempts are made to resolve their many ambiguities in light of the legislative intent and to evaluate their effectiveness in

1. Gardiner v. Gray, 171 Eng. Rep. 46, 47 (K.B. 1815). Lord Ellenborough's pithy statement constituted one of the earliest rationales for the doctrine of implied warranties.

2. The consumer who incurs personal injury or property damage due to a defective product can rely on strict liability in tort to come to his legal aid. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

3. Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 576 (1969).

4. *See, e.g.*, D. CAPLOVITZ, THE POOR PAY MORE (1963); P. WALD, LAW AND POVERTY (1965); Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381 (1965).

5. CAL. COM. CODE §§ 1101-11108 (West 1973 & Supp. 1978).

6. CAL. CIV. CODE §§ 1790-1797.5 (West 1973 & Supp. 1979).

7. 15 U.S.C. §§ 2301-2312 (1976).

achieving the goal of consumer protection. Finally, the Comment recommends increased governmental enforcement of these statutes as well as an extensive campaign to educate consumers about their expanded warranty rights so as to enable warranty law to guarantee more effectively that satisfaction, and not frustration, will be the lot of the consumer.

I. THE PROBLEM

A. *The Roots of Consumer Frustration*

> *Consumers—"people who are persuaded by persons whom they do not know to enter into contracts that they do not understand to purchase goods that they do not want with money that they have not got."*[8]

One of the chief causes of consumer frustration has long been the triumph of the legal fiction of freedom of contract over the reality of the adhesion contract.[9] The principle of freedom of contract, as an element of the ideology of laissez faire capitalism, leaves contract terms to be determined by unrestrained market forces. The parties, exercising their free will, may make whatever agreement they wish to make, and the courts will enforce that bargain.[10] In the realm of ordinary commercial transactions, this principle has proven its viability.[11]

The concept of freedom of contract naturally presupposes that the parties are indeed *free* and that the contract is a bargained-for expression of their will.[12] The consensual element present in most commercial transactions, however, is noticeably absent in the consumer transaction where adhesion is the rule and dickering the exception. Under this analysis, the absence of real choice for the consumer combined with the oligopolistic market structure of much of the economy suggests that the principle of freedom of contract is a myth perpetuated in order to secure the

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8. Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38, 38 (1958) (quoting a 1944 lecture by Lord Greene).

9. *See* notes 164-68 & accompanying text *infra*.

10. The law will not make a better contract for the parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce a contract as it is written.

Kupfersmith v. Delaware Ins. Co., 84 N.J.L. 271, 275, 86 A. 399, 401 (1913).

11. The official comment to the U.C.C. "states affirmatively . . . that freedom of contract is a principle of the Code . . . ." U.C.C. § 1-102, Comment 2. *See* Delta Air Lines, Inc. v. Douglas Aircraft Co., 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (2d Dist. 1965) (upholding exculpatory clause in contract for sale of commercial airplane). *But see* note 25 *infra*.

12. *See generally* Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972).

benefits of overwhelming bargaining power.[13]

The consumer-purchaser has additional problems. First, he lacks the legal expertise necessary to understand his rights and, therefore, is unlikely to assert them. A recent empirical study of consumer behavior found that only approximately one third of product defects perceived by consumers result in complaints to the sellers,[14] that complaints are least likely to be voiced by the poor and uneducated, that almost one half of voiced complaints are not resolved to the consumer's satisfaction, and that sellers are able to impose their decisions on virtually all complaining consumers since even the disgruntled purchaser rarely resorts to the courts. The consumer in effect recognizes the seller as the court of last resort.[15]

Second, warranties are often unavailable to the buyer until after the sale.[16] The lack of pre-sale access decreases the likelihood that the curious purchaser will become aware of his warranty rights or duties or ask any questions about them. A related problem is the buyer's inability to compare varying warranty terms, which prevents him from considering the warranty factor when deciding which product to purchase. As a result, sellers have little incentive to give better warranties, and the competitive pressures that theoretically protect the consumer are stifled.[17]

Not only are consumer warranties drafted so as to reduce the actual rights which the buyer would have by virtue of the implied warranties,[18] but these "guarantees" tend to be written in obfuscating legal jargon that is incomprehensible to the average layman

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13. Professor Kessler warned in 1943: "Standard contracts . . . could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

14. Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC. REV. 701 (1977).

15. *Id.* at 729-30.

16. Household appliance warranties, which are often sealed in the box, are the most common examples of this problem. *See* 40 Fed. Reg. 60,168, 60,182-83 (1975); note 56 *infra*.

17. Currently, few warrantors advertise the terms of their warranties. *See* notes 495-96 & accompanying text *infra*.

18. [T]he paper with the filigree border bearing the bold caption "Warranty" or "Guarantee" was often of no greater worth than the paper it was printed on. Indeed, in many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.

H.R. REP. NO. 1107, 93d Cong., 2d Sess. 24, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7706.

whose familiarity with implied warranties of merchantability and exclusions of consequential damages tends to be minimal.[19] Accordingly, these documents are seldom read, if at all, until the product breaks down.

An additional problem facing the consumer is that the legal system is too cumbersome and expensive for the little man with a little claim.[20] Few consumers are stubborn enough and few attorneys selfless enough to go through the lengthy procedures and high expense of a lawsuit when the most that they can hope for is recovery of the product's purchase price plus interest. The absence of adequate sanctions such as an award of attorney's fees, statutory minimum penalties, or punitive damages gives the con-

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19. An FTC Task Force Report on Appliance Warranties and Service concluded:

> There is substantial evidence that at the time of the sale the purchaser of a major appliance does not understand the nature and extent of the protection provided by the manufacturer's warranty or of the obligations under the warranty of the manufacturer or of the retailer. This lack of understanding may be due to deceptive advertisements, a misleading or inaccurate explanation by the salesman who sold the appliance, or to the content and terminology of the warranty itself.

Id. at 7710. Even sophisticated purchasers are likely to feel confused about their rights when perusing a new color TV warranty that provides, *inter alia*:

> ALL WARRANTIES IMPLIED BY LAW, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS, ARE HEREBY LIMITED, WITH RESPECT TO WORKMANSHIP AND PARTS (OTHER THAN HANDLE, ANTENNA, ACCESSORIES AND COLOR CATHODE RAY TUBE), TO A PERIOD OF ONE YEAR AND, WITH RESPECT TO THE COLOR CATHODE RAY TUBE, TO A PERIOD OF TWO YEARS AFTER DATE OF WARRANTY REGISTRATION OR DATE OF RETAIL PURCHASE BY THE FIRST PURCHASER. THE EXPRESS WARRANTY AND THE REMEDIES CONTAINED HEREIN AND SUCH IMPLIED WARRANTIES AS HEREINBEFORE LIMITED ARE MADE SOLELY TO THE FIRST PURCHASER FOR BENEFICIAL USE (THE BUYER), ARE THE SOLE WARRANTIES AND REMEDIES AND ARE IN LIEU OF ALL OTHER WARRANTIES, GUARANTEES, AGREEMENTS OR OTHER LIABILITIES, WHETHER EXPRESS OR IMPLIED, AND ALL OTHER REMEDIES FOR BREACH OF WARRANTY OR ANY OTHER LIABILITY OF [the manufacturer]. IN NO EVENT SHALL [the manufacturer] BE LIABLE FOR CONSEQUENTIAL DAMAGES.

Toshiba Color TV Warranty (1976) (on file with the *UCLA Law Review*).

But it would not be completely fair to put all the blame for these atrociously worded documents at the feet of the warrantors and their attorneys. Statutes such as section 2-316(2) of the Uniform Commercial Code, which requires that a disclaimer mention the magic work "merchantability," promote gibberish while purporting to "protect the buyer from surprise." U.C.C. § 2-316, Comment 1. Out of an excess of caution, the warrantor endeavors through legal precision and verbal overkill to satisfy the courts; but the judges' painful scrutiny regularly unearths flaws and ambiguities to be construed against the hapless drafter. The warrantor's efforts to avoid liability for his defective products are spurned, not for want of legal draftsmanship or mention of the word "merchantability," but rather for want of simple fairness.

20. *See* sources cited in note 4 *supra*.

sumer little incentive to sue and the warrantor even less incentive to improve his warranties or service.

The most common causes of frustration to the consumer are inadequate quality control and poor warranty service.[21] Due to the increased complexity of consumer products, much of the task of assuring the quality of products has been shifted to the consumer. The buyer's standard guarantee of a defect-free product is actually only a promise that any defects that he discovers will be remedied eventually. It is clear that, as the FTC has concluded, "manufacturers have no qualms about telling car buyers that they are getting defect-free products, and then producing automobiles far below the standard of perfection."[22]

Frustration due to flawed products is surpassed only by the anger of consumers who unsuccessfully try to have their defective products repaired. An industry-sponsored survey reported that car dealers handle only fifty-three percent of warranty work satisfactorily and that twenty-six percent of warranty repairs required repeated visits to the shop.[23] Nonperformance of warranty service has become so common that it has given rise to its own jargon including "Wall Jobs" and "Sunbaths."[24] This problem may be attributed to a lack of good mechanics, to inadequate compensation for warranty work,[25] or to simple greed or sloth. But the pre-

21. *See* H.R. REP. NO. 1107, 93d Cong., 2d Sess. 23-24, *reprinted in* [1974] U.S. CONG. & AD. NEWS 7702, 7706 ("Paralleling the growth of acquisition of consumer products has been a growing concern of the American consumer with the quality and durability of many of those products. Another growing source of resentment has been the inability to get many of those products properly repaired . . ."). *See generally* FEDERAL TRADE COMMISSION, REPORT ON AUTOMOBILE WARRANTIES (1970) [hereinafter cited as FTC REPORT].

22. FTC REPORT, *supra* note 21, at 27. More than one fifth of all consumer products were found to be defective, and defects were even more prevalent among automobiles, almost one third of which were perceived as defective according to one survey. Best & Andreasen, *supra* note 14, at 726-27.

23. FTC REPORT, *supra* note 21, at 36. Another survey found that thirty-six percent of car repairs were perceived by consumers as unsatisfactory. Best & Andreasen, *supra* note 14, at 726, Table 19.

24. FTC REPORT, *supra* note 21, at 36.

25. *Id.* at 54-55. State Senator Roberti has decried the fact that a "handful of large manufacturers dictate the terms of warranty service contracts with thousands of independent repair shops, and the repairman is often forced to perform warranty service below his actual costs." Press Release No. 49, May 12, 1976, *quoted in Review of Selected 1977 California Legislation*, 9 PAC. L.J. 281, 334 (1978). Such subcost contracts allegedly force repair shops to cut corners and to "turn out shoddy work." *Id.* In recognition of this problem, the California Legislature in 1977 amended the Unfair Trade Practices Act, CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1964 & Supp. 1978) *as amended by* Act of Sept. 13, 1977, ch. 787 § 2, 1977 Cal. Adv. Legis. Serv. 2353 (West), to make unlawful any warranty service or repair contract at rates "below the cost to such service or repair agency of performing the warranty service or repair." *Id.* § 17048.5. *Compare id. with* CAL. CIV. CODE §§ 1793.2(a)(1), .3(c) (West Supp. 1979) (service and repair facilities entitled to cost plus reasonable profit but reasonable discounts to manufacturers permitted).

cise cause is less important than the recognition that the result is economically wasteful,[26] morally indefensible, a threat to public safety, and a frustration to the consumer.[27]

B. *Solutions*

The conflict in warranty law between the principle of freedom of contract and the principle of fairness is traceable to the hybrid nature of the law of implied warranty itself. Warranty law from its inception has been an uneasy merger of contract and tort law, sometimes relying on the presumed intent of the parties, at other times invoking morality or public policy.[28] But even the as-

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26. First, low product quality and poor warranty service are wasteful in the sense that the consumer has wasted his time and money on a product that does not function properly. Second, the allocation of these undisclosed product costs to the consumer results in a misallocation of the economic resources of the society as a whole. *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

> If people want television sets, society should produce television sets; if they want licorice drops, then licorice drops should be made. And, the theory continues, in order for people to know what they really want they must know the relative costs of producing different goods. The function of prices is to reflect the actual costs of competing goods, and thus to enable the buyer to cast an informed vote in making his purchases.
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> . . . Not charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods; the result is that people purchase more of those goods than they would want if their true cost were reflected in price. . . . [T]he postulate that people are by and large best off if they can choose what they want, on the basis of what it costs our economy to produce it, would be violated.

Id. at 502-14. Allowing producers of shoddy products, whose production costs are presumably lower than those of other manufacturers, to shift the risk of product defects to the buyer enables such producers to enjoy a competitive advantage if they lower their prices and higher profits if they do not. In either case, the production of defective goods is promoted and the consumer's desire to get his money's worth is thwarted. *Accord*, Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). Mr. Akerlof demonstrates that in a market where buyers lack sufficient information about the quality of individual products, sellers of below average quality are rewarded, while sellers of superior products do not receive a price commensurate with their products' greater utility to consumers. The result is a modified version of Gresham's Law in which bad products tend to drive out the good. Enforceable guarantees are listed among the institutions able to counteract the effects of quality uncertainty. *Id.*

27. *See* Mueller, *supra* note 3, at 597.

28. Warranty law has also earned the racier characterization of a "freak hybrid born of the illicit intercourse of tort and contract." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960). In Dean Prosser's treatise on the law of torts, he discusses the distinction between tort and contract theory:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon

cendance of the contract over the tort aspect of warranty law would not preclude a court from allocating the risk of deficiencies in product quality to the warranty-disclaiming supplier. "[A]s the history of contract reveals, courts have always been expert at inferring agreement or 'imposing' obligations within the framework of an exchange relationship where the party's expressed intention is defective."[29]

The common law developed two basic methods to protect the purchaser of defective goods. First, judges fashioned the implied warranty of merchantability. When this term of the contract began to be modified or destroyed by "agreement" of the parties,[30] a second method arose. The courts raised to a high art canons of strained construction of statutes so as to frustrate attempts to disclaim warranties implied under them,[31] and they strictly construed disclaimers and other warranty terms against the drafter.[32]

In the long run, the second set of techniques must also prove to be self-defeating. It is only a matter of time until every disclaimer and limitation is sufficiently unambiguous and conspicuous and mentions all of the magic words so that it cannot be nullified without openly flouting the spirit and letter of both the contract and the U.C.C., which clearly permits disclaimers.[33]

Despite the willingness of many judges to bend over backwards to protect consumers, judicial reformation of warranty terms on an ad hoc basis proved unsatisfactory. Karl Llewellyn accurately described the inherent flaws of these techniques:

> First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. . . . Second, since they do not face the issue, they fail to accumulate either experience or

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> social policy, and not necessarily upon the will or intention of the parties . . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 613 (4th ed. 1971) [hereinafter cited as PROSSER].

29. R. SPEIDEL, R. SUMMERS, & J. WHITE, TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 1009 (2d ed. 1974).

30. *See* U.C.C. §§ 2-316, -719.

31. *See, e.g.*, Rehurek v. Chrysler Credit Corp., 262 So. 2d 452, 455-56 (Fla. App. 1972) (manufacturer cannot disclaim warranties because it is not a "seller"). "[O]ne gets a picture in reading these cases of lights going off, talismanic phrases being mumbled in the dark, and the light flashing back on just in time to show the consumer exiting with a check in his pocket." Clark & Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 U. KAN. L. REV. 567, 582 (1975).

32. *See, e.g.*, Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975) (under U.C.C.); Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954) (pre-Code law).

33. *See* U.C.C. § 2-316.

> authority in the needed direction: that of marking out for any given type of transaction what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain of a given type . . . . Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction . . . . The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.[34]

Thus, the legal and social causes of consumer frustration were too deeply rooted to permit a solution without legislative intervention. Eventually, the legislatures did intervene: in California with the Song-Beverly Consumer Warranty Act,[35] which took effect in 1971, and throughout the country with the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,[36] which became effective in 1975.

These statutes did not attempt to rewrite completely the law as it affected consumers; they merely tried to prevent the worst abuses by a patchwork of provisions modifying particular aspects of consumer warranty law. By avoiding a more comprehensive solution and grafting onto the already complex law of warranties additional layers of definitions, requirements, prohibitions, and remedies, the legislatures have actually created an additional obstacle to consumer protection. Complexity of the law itself makes it difficult for the consumer to assert his rights without the assistance of an attorney. In view of this result, it will be necessary to examine the effects of these statutes carefully in order to determine whether they truly benefit consumers.

The statutory modifications of consumer warranty law tend to adopt three different types of solutions to protect consumers: substantive regulations of warranty terms, disclosure requirements, and strengthened consumer remedies.

Substantive regulations restrict freedom of contract by creating duties and modifying contractual terms irrespective of the intent of the parties. A clear example is the prohibition of disclaimers of implied warranties when there is a written express warranty, as under both Song-Beverly[37] and Magnuson-Moss.[38] While the need for such regulation seems obvious, given the vast inequality of bargaining power, the ultimate benefit of such regulation to consumers may be called into question. For example, the warrantors' additional costs of compliance are ultimately borne by

34. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).
35. CAL. CIV. CODE §§ 1790-1797.5 (West 1973 & Supp. 1979).
36. 15 U.S.C. §§ 2302-2312 (1976).
37. CAL. CIV. CODE § 1793 (West Supp. 1979).
38. 15 U.S.C. § 2308(a) (1976).

purchasers and, arguably, may exceed the advantages of the protective legislation.[39] Consequently, some consumers may wish to bear the risks of product defects in return for a lower purchase price. Yet the final justification for substantive regulation is usually the absence of an effective alternative.

Disclosure requirements have frequently been adopted to protect the consumer from surprise and allow him to make more rational market decisions.[40] These provisions require that warrantors clearly and conspicuously disclose the terms of their warranties before or during the sale. They are designed to restore the bargain element to consumer contracts by informing the purchaser of his rights and of the legal consequences of his acts.[41]

The Achilles heel of all disclosure requirements, however, is the consumer's inability to alter the warranty terms even if he understands them perfectly.[42] The counterargument concedes that the individual buyer has little bargaining power but relies on the power of buyers as a class. If even a small but noticeable percentage of buyers were to shift their purchases to products with better warranties, it is reasoned, warrantors would respond by competing for that sophisticated element of the market with improved warranties.[43] Full disclosure is the prerequisite to such a process.

Unlike substantive regulations, disclosure requirements attempt to make the concepts of freedom of contract and a free market work for the consumer.[44] One's appraisal of disclosure as a realistic solution is largely a function of one's belief in the competitive versus monopolistic character of our economy. Monopolistic enterprises would have little incentive to improve their warranties since they face no competitive pressure from other warrantors to

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39. *But see* text accompanying notes 305-06 *infra*.

40. U.C.C. § 2-316, Comment 1; *see* 15 U.S.C. § 2302 (1976); CAL. CIV. CODE § 1792.4 (West 1973); U.C.C. § 2-316(2).

41. D. CAPLOVITZ, THE POOR PAY MORE 188 (1967) ("The problem lies not so much in the failure of the legal structure to establish their . . . rights as in the failure of these consumers to understand and to exercise their legal rights").

42. Mueller, *supra* note 3, at 580-81.

43. *See* Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 548-49 (1971); notes 413-14 & accompanying text *infra*.

44. *Cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In that case, the Supreme Court held the Virginia statute that penalized the advertising of prescription drug prices to be violative of the first amendment. The Court's rationale leaned heavily on the consumers' need for truthful commercial information:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

attract purchasers.[45]

A final drawback is that disclosure provisions may easily reach a point where the returns in the form of greater consumer awareness diminish as the amount of information required to be directed toward consumers grows from a trickle to a flood. The longer the warranty, the less likely it is to be read, however clearly it is written. A similar fate is foreshadowed for conspicuousness requirements found in many consumer protection statutes.[46] Each one demands that the warrantor draft the document so that certain provisions will catch the reader's eye. We may pity the consumer who is forced to receive voluminous documents all of whose terms are in large, colorful print, boldface type, and capital letters.

The third solution, strengthening remedies, seeks not to increase the buyer's substantive rights, but rather to improve his legal remedies when those rights are violated. Statutes granting attorney's fees[47] or some form of exemplary damages[48] are meant to reduce the economic barriers to the enforcement of consumers' rights and thereby to deter future violations. But if the consumer's potential recovery still remains small and contingent upon victory, and if few consumers, warrantors, or their respective attorneys are aware of the strenghtened remedies and penalties, consumers will be unlikely to sue and violators unlikely to be deterred. Unless consumers are apprised of their new rights, this solution will mark yet another paper victory for consumerism.

II. WARRANTY LAW UNDER THE CALIFORNIA COMMERCIAL CODE

The Uniform Commercial Code (U.C.C.) was adopted in California in 1963 and took effect in 1965 as the California Commercial Code.[49] Its provisions govern both commercial and consumer transactions, although it was drafted primarily to deal with the former. A significant contribution of the Code was a coherent treatment of warranties that accompany the sale of goods.[50]

45. *See generally* J. GALBRAITH, THE NEW INDUSTRIAL STATE (1971).

46. *E.g.*, 15 U.S.C. § 2302 (1976) (Magnuson-Moss); 15 U.S.C. § 1631(a) (1976) (Federal Truth in Lending Act); 12 C.F.R. § 226.6(a) (1978) (Federal Truth in Lending Act).

47. *See* 15 U.S.C. § 2310(d)(2) (1976); CAL. CIV. CODE § 1794 (West Supp. 1979).

48. *See* CAL. CIV. CODE § 1794 (West Supp. 1979).

49. For purposes of this Comment, the two codes are substantially identical except for the absence of U.C.C. § 2-302 regarding unconscionability from the California version. Citations will generally be to the U.C.C. where the two codes are identical.

50. "Goods" mean all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale

A. *Tripartite Approach to Warranties*

The Commercial Code defines three types of warranties relevant to consumer purchases: express warranties,[51] implied warranties of merchantability,[52] and implied warranties of fitness for a particular purpose.[53] Each type of warranty has different requisites and creates different obligations.

1. Express Warranties

Under section 2-313 of the U.C.C., express warranties are created by written or oral statements that relate to the goods sold and become part of the "basis of the bargain."[54] The express warranty may be in the form of an affirmation of fact, a promise, a description, a sample or a model. It may be created through individual agreement or through advertising in the mass media.[55]

a. *The Role of Reliance in the "Basis of the Bargain" Requirement.* A central issue in the law of express warranties is the role of the buyer's reliance. U.C.C. section 2-313 requires that in order to create an express warranty, the affirmation of fact, promise, description, sample, or model must be part of the "basis of the bargain." It is unclear what degree of buyer's reliance, if any, is necessary to satisfy this requirement. What is clear is that the consumer seldom actually relies on the written warranty, because it frequently accompanies a product inside the package, he seldom reads it until the product breaks down, and he rarely understands it even then.[56]

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other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-105(1).

51. U.C.C. § 2-313.

52. U.C.C. § 2-314.

53. U.C.C. § 2-315.

54. U.C.C. § 2-313(a)-(b). *Compare id. with* CAL. CIV. CODE § 1791.2 (West Supp. 1979) ("express warranty" under Song-Beverly) *and* 15 U.S.C. § 2301(6) (1976) ("written warranty" under Magnuson-Moss). *See also* notes 268-77, 390-96 & accompanying text *infra*.

55. Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1st Dist. 1968) (advertisements, labels, and direction pamphlet may all create express warranties); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1st Dist. 1966) (manufacturer's advertisements create express warranties running directly to the buyer).

56. One survey found that 49 out of the 51 consumer warranties examined were of the "pre-packaged" variety—"the type packaged with the product resulting often in the buyer not being aware of the terms of the warranty, or its existence, until he or she gets home and opens the box containing the product." 40 Fed. Reg. 60,168, 60,182 (1975).

The problem, therefore, is how to qualify typical consumer warranties as part of the "basis of the bargain" so as to fit under the protections of U.C.C. section 2-313. In order to do so, a court might adopt one of the following theories regarding the basis of the bargain requirement.

One solution would be to hold that the buyer's reliance is unnecessary. If "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell,"[57] then the buyer's state of mind should no longer be the absolute touchstone of a warranty's validity. In *Hauter v. Zogarts*[58] the California Supreme Court disapproved prior cases[59] which had demanded that the buyer prove reliance on the statement of the seller, as was the pre-Code law.[60] Instead the court stated that the impact of the basis of the bargain provision was either to shift the burden of proving non-reliance to the seller[61] or else to eliminate the concept of reliance altogether and make the warrantor stand behind his words unless they are adequately disclaimed.[62]

Having posed the issue and its possible solutions, the *Hauter* court then found it unnecessary to resolve the reliance question, because the buyer in that case had in fact relied upon the seller's claims of safety on the cover of the box.[63] The court's reluctance

57. U.C.C. § 2-313, Comment 4.

58. 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). In *Hauter*, the plaintiff was hit on the head by the ball of a golf training device, the "Golfing Gizmo," described by the manufacturer as "completely safe." The plaintiff prevailed against the manufacturer and seller on the theories of breach of express warranty and implied warranty of merchantability, strict liability in tort, and misrepresentation. The Song-Beverly Act, though quite relevant to the reliance issue as well as the questions of remedies and disclaimers, was not mentioned at all in this decision. It is likely, however, that the promise in *Hauter*, "COMPLETELY SAFE BALL WILL NOT HIT PLAYER," would not have qualified as an "express warranty" under Song-Beverly anyway, because it neither promises to maintain performance nor to compensate the buyer for non-performance, and does not use formal words such as "warrant" or "guarantee." *See* notes 268-77 & accompanying text *infra*.

59. "The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." Hauter v. Zogarts, 14 Cal. 3d at 115, 534 P.2d at 383, 120 Cal. Rptr. at 687 (citation omitted).

60. *See* UNIFORM SALES ACT § 12 (1906). ("Any affirmation of fact . . . is an express warranty if the natural tendency . . . is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon").

61. Hauter v. Zogarts, 120 Cal. 3d at 115, 534 P.2d at 384, 120 Cal. Rptr. at 688. *See also* U.C.C. § 2-313, Comments 3, 8; Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 UCLA L. REV. 281, 285 n.25 (1961).

62. Hauter v. Zogarts, 120 Cal. 3d at 115, 534 P.2d at 384, 120 Cal. Rptr. at 688. *See also* U.C.C. § 2-313, Comment 4; Note, *"Basis of the Bargain,"—What Role Reliance?*, 34 U. PITT. L. REV. 145, 149-50 (1972).

63. "We are not called upon in this case to resolve the reliance issue. The parties do not discuss the changes wrought by the Uniform Commercial Code, and plaintiffs

to decide this issue may lead to the same persistence of the reliance requirement in California as the court noted in other jurisdictions.[64] Recently a state appellate court ignored the apparent intent of the supreme court in *Hauter* to relax the reliance requirement and found "no reason to hold that reliance upon the warranty is not still a vital ingredient for recovery."[65]

As an alternative solution, a court could treat the buyer's reliance upon an express warranty arising after the sale as a modification of the contract.[66] According to the U.C.C.,[67] agreements modifying contracts are binding without additional consideration. This section is designed to "make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."[68] Comment seven to section 2-313 further supports this theory, as it clearly envisions that express warranties might be created as modifications to the contract.

> The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery

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are fully able to meet their burden regardless of which test we employ." Hauter v. Zogarts, 120 Cal. 3d at 116-17, 534 P.2d at 384, 120 Cal. Rptr. at 688 (footnote omitted). In spite of the court's statement that it was unnecessary to resolve the issue, it spent two pages discussing it.

64. *Id.* at 116 n.13, 534 P.2d at 384 n.13, 120 Cal. Rptr. at 688 n.13.

65. Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 760; 137 Cal. Rptr. 417, 427 (1st Dist. 1977) (no evidence of reliance on express warranty by the manufacturer of blood plasma; Commercial Code inapplicable in any event because provision of blood products is statutorily defined as a service, not sale).

66. *E.g.*, Winston Indus., Inc. v. Stuyvesant Ins. Co., 317 So. 2d 493 (Ala. App. 1975). There the court held that reliance was not necessary for an express warranty to arise in a situation where the buyer was completely unaware of the warranty until after the sale. The court considered important U.C.C. § 2-313, Comment 7, which provides that "[i]f language is used after the closing of the deal . . . the warranty becomes a modification, and need not be supported by consideration if it is otherwise seasonable and in order." *See also* 1 R. ANDERSON, ON THE UNIFORM COMMERCIAL CODE § 2-313:18 (2d ed. 1970); Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60, 64 (1974).

Professors White and Summers, in contrast, would not find the post-sale representation to be a valid modification unless it had been relied upon. "Why should one who has not relied on the seller's statement have the right to sue? Such a plaintiff is asking for greater protection than he would get under the warranty of merchantability, far more than he bargained for. We would send him to the implied warranties." J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 282 (1972) [hereinafter cited as WHITE & SUMMERS]. But the authors would also invalidate post-sale disclaimers and limitations of warranty. *Id.* at 363. The net result would leave the buyer with the protections of the implied warranty of merchantability, which are often greater than those of the express warranty.

67. U.C.C. § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding").

68. U.C.C. § 2-209, Comment 1.

> asks and receives an additional assurance), the warranty becomes a modification . . . .[69]

The primary difficulty with this approach is in characterizing the discovery of a warranty in the box as an "agreement" at all. It lacks the bilateral dickering suggested by the comment's parenthetical example.[70] Yet the Code's definition of "agreement," which incorporates "surrounding circumstances," may be broad enough to encompass this sort of transaction.[71]

A third possibility is that a court might hold that the buyer's reliance will be implied by law because the purchaser's reasonable expectation is that a standard written guaranty will be inside the package and that the warrantor will stand behind it. This sort of reliance may precede the sale and could be analogized to usages of trade which "furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law . . . ."[72] While one might argue that rewarding the buyer's unexpressed expectations is the exclusive domain of implied warranties, here the terms are explicit. Extrinsic policy considerations are used only to imply the buyer's reliance upon these express terms. Since the express warranty terms are aimed at protecting the buyer, a conclusive presumption of reliance would be appropriate. Regardless of whether such a presumption were used, to the extent that warrantors and sellers comply with Magnuson-Moss' requirement of presale availability of warranties,[73] litigating consumers should have little difficulty bearing the burden of proving reliance upon the warranty.

b. *Warranty or Puffery?* Express warranties may arise without the use of formal words such as "guarantee" or "warrant" and without any specific intention by the seller to create such a warranty.[74] However, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[75] This type of "salesman's talk" or "puffing" is generally treated as

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69. U.C.C. § 2-313, Comment 7.

70. *See also* U.C.C. § 2-313, Comment 1 ("Express warranties rest on 'dickered' aspects of the individual bargain . . .").

71. " 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208)." U.C.C. § 1-201(3). The seller's express warranty could be characterized as an offer of modifying terms that is accepted when the buyer reads the warranty and chooses to use the product.

72. U.C.C. § 1-205, Comment 4.

73. *See* notes 390-96, 427-33 & accompanying text *infra*.

74. U.C.C. § 2-313(2).

75. *Id.*

within the realm of permissible salesmanship, apparently on the theory that such statements by sellers are too vague to be relied upon seriously.

Unfortunately, the line between enforceable warranties and unenforceable puffery is nowhere clarified. Instead, courts generally prefer to employ the equally nebulous and conclusory distinction between "facts" and "opinions" to decide whether a statement falls in one category or the other.[76] While maintaining the view that statements of fact do create express warranties, the California Supreme Court has indicated that statements of opinion can also become warranties if they are "part of the basis of the bargain."[77] Although this view appears to contradict the language of section 2-313(2), it draws support from the official comment to this section.[78] Furthermore, the statutory language refers to a statement "purporting to be merely the seller's opinion," which is distinguishable from statements purporting to be facts. Sadly, the supreme court declined to explain the precise meaning of the "basis of the bargain" requirement or how an opinion could satisfy it, thereby providing little guidance in this label-ridden area of the law.

Puffery is best distinguished from the express warranty on the basis of the reasonable person standard: a warranty is a statement upon which a reasonable person justifiably would rely. In applying such a standard, some relevant considerations include the specificity of the statement, its susceptibility to verification, whether it was written or oral, by whom it was made, the degree of certainty with which it was stated, and the relative sophistication of the parties.[79]

c. *Privity of Contract.* When the manufacturer makes an express warranty, whether by individual agreement or by advertis-

76. *See, e.g.*, Matlack, Inc. v. Hupp Corp., 57 F.R.D. 151, 12 U.C.C. Rep. Serv. 420 (E.D. Pa. 1972); Carpenter v. Alberto Culver Co., 28 Mich. App. 299, 184 N.W.2d 547 (1970); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972). Equating warranties with statements of fact creates additional semantic confusion. Facts are usually defined as actual reality or existence or truth. Thus, untrue statements cannot be express warranties and a breach of express warranty becomes an impossibility. Upon close examination, the dichotomy between facts and opinions disintegrates leaving empty labels and circular definitions which may be easily manipulated to support either conclusion.

77. Hauter v. Zogarts, 14 Cal. 3d 104, 115 n.10, 534 P.2d 377, 383 n.10, 120 Cal. Rptr. 681, 687 n.10 (1975).

78. "Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?" U.C.C. § 2-313, Comment 8.

79. *See* WHITE & SUMMERS, *supra* note 66, at 274-76.

ing,[80] California law abandons the requirement of privity of contract and permits the purchaser to recover directly from the manufacturer.[81] The same result could be obtained without rejecting the privity requirement: a court could find that the express warranty amounts to an offer which is accepted by the act of purchase, thereby meeting the privity standard.

Naturally, the buyer is only likely to be concerned with the validity of his express warranty if it gives him greater rights than the implied warranties provide, *e.g.*, if it is longer in duration, promises a higher standard of quality, or is not subject to the defenses that would defeat a cause of action for breach of implied warranty.

2. The Implied Warranty of Merchantability

Under U.C.C. section 2-314, an implied warranty that the goods are merchantable arises whenever goods are sold by one who is a merchant[82] with respect to goods of that kind. The rationale for implying warranties is based on the presumed intent of the parties[83] as well as considerations of public policy, including the actual or presumed expertise of the merchant seller, the buyer's general reliance on the seller's skill and judgment, consumers' lack of bargaining power to insist on express warranties, and purchasers' inability to inspect goods sufficiently to discover all potential defects.[84]

a. *The Standard of Merchantability.* Section 2-314(2) defines merchantable goods as possessing "at least" five qualities,[85]

80. Thomas v. Olin Mathieson Chem. Corp., 255 Cal. App. 2d 806, 63 Cal. Rptr. 454 (2d Dist. 1967) (plaintiff, a big game hunter, allowed to recover expenses of unsuccessful safari from manufacturer of defective rifle on theory of express warranty in newspaper advertisement).

81. "Privity is not required for an action based upon an express warranty." Hauter v. Zogarts, 14 Cal. 3d 104, 114 n.8, 534 P.2d 377, 383 n.8, 120 Cal. Rptr. 681, 687 n.8 (1975) (citing Seely v. White Motor Co., 63 Cal. 2d 9, 14, 403 P.2d 145, 148, 45 Cal. Rptr. 17, 20 (1965)).

82. " 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed . . . ." U.C.C. § 2-104(1). But even non-merchants must disclose known latent defects. U.C.C. § 2-314, Comment 3.

83. Ezer, *supra* note 61, at 292 ("[T]he law inserts a warranty that the goods sold are merchantable, the presumption being that the parties themselves, had they thought of it, would specifically have so agreed").

84. *Cf.* Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 379, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974) (applying implied warranty principles to builders and vendors of new construction).

85. (2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and

of which two are significant to the consumer-purchaser. Goods may be merchantable only if they "are fit for the ordinary purpose for which such goods are used"[86] and "conform to the promises or affirmations of fact made on the container or label if any."[87] It is the "fitness for ordinary purpose" concept which is fundamental to the definition of merchantability.[88] While this standard is easy to apply in the typical case of an item that clearly malfunctions, the test becomes fuzzy at the edges. Debates over the merchantability of uncrashworthy cars,[89] cosmetics causing allergic reactions,[90] and lethal products such as whiskey or cigarettes[91] testify to the complexity inherent in this elusive standard.

Many cases discussing this subject argue in conclusory terms about whether an item is "defective" or a use "ordinary." These debates shed more heat than light on the issue. The determination of whether or not a product is merchantable might better be reached by balancing a variety of factors including the probability and magnitude of the threatened injury, its remoteness in time or causation, its foreseeability to the buyer or seller, the relative difficulty to the seller or buyer of preventing the injury, and even the cost of the product itself.[92]

(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

U.C.C. § 2-314.

86. *Id.* § 2-314(2)(c).

87. *Id.* § 2-314(2)(f). The latter provision adds little to the rights the buyer has under express warranties except in jurisdictions which continue to require reliance upon express warranties to satisfy the "basis of the bargain" requirement.

88. U.C.C. § 2-314, Comment 8.

89. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) (uncrashworthy automobile frame held not to be unmerchantable because collision is not the "intended" use). Many cases and commentators have rejected the *Evans* approach as illogical and contrary to public policy. *E.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969) (intended use standard should not exempt the manufacturer from responsibility for the faulty performance of his product when consequences occur which he may readily foresee as incident to its normal use); Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967).

90. *See, e.g.*, Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1st Dist. 1968).

91. *See, e.g.*, Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir.), *cert. denied*, 397 U.S. 911 (1969) (cancer-causing cigarettes not "defective").

92. U.C.C. § 2-314, Comment 7 ("In case of doubt as to what quality is intended,

A second response to the merchantability question, which also fails to weigh the above factors, is the attempt to shift the responsibility for the court's decision onto the legislature. Some courts point to the legislature's failure to outlaw a particular product or product design as the justification for finding such design merchantable.[93] But the "better left to the legislature" reasoning does not diminish the fact that the court has made a decision; rather it serves as a convenient rationalization for the status quo. Since the legislature has spoken on the subject of merchantability, even if the words are ambiguous and the mandate unclear, the courts must still interpret them in the light of sound public policy and the ascertainable legislative intent. The official comment to section 2-314 states:

> Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . . ," and the intention is to leave open other possible attributes of merchantability.[94]

Given this explicit sanction of judicial development, it seems that

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the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation . . . "). *See* Sylvia Coal Co. v. Mercury Coal & Coke Co., 151 W. Va. 818, 156 S.E.2d 1 (1967) (low contract price for coal used to decide scope of seller's implied warranty of merchantability).

It may be easier to explain many of the merchantability cases on the basis of these factors rather than the labels they employ. For example, Dean Prosser noted that the crashworthiness cases that have denied recovery "have tended to be those in which protection of the plaintiff would have required an extensive and costly redesign of the entire automobile, while those allowing it would have tended to call for only minor and inexpensive changes in detail."
PROSSER, *supra* note 28, § 96, at 646.

The California Supreme Court recently defined as "defective in design" for strict products liability purposes any product failing to perform "as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Barker v. Lull Engineering Co., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978). The court noted that this standard is analogous to the U.C.C. standard of merchantability. This standard is broader than a strict intended use test. In addition, the court added to its definition of design defect the requirement that the benefits of the challenged product design outweigh its risks. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

93. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822, 824 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) ("to require manufacturers to construct automobiles in which it would be safe to collide . . . would be a legislative function"). *But see* Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1975) (no preemption).

94. U.C.C. § 2-314, Comment 6. *See also* 15 U.S.C. § 1392(d) (1976), which states,

> Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles . . . if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

the assertion of lack of authority is actually an apologetic abdication of judicial responsibility.

b. *Scope and Operation of Section 2-314.* As with express warranties, an action for breach of the implied warranty of merchantability need not allege negligence by the seller or his knowledge of any defect,[95] although the buyer still must prove damages proximately caused by a defect existing at the time of the sale.[96] Under the U.C.C., implied warranties are easier to disclaim than express warranties,[97] but unlike oral express warranties,[98] implied warranties are not subject to the parol evidence rule because they are not based on the parties' agreement, arising instead by operation of law.[99]

By its terms, section 2-314 applies only to the sale of goods by a merchant, but there has been a judicial trend to extend implied warranties into other transactions,[100] *e.g.*, leases of personal property[101] and sales[102] and leases[103] of real property. On the question of whether the implied warranty of merchantability exists in the sale of *used* goods, the California courts have not taken a position. The fact that neither section 2-314 nor the Code's all-inclusive definition of "goods"[104] in any way excludes secondhand goods suggests that they might be covered. The official comment also

95. *But cf.* Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1st Dist. 1968) (harm to recognizable number of users of skin cream must be foreseeable).

96. WHITE & SUMMERS, *supra* note 66, at 286.

97. *Compare* U.C.C. § 2-316(1) *with id.* § 2-316(2)-(3). *See also* notes 209-28 & accompanying text *infra* (discussing disclaimers).

98. *See* note 212 & accompanying text *infra*.

99. Holmes Packaging Mach. Corp. v. Bingham, 252 Cal. App. 2d 862, 60 Cal. Rptr. 769 (1st Dist. 1967). The significance of this exemption is that a party desiring to eliminate implied warranties must comply with the more stringent requirements of U.C.C. § 2-316, particularly the requirement of conspicuousness; the typical merger clause under U.C.C. § 2-202(b) which states that the writing is a "complete and exclusive statement of the terms of the agreement" will not suffice. Otherwise, the requirements of § 2-316 would be so easily circumvented as to render the provision meaningless.

100. *See* Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971).

101. *E.g.*, Holmes Packaging Mach. Corp. v. Bingham, 252 Cal. App. 2d 862, 873, 60 Cal. Rptr. 769, 775-76 (1st Dist. 1967); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

102. In Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974), the California Supreme Court ruled that builders and sellers impliedly warrant that new construction is designed and constructed in a reasonably workmanlike manner. Plaintiffs were denied recovery, however, because they waited almost four years before giving notice of the defects; the court applied the notice requirement of U.C.C. § 2-607(3) by analogy.

103. Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (imposing an implied warranty of habitability on all residential landlords and permitting tenants to use it as a defense in unlawful detainer actions).

104. *See* U.C.C. § 2-105(1), *quoted at* note 50 *supra*.

implies that used goods are included, although the standard of merchantability would involve "only such obligation as is appropriate to such goods."[105] A growing minority of jurisdictions have adopted this view.[106]

These extensions of the implied warranty concept are sanctioned by the official comment's proclamation of a hands-off policy designed not 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 to such a contract."[107] Nonetheless, contracts for services have generally remained outside of the penumbra of section 2-314,[108] while treatment of the various hybrid sales-service transactions has been anything but uniform.[109]

c. *Defenses.* It is generally accepted that section 2-314 applies only to the direct seller.[110] Because the remote manufacturer makes no implied warranty of merchantability to the consumer, privity requirements bar an action unless there is an express warranty or personal injury results.[111]

Causation-related defenses can also defeat an action for breach of the implied warranty of merchantability. The buyer must prove not only that a defect existed at the time of sale, but also that the breach was the proximate cause of the damages sustained.[112] The issue of proximate cause is no more susceptible of easy resolution here than in the area of torts. "[A]n affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense,"[113] as where the buyer misused or improperly maintained the product. Moreover, the buyer's "assumption of the risk," that is, his voluntary and unreasonably close encounter with a known

105. U.C.C. § 2-314, Comment 3.

106. *E.g.*, Chamberlain v. Bob Matick Chevrolet, Inc., 4 Conn. Cir. Ct. 685, 239 A.2d 52 (1967); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976). *See also* Comment, *Are There Implied Warranties on Used Cars in California?*, 9 U.S.F.L. REV. 539 (1975).

107. U.C.C. § 2-313, Comment 2.

108. *E.g.*, Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1st Dist. 1973) (no implied warranty of merchantability in blood transfusion defined by statute as a service).

109. *See, e.g.*, Murray, note 100 *supra*; Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 11 (1972).

110. *See* WHITE & SUMMERS, *supra* note 66, at 333-35.

111. *See* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (2d Dist. 1972) (no implied warranty arises without privity of contract).

112. U.C.C. § 2-314, Comment 13.

113. *Id.*

risk, may reduce recovery.[114] Finally, the implied warranty of merchantability is subject to total or partial eradication by means of exclusions and modifications of warranty.[115]

3. The Implied Warranty of Fitness for a Particular Purpose

The third type of U.C.C. warranty of interest to consumers is the implied warranty of fitness for a particular purpose under section 2-315. This warranty arises "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods . . . ."

The official comment suggests that the particular purpose must differ from the ordinary purpose for which the goods are used.[116] But for whatever purpose the goods are purchased, the buyer, in order to receive an implied warranty of fitness for a particular purpose, must rely on the seller's skill or judgment in furnishing suitable goods.[117] The seller, who need not be a merchant, must have reason to know of the buyer's particular purpose and of his reliance on the seller.[118]

Generally, the same causation-related defenses apply here as in the context of implied warranties of merchantability. In the case of an implied warranty of fitness, however, there usually is privity of contract because this warranty only arises between parties who have somehow dealt directly with one another. Often the same conduct which creates an implied warranty of fitness also

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114. *See* PROSSER, *supra* note 28, at 522-24.

115. *See* notes 209-28 & accompanying text *infra*.

116. U.C.C. § 2-315, Comment 2. But it is arguable that an *unusual* purpose should not be a necessary precondition. One major objection to the extraordinary use requirement is that it compels courts to distinguish such purposes from ordinary purposes, a venture already shown to be hopeless in the crashworthy car cases. The comment's example of a particular purpose is the sale of shoes bought for the purpose of climbing mountains, but it is unclear why such use is at all extraordinary for climbing shoes. Secondly, it appears that the equities are the same whether the buyer relies on the seller to select suitable hiking boots, street shoes, or golden slippers.

Therefore, a better construction of the term "particular purpose" might require a specific rather than unusual purpose. Unfortunately, few cases have adopted this interpretation. *See* cases cited in 1 R. ANDERSON, *supra* note 66, § 2-315:14 (Supp. 1977). This issue is of practical significance only where there is no express warranty and no implied warranty of merchantability, because, for example, the seller is not a merchant in goods of that kind.

117. The mere existence of a patent or trade name is not dispositive of the issue of reliance. U.C.C. § 2-315, Comment 5. But if the buyer provides the technical specifications or demands a particular brand, it is unlikely that he is relying on the seller. *Id.* The same is true if the buyer possesses greater expertise than the seller. *E.g.*, Sylvia Coal Co. v. Mercury Coal & Coke Co., 151 W. Va. 818, 828, 156 S.E.2d 1, 7 (1967).

118. Actual knowledge is not necessary. U.C.C. § 2-315, Comment 1.

gives rise to an oral express warranty under section 2-313.[119] In that event, the only significant advantage of the implied warranty of fitness is that, being implied by law, it does not run afoul of the parol evidence rule.[120]

B. *Buyer's Remedies for Breach of Warranty*

When a product does not comply with any warranty of quality, express or implied, the U.C.C. gives the buyer an assortment of remedies to put him in as good a position as he would have held if the warrantor had fully complied with the warranty.[121] The U.C.C. does not grant the buyer punitive damages.[122] The remedies include the buyer's rights to reject the non-conforming goods, revoke acceptance of them, "cover" by purchasing substitute goods, and recover damages for the breach of warranty.[123]

1. Rejection and Revocation of Acceptance

a. *Rejection*. The buyer may reject goods if they "fail in any respect to conform to the contract."[124] This provision, while often called the "perfect tender rule," may be largely illusory due to a host of exceptions.[125]

The most significant encroachment on the buyer's apparently absolute right to reject is the seller's right to cure. The U.C.C. gives a seller a right to cure any improper tender if the time for performance has not yet passed.[126] Even if it has, the seller has a

119. Both warranties would arise, for example, when a seller expressly promises that the goods will satisfy the buyer's particular requirements.

120. *See* note 99 & accompanying text *supra*. *But see* Dekofski v. Leite, 336 Mass. 127, 129, 142 N.E.2d 782, 784 (1957) (pre-Code). An exemption from the parol evidence rule for this implied warranty is questionable, given its similarity to an oral express warranty.

121. U.C.C. § 2-711(1). *See generally* Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).

122. *See* U.C.C. §§ 2-711 to -721. Moreover, the California Civil Code authorizes the recovery of exemplary damages only in actions "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied." CAL. CIV. CODE § 3294 (West 1973). However, in Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959), the court awarded punitive damages in a fraudulent real estate transaction because the defendant violated non-consensual obligations implied by law. Query whether violations of implied warranties should be treated similarly if the purchaser can make the requisite showing of oppression, fraud, or malice.

123. U.C.C. § 2-711(1).

124. *Id.* § 2-601.

125. *See* WHITE & SUMMERS, *supra* note 66, at 257.

126. "Where any tender of delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." U.C.C. 2-508(1). Read literally, this subsection would permit

"further reasonable time" to attempt a cure, provided the seller had reasonable grounds to believe his original tender would be acceptable to the buyer.[127]

Further limitations on the buyer's right to reject are detailed in U.C.C. section 2-602(1). This subsection requires a rejection to be made within a reasonable time after delivery[128] and further provides that rejection is "ineffective" unless the buyer "seasonably" notifies the seller. These procedural limitations on the buyer's right to reject can easily prove to be traps for the unwary consumer.

b. *Revocation of Acceptance.* Once goods have been accepted, the buyer's primary remedy for breach of warranty is revocation of the acceptance.[129] A buyer may accept goods in several ways. The buyer's acceptance may be express, as where the buyer signifies to the seller that he will keep the goods.[130] This type of acceptance, however, cannot occur until the buyer has had a "reasonable time to inspect the goods."[131] The concept of a reasonable time is sufficiently flexible to take into account the sophistication of the buyer as well as the complexity of the goods.[132] The buyer can also accept by making an ineffective rejection.[133] Finally, the buyer can accept by doing any act which is "inconsistent with the seller's ownership."[134] Acts "inconsistent with the seller's ownership" include only those acts which are inconsistent with the buyer's claim that he has rejected.[135] Actions such as use of the goods may not constitute acceptance, however,

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the seller to cure any tender, no matter how nonconforming, so long as the time for performance has not yet expired.

127. "Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a futher reasonable time to substitute a conforming tender." U.C.C. § 2-508(2). Under this section, it would seem that a cure could not be in the form of a money allowance.

128. What constitutes a "reasonable time" is of course a function of the circumstances of each case. U.C.C. § 1-204(2). Relevant circumstances to consider should include such factors as the sophistication of the buyer, the complexity of the goods, and the difficulty of discovering the particular defect. *See, e.g.*, Lawner v. Englebach, 433 Pa. 311, 249 A.2d 295, 5 U.C.C. Rep. Serv. 1236 (1969) (the court found the fact that the buyer of a diamond ring was a consumer, and not an expert, to be relevant to a determination of what was a "reasonable time" in which to reject).

129. U.C.C. § 2-608.

130. *Id.* § 2-606(1)(a).

131. *Id.*

132. *See* note 128 *supra*. In the case of an automobile, for example, a reasonable time should be long enough to permit the buyer to have the car checked over by his mechanic.

133. U.C.C. § 2-606(1)(b).

134. *Id.* § 2-606(1)(c).

135. *Id.* § 2-606, Comment 4.

if dictated by necessity.[136]

From the buyer's perspective, the major disadvantage of revocation of acceptance is that, unlike the right to reject, the right to revoke acceptance is conditioned upon the defect being "substantial."[137] However, once the buyer revokes acceptance, he need not permit the seller to cure.[138]

If the buyer accepted goods with knowledge of a defect, he is precluded from revoking his acceptance unless he accepted with the reasonable assumption that the nonconformity would be cured.[139] If the buyer was unaware of the defect when he accepted, his acceptance must be attributable either to the difficulty of discovering the defect or to the seller's assurances.[140] Revocation of acceptance must occur within a reasonable time and must be made before any deterioration in the goods not caused by their

136. *Cf.* Minsel v. El Rancho Mobile Home Center, Inc., 32 Mich. App. 10, 188 N.W.2d 9, 9 U.C.C. Rep. Serv. 448 (1971) (concluding that use of a mobile home by a buyer for six weeks after he sent a "letter of rejection" did not preclude "rescission").

137. The wording of U.C.C. § 2-608, which refers to a defect which "substantially impairs [the value of the goods] to him" implies a subjective test. *See* U.C.C. § 2-608, Comment 2. This comment indicates that the particular circumstances of the buyer can make a defect substantial to him. Nonetheless, it is unlikely that a buyer will frequently be able to convince a trier of fact that an objectively trivial defect is nonetheless substantial to him. *See* WHITE & SUMMERS, *supra* note 66, at 260.

The concept of "substantial non-conformity" would seem to be closely related to the common law concept of "material breach." The *Restatement of Contracts* lists the following factors as being relevant in a determination of whether a breach is material:

> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
> (e) The willful, negligent, or innocent behavior of the party failing to perform;
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

RESTATEMENT OF CONTRACTS § 275 (1932).

138. A buyer who has revoked has the "same rights and duties with regard to the goods involved as if he had rejected them." U.C.C. § 2-608(3). It thus might be argued that the revoking buyer has a "duty" to accept a cure by the seller, just as the buyer has a duty to accept cure after rejecting goods.

Although this argument seems plausible, it is probably incorrect. The Code draftsmen specifically gave the seller a right to cure after the buyer rejected goods. U.C.C. § 2-508. Had they intended the seller to have such a right after the buyer revoked acceptance, it is surprising that they did not say so. Furthermore, a right to reject an installment is expressly made dependent on the defect being substantial and "non-curable." U.C.C. § 2-612. Both of these sections show that when the Code draftsmen wanted to give a seller a right to cure after rejection, they did so.

139. U.C.C. § 2-608(1)(a).

140. *Id.* § 2-608(1)(b).

own defects occurs.[141]

Presumably, the requirement that revocation of acceptance occur within a reasonable time, like the requirement that revocation be made before the goods substantially change, is designed to protect the seller. Therefore, it seems that the buyer should be allowed to revoke acceptance at any time before his delay would injure the seller.

c. *Effect of Rejection and Revocation of Acceptance.* The Code expressly rejects the notion that a buyer must elect between the remedy of damages and the remedies of rejection or revocation of acceptance.[142] Once the buyer rightfully rejects or justifiably revokes acceptance, he may cancel the contract, obtain a refund of monies already paid, and receive damages.[143] Alternatively, the buyer may "cover" by making a prompt and reasonable substitute purchase, and he then may receive the difference between the contract and cover price.[144]

The right to reject is subject to any contractual limitations on remedies.[145] Although the right to revoke is not expressly made subject to such contractual limitations, the text of U.C.C. section 2-719 makes it clear that the parties can agree to eliminate the buyer's remedy of revocation, as by limiting the buyer's remedies to repair and replacement of the goods.[146]

Since most modern consumer warranties limit the buyer's remedies to repair or replacement,[147] the U.C.C. provisions regarding rejection and revocation of acceptance will not frequently be brought into play. They remain relevant, though, in cases where the parties have not agreed to a limitation of remedies, or where the limitation of remedies clause is rendered inoperative.[148]

2. Damages and the Likelihood of Recovery

"*For every wrong there is a remedy.*"[149]

In *Seely v. White Motor Co.*,[150] the California Supreme Court adopted a "nature of the damage" test for application of strict tort liability. Under this test, when a defective product causes per-

141. *See id.* § 2-608(2).
142. *See id.* Comment 1.
143. *Id.* § 2-711(1).
144. *Id.* § 2-712.
145. *Id.* § 2-601.
146. *Id.* § 2-719(1)(a).
147. Random Survey of Consumer Warranties (on file with the *UCLA Law Review*).
148. *See* notes 231-49 & accompanying text *infra*.
149. CAL. CIV. CODE § 3523 (West 1973).
150. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

sonal injury or property damage rather than mere economic losses, the injured party can ignore the U.C.C., privity, disclaimers, and notice requirements and, in a strict liability tort action, recover all damages proximately caused.[151]

As a result of *Seely*, in California the U.C.C. governs purely economic losses, both the direct loss of the value of the defective item and the consequential loss of profits or other commercially cognizable indirect losses.[152] Left to the mercies of the U.C.C. provisions, the aggrieved consumer with an incontrovertibly breached warranty must count himself fortunate if he succeeds in getting even a refund of his purchase price. Working against him are the following factors: (1) consumer warranties customarily provide that repair or replacement is the sole remedy of the buyer;[153] (2) even if that sole remedy "fail(s) of its essential purpose,"[154] the warranty usually excludes consequential damages; (3) even if this exclusion is found to be unconscionable[155] or is otherwise circumvented, a consumer's consequential damages are usually negligible: his primary damages are measured in time, trouble, and frustration;[156] (4) if, somehow, the buyer's losses are substantial, he can only recover those which are generally foreseeable to the seller and unavoidable by the buyer;[157] (5) the damages for breach of warranty as measured by the warranted value minus actual value under section 2-714(2) or by the cover price minus contract price under section 2-712(2) will rarely yield more than the purchase price; (6) so as not to be barred from all remedy, he must have surmounted the privity barrier; he must have given the seller notice of the breach within a reasonable time;[158] and he must have brought his action within four years after the sale or after the discovery of the breach if there is an express warranty of future performance;[159] (7) finally, even if the consumer miracu-

151. Justice Peters proposed a "nature of the transaction" test which would have left commercial, but not consumer, purchasers to the provisions of the U.C.C. irrespective of the type of damage incurred. *Id.* at 26, 403 P.2d at 153, 45 Cal. Rptr. at 23 (Peters, J., concurring).

152. *See* U.C.C. § 2-715.

153. Random Survey of Consumer Warranties (on file with the *UCLA Law Review*).

154. U.C.C. § 2-719(2). *See* notes 232-43 & accompanying text *infra*.

155. U.C.C. § 2-719(3).

156. Perhaps some of the buyer's expenses would be compensable as incidental damages under § 2-715(1).

157. *Id.* § 2-715(2).

158. *Id.* § 2-607(3)(a). " 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." *Id.* Comment 4.

159. *Id.* § 2-725(2). The parties can "agree" to reduce the period of limitations to as little as one year. *Id.* § 2-725(1). If personal injury results, a one year limitation

lously overcomes all of the above obstacles, the U.C.C. does not provide for recovery of exemplary damages[160] or attorneys' fees.[161] Thus a lawsuit could easily result in a net loss to the "prevailing" consumer.

C. *Disclaimers of Warranty and Limitations of Remedy*

Under the U.C.C., sellers may limit their liability for defective products either by disclaiming, modifying, or excluding the warranty under section 2-316 or by limiting remedies under section 2-719. Both sections reflect the Code's embodiment of the principle of freedom of contract[162] by allowing the seller to reallocate to the buyer the risk of loss due to defects.

1. General Restrictions on Risk-Shifting Clauses

Nonetheless, sections 2-316 and 2-719 limit permissible risk shifting, and there are more general provisions in the U.C.C. and common law of contracts[163] that regulate the content of all contract terms and prescribe methods of interpreting them.

a. *The Contract of Adhesion.* The essence of the principle of freedom of contract is that the parties should be allowed to bargain for whatever terms and conditions they see fit to include in their agreement. Once such an agreement has been created, the coercive apparatus of the legal system is generally available for its enforcement. The underlying assumption is that there has indeed been a bargained-for exchange expressing the mutual assent of the parties.[164] The problem in consumer transactions is that warranty disclaimers and limitations are by no means the product of an agreement or mutual assent. Rather, they tend to be imposed by the stronger party via the standard form boiler-plate warranty[165]

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period applies. CAL. CIV. PROC. CODE § 340(3) (West Supp. 1978); Becker v. Volkswagen of America, Inc., 52 Cal. App. 3d 794, 125 Cal. Rptr. 326 (1st Dist. 1975).

160. *See also* CAL. CIV. CODE § 3294 (West 1970) (exemplary damages recoverable in actions not based on contract); note 122 *supra*. *But see* Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965) (granting punitive damages under the U.C.C.).

161. California courts are authorized to award attorneys' fees to successful plaintiffs enforcing important rights affecting the public interest. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1979). But the vast majority of consumer lawsuits probably could not meet all the conditions set forth in the statute which is apparently aimed at the major public interest lawsuit.

162. *See* U.C.C. § 1-102(3) & Comment 2.

163. *See id.* § 1-103 (unless displaced by U.C.C., common law supplements its provisions).

164. *See id.* §§ 1-201(3) (defining "agreement"), 1-201(11) (defining "contract"). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 19(1) (1973).

165. *See* Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962).

> In the advanced industrial society, the economic apparatus is no longer

upon consumers who lack both the knowledge and choice necessary for an actual agreement.

How then can these seller-protection clauses be considered part of the contract at all? The answer lies in what is commonly known as the "Objective Theory of Contracts," which, in order to prevent fraud and ease the task of the factfinder, elevates the physical manifestations of assent over assent-in-fact.[166] However, the fundamental presupposition of this theory, that certain acts or words are the best evidence of the parties' actual intentions, while true for negotiated commercial contracts, is patent nonsense when applied to the consumer warranty. Acquiescence to terms which the buyer could neither comprehend nor hope to alter constitutes real consent to little more than the barest of agreements. Karl Llewellyn suggested a special approach for this type of contract:

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the . . . dickered terms which constitute the dominant and only real expression of agreement . . . .[167]

But courts have yet to adopt such a standard, perhaps due to its vagueness and unworkability, or to the absence of statutory authority. They continue instead to rely on contract-policing doctrines such as mistake, duress, construction against the drafter, undue influence, public policy, and others. Unfortunately, these

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> focused on the particular tastes and the particular desires of individuals, but is based on mass production . . . . One speaks of the standardized mass contract or—and this term might even be preferable—of standardized forms of business transactions or standard contracts or . . . "contracts of adhesion" . . . not formulated as a result of the give-and-take of bargaining . . . .

Id. at 481.

166. *See generally* Dauer, *Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction*, 5 AKRON L. REV. 1 (1972). According to Judge Hand:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912).

167. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

doctrines suffer from the same flaws.[168]

b. *Post-Sale Disclaimers and Limitations.* Special objections can be raised to disclaimers and limitations in those cases where the consumer does not see the warranty or disclaimer until after the sale, *i.e.*, the warranty-in-the-box problem. While risk-shifting clauses are not subject to any particular "basis of the bargain" requirement,[169] neither are they exempt from ordinary principles of contract formation. Since the post-sale disclaimer must be part of the agreement in order to be enforceable,[170] it could not be found binding without resort to some theoretical device, as those discussed earlier in the context of the post-sale express warranty.[171]

The theories which justify enforcing a post-sale express warranty, however, cannot be bent to support the warrantor's risk-shifting clauses. For example, the policy of protecting defenseless consumers, which underlies forcing the warrantor to stand behind his warranty regardless of the buyer's lack of reliance, clearly militates against enforcement of unseen and incomprehensible terms which reduce the buyer's rights.

Relying on the modification of contract theory,[172] however, one finds it more difficult to distinguish between provisions creating and those limiting warranties. It could be argued that by purchasing the product, the buyer implicitly agrees to accept all present or future contract terms that guarantee its quality. The same assumption may not be made regarding terms which eviscerate the buyer's rights. Disclaimers and limitations of remedy are "repugnant to the basic dickered terms"[173] because they frustrate rather than fulfill the purchaser's reasonable expectations. Thus, they do not merit identical treatment.

Some might argue that the distinction between provisions creating and those limiting warranties may be justified by reasoning according to principles of section 2-207. Under that section, additional terms in an acceptance or confirmation may become part of a contract between merchants unless the terms "materially alter" the contract.[174] Due to the existence of the implied warranty of merchantability, an express warranty does not constitute

168. *See* Dauer, *supra* note 166, at 19-32; notes 30-34 & accompanying text *supra*.

169. Express warranties must be part of the "basis of the bargain" in order to be enforceable. *See* U.C.C. § 2-313.

170. U.C.C. § 2-719(1)(a) allows limitations of remedy by "agreement" and § 2-316(2) goes further to require that disclaimers of warranty be "conspicuous."

171. *See* notes 57-73 & accompanying text *supra*.

172. *See* notes 66-71 & accompanying text *supra*.

173. U.C.C. § 2-313, Comment 1.

174. *Id.* § 2-207(2)(b).

a material alteration, but disclaimers and limitations of remedy normally do. The comment to this section specifically mentions clauses negating implied warranties as examples of material alterations which are not part of even the commercial contract unless the buyer expressly agrees to them.[175] That a consumer should not be bound by them follows a fortiori.

If the product costs over $500, the warrantor asserting any of the exculpatory clauses as contract modifications faces the additional obstacle of the Statute of Frauds.[176] In that event, the warrantor's best hope is probably a signed warranty registration card by which the buyer purportedly agrees to all the warranty terms. This apparently would constitute a valid agreement modifying the contract while simultaneously satisfying the Statute of Frauds. These cards are commonly provided by warrantors, who often require that they be signed and returned within a certain period of time as a condition of warranty service.[177] This requirement, however, is invalid under the California Commercial Code,[178] and, in the case of a "full warranty," is both invalid[179] and possibly an actionable "deceptive warranty"[180] under Magnuson-Moss. Thus, on statutory policy grounds, courts should give no effect to these cards.

Perhaps the most important distinction between post-sale terms creating warranties and those limiting them is simply that the courts recognize the latter to be unfair impositions on consumers.[181] Pre-Code case law generally refused to enforce such terms.

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175. *Id.* Comment 4.

176. Section 2-209(3) requires that section 2-201 on the Statute of Frauds be satisfied if the modified contract is within its provisions. However, it may be that the exception from the Statute of Frauds for goods which have been accepted and paid for or received, U.C.C. § 2-201(3)(c), may extend to modifications.

177. *See* Random Survey of Consumer Warranties (on file with the *UCLA Law Review*.

178. CAL. COM. CODE § 2801 (West Supp. 1979) provides:

> In any retail sale of goods, if the manufacturer or seller of the goods issues a written warranty or guarantee as to the condition or quality of all or part of the goods which requires the buyer to complete and return any form to the manufacturer or seller as proof of the purchase of the goods, such warranty or guarantee shall not be unenforceable solely because the buyer fails to complete or return the form. This section does not relieve the buyer from proving the fact of purchase and the date thereof in any case in which such a fact is in issue.
>
> The buyer must agree in writing to any waiver of this section for the waiver to be valid. Any waiver by the buyer of the provisions of this section which is not in writing is contrary to public policy and shall be unenforceable and void.

179. *See* notes 462-64 & accompanying text *infra*.

180. *See* notes 538-43 & accompanying text *infra*.

181. In Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974), the court held a disclaimer of implied warranties delivered after the buyer had

As stated by Williston, "if a bargain with an implied warranty has once arisen, a subsequent disclaimer of warranty when the goods are delivered will not avail the seller."[182] If anything, that refusal has strengthened since the adoption of the U.C.C. In *Dorman v. International Harvester Co.*,[183] a California appellate court voided a post-sale disclaimer and limitation of consequential damages based on the following rule: "A disclaimer of warranties must be specifically bargained for so that a disclaimer in a warranty given to the buyer *after* he signs the contract is *not* binding."[184]

If the *Dorman* rule were to be strictly enforced, however, virtually no disclaimer in a consumer warranty would ever be upheld. Moreover, a specific bargaining requirement is so inimical to the prevailing objective theory of contracts[185] that it is unlikely to be invoked except in consumer transactions or relatively egregious circumstances.

Naturally, if the parties expressly agree to the disclaimer, it will be upheld. The California Supreme Court stated in *Hauter v. Zogarts*: "Although the parties are free to write their own contract, the consumer must be placed on fair notice of any disclaimer or modification of a warranty and must freely agree to the seller's terms. 'A unilateral nonwarranty cannot be tacked to a contract containing a warranty.' "[186]

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already contracted to buy the automobile to be unenforceable and unconscionable. But the court relied on the rest of the express warranty delivered at the same time to hold the manufacturer liable. This case also provides an instructive example of the effectiveness and perils of extra-judicial consumer redress: after repeated failures to have his car repaired by the dealer, the frustrated buyer exhibited the vehicle on his property with six prominent signs reading "This Is A Pile Of Junk," "This Car Comes From DeKalb Chrysler Plymouth," and "Undriveable." But the buyer did not receive the response that he had hoped for. Two of the dealer's salesmen tore down the signs, broke the car's window, and nearly ran the buyer down.

182. 8 S. WILLISTON, WILLISTON ON CONTRACTS § 993A, at 610 (3d ed. 1964). *See also* Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (3d Dist. 1966) (disclaimer on containers delivered after the sale held invalid).

183. 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975).

184. *Id.* at 19-20, 120 Cal. Rptr. at 522 (emphasis original). *See also* Koellmer v. Chrysler Motors Corp., 6 Conn. Cir. Ct. 478, 276 A.2d 807 (1970) (disclaimer contained in operator's manual of truck not binding on buyer because, *inter alia*, it was not delivered until after the sale was consummated); Omni Flying Club, Inc. v. Cessna Aircraft Co., 315 N.E.2d 885 (Mass. 1974) (limitation of remedy clause inoperative because buyer did not sign it and may not have had a copy of it at the time of sale); Dougall v. Brown Bay Boat Works & Sales, Inc., 287 Minn. 290, 178 N.W.2d 217 (1970); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

185. "[O]ne who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party." 67 AM. JUR. 2d, *Sales* § 491, at 664 (1973).

186. Hauter v. Zogarts, 14 Cal. 3d 104, 120, 534 P.2d 377, 387, 120 Cal. Rptr. 681, 691 (1975) (quoting Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 97, 54 Cal. Rptr. 609, 616 (3d Dist. 1966)).

c. *Unconscionability*. Of all the provisions of the U.C.C., the one that places the broadest limits on freedom of contract is section 2-302. This section permits courts to refuse to enforce, completely or in part, any contract or clause which they find to be unconscionable "as a matter of law" at the time it was made.[187] The statute nowhere defines unconscionability. Under common law an unconscionable contract was defined as one that "no man in his senses and not under a delusion would make on the one hand and as no honest and fair man would accept on the other."[188] More recently unconscionability was described as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[189] The official comment explains the statutory purpose to be "prevention of oppression and unfair surprise" through direct policing of contracts by the courts; the covert judicial techniques of the past are eschewed.[190]

While a great deal more could be and has been said on this topic,[191] much of it is of only academic importance in California because the state legislature chose not to enact section 2-302 into law, despite the urgings of eminent legal scholars.[192] The legislature feared that enactment of this section would encourage wholesale judicial rewriting of contracts[193] and that refusing to enact it would prevent such activities, a notion rebutted by generations of judicial ingenuity.[194]

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187. U.C.C. § 2-302(1). It appears odd to categorize a morality-laden term such as "unconscionability" as a matter of law; perhaps the decision reflects a political choice to keep the issue from a jury populated by consumers.

188. Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750).

189. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

190. The official comment to U.C.C. § 2-302 begins:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

191. For an introduction to the literature on the subject of unconscionability, see articles cited in WHITE & SUMMERS, *supra* note 66, at 115 n.12.

192. W. WARREN & H. MARSH, SIXTH PROGRESS REPORT TO THE LEGISLATURE BY SENATE FACT FINDING COMMITTEE ON JUDICIARY, PT. 1, THE UNIFORM COMMERCIAL CODE 455-56 (1959-61), *quoted in* CAL. COM. CODE § 2302, California Code Comment (West 1973).

193. *Id. See also* California State Bar Committee on the Commercial Code, *The Uniform Commercial Code*, 37 CAL. ST. B.J. 117, 135-36 (1962). That fear has not been borne out by the experience of other jurisdictions that did enact U.C.C. § 2-302; in only a handful of states have appellate courts actually voided contracts or clauses as unconscionable. *See* WHITE & SUMMERS, *supra* note 66, at 115.

194. *See* notes 29-34 & accompanying text *supra*. *See also* the pre-Code unconscionability cases cited in U.C.C. § 2-302, Comment 1.

Perhaps as a result of the legislature's reluctance to enact section 2-302, many of the covert tools used to police unfair contracts have been resharpened by California courts. Strict construction of statutes and contracts against drafters as well as modification of the rules of contract formation to prevent surprise and invalidate post-sale disclaimers retain vitality as doctrines that make life difficult for drafters of warranties.[195]

Additional methods for nullifying contracts deemed to be against the public interest also have been developed. In a line of cases beginning with *Tunkl v. Regents of University of California*[196] in 1963, California courts in a variety of contracts have voided exculpatory clauses deemed to be "against the public interest." In *Madden v. Kaiser Hospitals*, the state supreme court proclaimed: "[C]ourts will not enforce provisions in adhesion contracts which limit the duties or liability of the stronger party unless such provisions are 'conspicuous, plain and clear' and will not operate to defeat the reasonable expectations of the parties."[197] Although these cases deal only with clauses limiting liability for negligence, the principles enunciated therein have broader implications and serve the same policing function as the doctrine of unconscionability.

California courts could employ one other pro-consumer weapon: the common law doctrine of unconscionability, which predates the U.C.C.[198] In the District of Columbia case, *Williams v. Walker-Thomas Furniture Co.*,[199] the court relied on common law unconscionability, but only after the legislature had enacted section 2-302 and before the statute had taken effect. To apply the common law doctrine of unconscionability to sales of goods in California, however, would appear to fly in the face of legislative intent, a flight judges are justifiably reluctant to take. Thus, in *Dorman v. International Harvester Co.*,[200] the court used other grounds to void a disclaimer of warranties, while noting that it could have decided the issue of whether the disclaimer of implied warranties was "unconscionable under California common law."[201] Aside from the questionable propriety of using this doc-

195. *See, e.g.*, Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975) (disclaimer held ineffective because it was not sufficiently conspicuous, not specifically bargained for, and was ambiguous).

196. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (clause releasing hospital from liability for negligence).

197. Madden v. Kaiser Hosps., 17 Cal. 3d 699, 710, 552 P.2d 1178, 1185, 131 Cal. Rptr. 882, 889 (1976) (dictum) (arbitration provision upheld) (citation omitted).

198. *See, e.g.*, Swanson v. Hempstead, 64 Cal. App. 2d 681, 149 P.2d 404 (2d Dist. 1944) (attorney's contingent fee found not to be unconscionable).

199. 350 F.2d 445 (D.C. Cir. 1965).

200. 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975).

201. *Id.* at 21, 129 Cal. Rptr. at 523. Oddly enough, reliance on common-law

trine at all in California, the total absence of statutory guidelines lends credence to the additional criticism that a rule so unpredictable in scope or application can have little deterrent effect at all and can only protect the rare consumer whose case is brought to trial.[202]

d. *Good Faith and Reasonableness.* The concepts of good faith and reasonableness, unlike unconscionability, are not only part of the California Commercial Code, but they apply to every duty under it[203] and cannot be disclaimed by agreement of the parties.[204] The consumer's problems are not over, however. If the definition of unconscionability is elusive, the twin concepts of good faith and reasonableness are thoroughly obscure and, possibly, vacuous. The Code does define good faith as "honesty in fact,"[205] but, in the case of a merchant, it adds "observance of reasonable commercial standards of fair dealing in the trade."[206] No attempt is made to define "reasonableness."

Given the broad and hazy definitions of all of these terms, it seems that it would be easy to apply the latter two intangible standards which were enacted into law in California as a substitute for the one that was not. Nonetheless, the difficulty in fashioning workable standards to apply such all-embracing obligations as good faith and reasonableness, along with the total absence of any "enforcement" language as is present in section 2-302, makes this substitution unlikely.

Although dicta may be found to the effect that these terms can bar the enforcement of manifestly unreasonable or unfair clauses,[207] it is difficult to find cases that truly rely on such reasoning. Of course, outside of California, courts can simply use section 2-302.[208] But even in this state, the courts have hesitated to extend the principles of reasonableness and good faith beyond the role of canons of construction to the more rigorous task of directly policing contract provisions.

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unconscionability would circumvent the oft-debated issue of whether section 2-302 applies to disclaimers at all. *See, e.g.*, WHITE & SUMMERS, *supra* note 66, at 386-92.

202. *See* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 533 (1967). *Contra*, Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).

203. CAL. COM. CODE § 1203 (West 1973).

204. *Id.* § 1102(3).

205. *Id.* § 1201(19).

206. *Id.* § 2103(1)(b).

207. *E.g.*, Vlases v. Montgomery Ward & Co., 377 F.2d 846, 850 (3d Cir. 1967) (sale of diseased chicks; court's dicta indicated disclaimer could be voided as manifestly unreasonable).

208. Louisiana has not enacted article two of the U.C.C. and, therefore, its courts also cannot rely on section 2-302. U.C.C. Table 1, at XLIII (1978).

2. Specific Statutory Restrictions

a. *Disclaimers, Exclusions, and Modifications of Warranties.* The UCC permits warrantors to disclaim warranties,[209] a fact which has led to a good deal of litigation, confusion, and consumer frustration. The very idea of a disclaimer of express warranties appears oxymoronic. Permitting the seller to take away with one clause that which he has given with another does not exemplify the highest standards of fair dealing. As a result, section 2-316(1) seeks to protect the buyer from unexpected disclaimers by rendering inoperative negations or limitations of warranty which are inconsistent with express warranties.[210]

Considering the attitude of the courts toward disclaimers, the wise warrantor will not attempt to negate a written express warranty;[211] but he may be able to use the parol evidence rule to exclude prior or contemporaneous oral warranties.[212]

Under section 2-316(2), the implied warranty of merchantability can be excluded or modified if the word "merchantability" is mentioned and, in the case of a written disclaimer, if it is "conspicuous." Of course, mentioning the word

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209. *Id.* § 2-316.

210. *Id.* § 2-316, Comment 1. " 'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms." *Id.* § 2-313, Comment 1; *see* Hauter v. Zogarts, 14 Cal. 3d 104, 524 P.2d 377, 120 Cal. Rptr. 681 (1975) (words of disclaimer or modification give way to words of warranty absent clear agreement to the contrary).

211. *See* Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975).

> The purported disclaimers of warranty . . . highlight the absurdity of a rule of law which elevates these bland and substantially meaningless terms and conditions above the individually and expressly negotiated terms and conditions, and gives them controlling effect over specifically agreed upon items and conditions of the contract. To adhere to such a rule means that the law presumes that the buyer of a brand new automobile intends to nullify in general all of the things for which he has specifically bargained and will pay. We would presume the buyer does just the opposite.

Id. at 20-21, 120 Cal. Rptr. at 523 (quoting Berg v. Stromme, 79 Wash. 2d 184, 193, 484 P.2d 380, 385 (1971)).

212. U.C.C. § 2-316(2). Comment 2 remarks that this protects against false allegations of oral warranties, neglecting to mention that it also protects against true allegations. Nevertheless, the parol evidence rule may not be insurmountable if the oral express warranty is held to be a "consistent additional term" within the meaning of section 2-202(b) and if the instrument is found not to have been intended to be "a complete and exclusive statement of the terms of the agreement" because the buyer did not read or understand the merger clause. *See* U.C.C. § 2-202. The parol evidence rule can also be circumvented if the buyer can show that the oral warranty was made fraudulently, because the fraud exception to the parol evidence rule is brought into the U.C.C. through section 1-103. *See also* WHITE & SUMMERS, *supra* note 66, at 75.

merchantability to an average consumer is not likely to communicate much useful information to him or protect him from later disappointments.

General language, even if it does not mention merchantability, may also suffice to exclude the implied warranty of fitness for a particular purpose;[213] but, again, written disclaimers must be "conspicuous."[214] This term means "so written that a reasonable person against whom it is to operate ought to have noticed it . . . . Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."[215] This is a requirement that courts enforce energetically, striking disclaimers if they are at all imprecise or ambiguous,[216] if there is "only a slight contrast with the balance of the instrument,"[217] or if they are on the reverse side of the contract form.[218]

Notwithstanding the above limitations, section 2-316(3)(a) sets forth a simpler route to exclude implied warranties: "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like '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 . . . ."[219] Even under this provision, the consumer may be able to prove "circumstances indicating otherwise," *i.e*, that he was not familiar with the "ordinary commercial usage" contemplated by this subsection[220] and that its import was not made plain to him.[221] While this subsection does not explicitly demand conspicuousness per se, it does require that the buyer's attention be called to the exclusion and that it make plain the absence of implied warranties. Consequently, disclaimers of this type will not be enforced unless they are quite noticeable.[222]

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213. *E.g.*, "There are no warranties which extend beyond the description on the face hereof." U.C.C. § 2-316(2).

214. *Id.* Comments 3, 4.

215. *Id.* § 1-201(10).

216. *See, e.g.*, Boeing Airplane Co. v. O'Malley, 329 F.2d 585, 593 (8th Cir. 1964); Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516 (2d Dist. 1975).

217. Dorman v. International Harvester Co., 46 Cal. App. 3d at 19, 120 Cal. Rptr. at 522 (quoting Woodruff v. Clark Country Farm Bureau Coop. Ass'n, 286 N.E.2d 188, 198 (Ind. App. 1972) (quoting Greenspun v. American Adhesives, Inc., 320 F. Supp. 442, 444 (E.D. Pa. 1970)).

218. *E.g.*, General Elec. Credit Corp. v. Hoey, 7 U.C.C. Rep. Serv. 156 (N.Y. Sup. Ct. 1970). *Contra*, Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343 (Ky. Ct. App. 1970) (placement of disclaimer not determinative).

219. U.C.C. § 2-316(3)(a).

220. *Id.* Comment 7.

221. WHITE & SUMMERS, *supra* note 66, at 365.

222. *See* Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 396, 268 A.2d 345, 353 (L. Div. 1970).

Implied warranties may also be excluded as to defects that an examination should reveal, if the buyer examines the goods voluntarily or refuses to examine them despite the seller's demands.[223] This provision does not pose a significant problem for consumers, who generally buy articles in their packages, are not asked to inspect anything, and lack the expertise to be charged with knowledge of any but the most patent defects.[224]

Finally,[225] section 2-317(c) states that express warranties displace inconsistent implied warranties other than the implied warranty of fitness for a particular purpose. There are, however, several reasons to expect that California courts will stretch to avoid that result: (1) the statute creates a presumption that all warranties are cumulative and are construed as consistent unless that construction is impossible or unreasonable;[226] (2) the section is meant to apply only where "factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent";[227] (3) a warrantor who wishes to do so can explicitly disclaim implied warranties under section 2-316 and should not be permitted to avoid that section's restrictions covertly; (4) in ambiguous or confusing situations, as envisioned in this section, courts are likely to construe all provisions against the drafter, who is, after all, responsible for the confusion;[227.1] (5) a state court of appeal found that express automobile warranties did not negate any of the implied warranties.[228] It should be remembered, though, that even invalid disclaimers are likely to dissuade most consumers and many attorneys from attempting to assert their claims, either informally or in a court of law.

b. *Limitations of Remedy*. The second major technique for curtailing the liability of warrantors is the limitation of remedies permitted by section 2-719.[229] Such limitations do not act to disclaim the seller's warranty; rather they limit the buyer's rights upon breach of that warranty. Because these techniques may often lead to the same result, it may be asked why the U.C.C.'s treatment of these functionally similar clauses is so dissimilar.

223. U.C.C. § 2-316(3)(b) & Comment 8.

224. *Id.*

225. Exclusions of warranties by course of dealing or performance and usage of trade under U.C.C. § 2-316(3)(c) are not relevant to consumer transactions.

226. U.C.C. § 2-317 & Comment 1.

227. *Id.* Comment 2.

227.1. *See* CAL. CIV. CODE § 1654 (West 1973).

228. Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 652, 55 Cal. Rptr. 94, 102 (1st Dist. 1966).

229. Remedy is defined as "any remedial right to which an aggrieved party is entitled with or without resort to a tribunal." U.C.C. § 1-201(34).

The cases devote much more time and wrath to disclaimers than to limitations of remedy; yet in most consumer warranties, the express warranty of quality may render any subsequent disclaimer of implied warranties less meaningful.

In contrast, the standard limitation of remedy, which makes repair or replacement the buyer's sole recourse, is deceptively effective:

> For by generously admitting a sole (and minimal) obligation to keep trying until the promised defect-free product is delivered, it continues to deny—either expressly or by necessary implication—all other responsibility. And it does all of this in a virtuous and reassuring tone that is much appreciated by sales managers.
>
> If the language of this "guarantee" to repair or replace means what it says, what a consumer really buys from his dealer is not a properly operating color TV, stereo, dishwasher, or car. He buys a promised opportunity to get one sooner or later if in the meantime he cooperates with the manufacturer-wholesaler-dealer establishment. In effect, he not only has the role of final inspector in the production process, but is also expected to take all risks and bear all expenses involved in making that inspection.[230]

Although limitations of remedy are permitted by the U.C.C., an aggrieved purchaser receives some protections from section 2-719. For instance, the provision of a single remedy will not foreclose the availability of alternative remedies unless the remedy is expressly agreed to be exclusive.[231] Secondly, even a properly drafted limitation of remedies may be rendered ineffective under section 2-719(2): "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." Unfortunately, neither the statute nor the cases interpreting it have managed to explain clearly the meaning of a remedy's "essential purpose."[232]

The Code comment says that this section applies where an apparently fair and reasonable clause due to unforeseen circumstances deprives either party of the substantial value of the bargain.[233] It demands that there be "at least a fair quantum of remedy" for breach of the contractual obligations; otherwise the

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230. Mueller, *supra* note 3, at 581-82.

231. U.C.C. § 2-719(1)(b). *See also* Ford Motor Co. v. Reid, 250 Ark. 176, 184, 465 S.W.2d 80, 85 (1970).

232. *See generally* Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CALIF. L. REV. 28 (1977).

233. U.C.C. § 2-719, Comment 1. One might think that a clause drafted for the purpose of limiting the warrantor's liability would, if it actually survived the strictest of scrutinies and managed to shelter the warrantor, be deemed a grand success, the Evel Knievel of adhesion contracts. Not so, according to the Comment.

clause may be deleted as "unconscionable."[234]

The reference to unconscionability has little significance in other jurisdictions, but in California it may provide a route for the doctrine's application to limitations of remedy despite the legislature's failure to adopt the U.C.C.'s general unconscionability provision in section 2-302.[235] If so, the result is that limitations of remedy are vulnerable to attack not only if they were intolerably oppressive at inception,[236] but, unlike other clauses, also if they appeared fair at inception and only subsequently became oppressive.

The most common failure of essential purpose is the infamous "lemon" story in which the buyer is condemned endlessly to tow his defective automobile back to the dealer in a futile attempt to attain his sole remedy.[237] Tiring somewhat of hearing this refrain, the courts have held either that the limited remedy failed, making other remedies, such as lawsuits, available,[238] or that the contractual promise to repair itself had been breached, leading to the same result.[239] Moreover, limitations on consequential damages may be disregarded when the limited remedy fails, "giving way to the general remedy provisions of this Article."[240]

The essential purpose of limited remedies also fails if the time limit within which the buyer must give notice of defects is insufficient to discover latent defects.[241] Since such provisions are unfair from the outset, however, it is difficult to claim that their purpose failed. Rather, these contracts do not give a "fair quantum of remedy"[242] for breach and would be stricken on that ground.[243] The preceding examples demonstrate the virtual inscrutability of a

234. *Id.*

235. *See id.* § 2-719(3).

236. *See id.* § 2-302.

237. In this tragic scene, the buyer is portrayed by the heroic Sisyphus. He is sentenced to this absurd punishment by the "Big Four" (who reside at the peak of celestial Mt. Motown) because he took their advertisements seriously.

238. *E.g.*, Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227, 229 (Tenn. Ct. App. 1972).

239. *E.g.*, Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 465-66, 188 S.E.2d 250, 252-53 (1972). *See also* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

240. U.C.C. § 2-719, Comment 1. *See, e.g.*, Riley v. Ford Motor Co., 442 F.2d 670, 674 (5th Cir. 1971). *But see* Kohlenberger v. Tyson's Food, Inc., 256 Ark. 584, 597-98, 510 S.W.2d 555, 565 (1974). A similar result is now explicitly available under the "Lemon Rules" of Song-Beverly, CAL. CIV. CODE § 1793.2(d) (West Supp. 1979), and Magnuson-Moss, 15 U.S.C. § 2304(a)(4) (1976).

241. *E.g.*, Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968). *See generally* Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1974).

242. U.C.C. § 2-719, Comment 1.

243. Or this limit could be viewed as a manifestly "unreasonable time" which is invalid under section 1-204(1).

remedy's purpose and the ease with which equitable considerations can rush in to occupy a statutory vacuum. Thus, given the Comment's requirement that at least minimum adequate remedies be available, the remedy for breach of warranty is somewhat nonwaivable. The warranty itself, of course, may be disclaimed totally. This distinction is difficult to justify.[244]

Naturally, limitations of remedy, like warranty disclaimers, are ineffective as defenses in actions for personal injury or property damage based on negligence or strict liability in tort.[245] This result accords with the California Commercial Code:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable.[246]

Unfortunately, the statute says nothing about damages which are neither consumer-personal injury nor commercial, and the result is that, for such losses, there is no presumption one way or the other.[247]

Although unconscionability is a valid defense, its standard is more stringent than the "minimum adequate remedies" requirement stated in the comment. It is certainly preferable, however, for a buyer to be able to assert a defense explicit in the statute, rather than in the comments which are not enacted into law despite their accepted authority in construing the statutes.

Were a California court to ignore the comments and argue that only limitations of consequential damages are subject to the unconscionability restriction, it would still face the problem of the standard repair-or-replace-only remedy limitation which, by denying the remedy of a lawsuit, indirectly excludes consequential damages as well.

Some courts have imposed an additional control on remedy

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244. *See* notes 250-51 & accompanying text *infra*.

245. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).

246. CAL. COM. CODE § 2719(3) (West Supp. 1979). This section has the same meaning as U.C.C. § 2-719(3) but it clarifies the burden of proof. This modification in California does obviate the question of whether the "is not" at the end of the U.C.C. version refers to "not unconscionable" or to "not prima facie unconscionable" in favor of the buyer. *See* CAL. COM. CODE § 2-719(3), California Code Comment (West 1964).

247. An issue arises as to what are consumer as opposed to commercial losses. Article 2 of the U.C.C. does not define "consumer goods" but incorporates the section 9-109(1) definition: goods "used or bought for use primarily for personal, family, or household purposes." U.C.C. § 2-103(3).

limitations which is nowhere to be found in section 2-719 or its comments. Relying on the prevention of surprise rationale that underlies section 2-316(2),[248] they have required limitations of remedy, which serve the same risk-shifting function as disclaimers of warranty, to be conspicuous. While functionally this approach is certainly sensible, it is also undeniably in conflict with the structure and purpose of the Code, which keeps the issues of warranty disclaimers under section 2-316 and limitations of remedy under section 2-719 separate and distinct.[249]

3. Toward a More Unified Approach

As discussed above, the U.C.C. gives the warrantor two distinct methods of limiting his liability for breach of warranty, and these are subject to different controls. This dichotomy may lead to differing results in functionally identical situations.[250] For example, a modification of warranty which reduces the duration of all warranties to one month after purchase would be permissible if it were conspicuous and mentioned the word merchantability under section 2-316(2). But if the seller instead were to require the buyer to notify him of any defect within one month of purchase as a prerequisite to any remedy, this clause would survive only if it did not "fail of its essential purpose" under section 2-719(2). Moreover, while a limitation of consequential damages for breach of warranty must be "conscionable" under section 2-719(3), the complete eradication of the same warranty need not be (at least in California). It is difficult to conceive of any real-world difference between a clause limiting the *remedies* to repair and replacement of defective goods and a clause excluding all *warranties* except an express warranty to repair and replace defective goods.[251]

To the buyer, of course, there is little difference between a warranty with no remedy and no warranty at all. Elevating form over substance can only add to the plethora of confusion and inconsistency already present in the decisional law. But these inconsistencies cannot be eliminated by the courts when the root of the problem is in the structure of the statutes which they must interpret faithfully. Remedying these problems is a job for the legislature. Less than a decade after enacting the Commercial Code, the

248. *E.g.*, Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 154, 324 N.E.2d 583, 586-87 (1974); Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 544 P.2d 20 (1975).

249. *See* U.C.C. §§ 2-316(4) & Comment 2, 2-719, Comment 3.

250. In K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, 246, 541 P.2d 1378, 1381 (1975), the Oregon Supreme Court stated that disclaimers of warranty and limitations of remedy are "substantially identical."

251. *See* K & C Inc. v. Westinghouse Elec. Corp., 437 Pa. 303, 263 A.2d 390 (1970).

California legislature moved again in the consumer protection field,[252] and in 1975 the U.S. Congress also moved to reform the law of consumer warranties.[253] Unfortunately, both of the resulting pieces of legislation appear to magnify rather than reduce the distinctions between warranty disclaimers and limitations of remedy.[254] Thus the courts will have to face this problem again in the future.

III. THE SONG-BEVERLY CONSUMER WARRANTY ACT

In 1970, the California legislature enacted the Song-Beverly Consumer Warranty Act (Song-Beverly)[255] in order to improve the lot of the consumer who has purchased a defective product. The Act contains substantive regulations of warranty terms, disclosure requirements, and strengthened consumer remedies. Due to the California legislature's expansion of Song-Beverly's consumer rights and remedies between 1970 and 1978, this Act is now the primary repository of the California consumer's rights and the warrantor's obligations. The U.C.C. and Magnuson-Moss, however, still retain importance in many areas such as disclosure requirements and remedies for non-willful breaches of warranty.

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252. *See* note 255 & accompanying text *infra*.

253. *See* note 387 & accompanying text *infra*.

254. *See* notes 380-86, 498-513 & accompanying text *infra*.

255. CAL. CIV. CODE §§ 1790-1797.5 (West 1973 & Supp. 1979) (originally enacted as Act of Sept. 17, 1970, ch. 1333, § 1, 1970 Cal. Stats. 2478). The Act took effect in 1971 and has been amended several times since then.

As this Comment was going to print, the California legislature decided to substantially rewrite many sections of Song-Beverly. Act of Sept. 20, 1978, ch. 991. 1978 Cal. Legis. Serv. 3397 (West). As no effective date for these amendments is stated, they presumably took effect on January 1, 1979. *See* CAL. CONST. art. IV, § 8(c)(1) (West Supp. 1978). While publishing deadlines preclude extensive revision, the more important amendments are incorporated and briefly discussed. Aside from merely clarifying many of the Act's provisions, the 1978 amendments' major contributions include: expanding the scope of the Act through broader definitions of "consumer goods," CAL. CIV. CODE § 1791(a) (West Supp. 1979), and "express warranty," *id.* § 1791.2; creating an implied warranty of merchantability by the retailer of consumer goods in addition to that of the manufacturer, *id.* § 1792; requiring the manufacturer to either replace nonconforming goods or refund their purchase price less depreciation if it is unable to repair them "after a reasonable number of attempts," *id.* § 1793.2(d); extending the aggrieved consumer's rights to treble damages and attorneys' fees as well as awarding other reasonable costs and expenses, legal and equitable relief to the prevailing buyer, *id.* § 1794; restricting further the ability of suppliers to disclaim implied warranties, *id.* § 1793; and lastly, requiring that the installation, service, or repair of new or used consumer goods be performed in a good and workmanlike manner, *id.* §§ 1796-1796.5.

This Comment will not deal with the provisions of the Act dealing with Mobilehome Warranties, *id.* §§ 1797-1797.5 (West 1973 & Supp. 1979).

A. *Scope of the Song-Beverly Act and its Effect on the Commercial Code*

The Song-Beverly Act does not attempt to rewrite consumer warranty law completely; rather it supplants the Commercial Code only in those areas where the legislature felt the greatest need for reform, and it leaves the rest unaltered. Where there is a conflict over the rights granted to buyers of consumer goods, Song-Beverly prevails,[256] but the Act's remedies are to be construed as cumulative and as not restricting any other remedies available to the buyer.[257] The apparent purpose of these provisions is to give the buyer the best of both codes: a choice of the law most favorable to him.[258]

While the Commercial Code governs the sale of all categories of goods, Song-Beverly protects only retail purchasers of goods bought "primarily for personal, family, or household purposes."[259] The buyer's purpose test is fairly straightforward when the buyer's purpose is clear, but difficult issues of fact are foreseeable regarding automobiles, typewriters, adding machines, and other items which are frequently bought for business as well as personal use.

Goods normally used commercially, but occasionally purchased for personal use present a similar but distinct problem for warrantors. A new computer purchased by a computer enthusiast as part of his or her hobby and strictly for pleasure is apparently a "consumer good."[260] The warrantor of such items must either attempt to write a single warranty which complies with Song-Beverly and the Code, thereby bestowing unnecessary protections on the commercial purchaser, or else provide two different sets of warranties. While the latter response would give the warrantor more latitude in his commercial warranty and avoid violating the stricter standards imposed by Song-Beverly, few warrantors have bothered to adopt it.[261]

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256. *Id.* § 1790.3 (West 1973).

257. *Id.* § 1790.4 (West Supp. 1979).

258. But the increased complexity and uncertainty resulting from this cumulation of statutes are not favorable to consumers who are even less likely to understand their legal rights and even more dependent upon lawyers to vindicate them.

259. CAL. CIV. CODE § 1791(a) (West Supp. 1979). The section provides: " 'Consumer goods' means any new product or part thereof that is used or bought for use primarily for personal, family, or household purposes, except for clothing and consumables."

260. *Id.*

261. The explanation for this fact may lie with sloth, ignorance of Song-Beverly, or more likely, the absence of sufficiently large penalties for non-compliance to spur warrantors to change their ways. *See, e.g.*, 1977 IBM Typewriter Warranty (on file with the *UCLA Law Review*) (purporting to exclude all implied warranties and in some cases charge the buyer with travel expenses of repairmen performing warranty

In addition to the consumer goods limitation, Song-Beverly's scope also is restricted by the date of sale or manufacture of the product as well as the nature of the goods sold. The Act only applies to retail[262] sales of goods after January 1972. It does not cover new goods manufactured prior to March 1971 but does cover used goods accompanied by an "express warranty" regardless of the date of manufacture.[263] "Clothing" and "consumables," such as household items, food, and cosmetics,[264] also are covered only when accompanied by an express warranty.[265] Moreover, Song-Beverly does not apply to built-in air conditioning or heating systems, as opposed to portable ones, even if there is an express warranty.[266] Finally, the Act is inapplicable to defects caused by "unauthorized or unreasonable use of the goods following sale."[267] The same result would be reached under the U.C.C. or common law, either as a matter of proximate causation or as part of the definition of merchantability.

B. *Warranties Created by the Song-Beverly Act*

1. Express Warranties

a. *Definition.* At the heart of the Song-Beverly Act lies the "express warranty." It triggers not only the Act's elaborate scheme of service and repair obligations,[268] but often the implied warranty of merchantability[269] and the prohibition against disclaimers of implied warranties as well.[270] "Express warranty" is defined as:

> (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if

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service). In the case of a consumer warranty, such provisions would probably violate the Song-Beverly Act. *See* CAL. CIV. CODE §§ 1793, 1793.2(c) (West Supp. 1979). The same terms in a commercial warranty would be permitted. U.C.C. §§ 2-316, 2-719.

262. CAL. CIV. CODE. §§ 1791(a), 1792, 1792.1, 1792.2 (West Supp. 1979).

263. *Id.* § 1795.5(d). This subsection was added in 1975 as declaratory of existing law.

264. *Id.* § 1791(c), (d).

265. *Id.* §§ 1791(a), 1793.35.

266. *Id.* § 1795.1. This specific exclusion along with the definition of "consumer goods" in section 1791(a) suggest that other built-in machines and like products do fall under the Act's provisions regardless of whether at common law they would be classified as real or personal property.

267. *Id.* § 1794.3 (West 1973).

268. *Id.* § 1793.2 (West Supp. 1979). *See also* notes 293-98 & accompanying text *infra*.

269. CAL. CIV. CODE §§ 1791.1(a), 1792, 1795.5. (West 1973 & Supp. 1979).

270. *Id.* § 1793 (West Supp. 1979) (if express warranty given no supplier may limit, modify, or disclaim the implied warranties guaranteed by Song-Beverly).

> there is a failure in utility or performance; or (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.[271]

In analyzing this definition, it is useful to compare provisions of the Commercial Code.

The Act's definition of express warranty includes conformity to any sample or model.[272] As these terms are not explained in the statute, it may be assumed that the U.C.C. definitions and case law are applicable, less the "basis of the bargain" limitation.[273] A problem that may arise is that the warrantor by sample or model, unlike the warrantor by a written warranty of future performance, may be unaware that he has even made a warranty and is subject to all of the Act's duties.

Since there is no requirement of buyer's reliance in Song-Beverly, and it is instead sufficient that the otherwise conforming express warranty "arises out of the sale," post-sale warranties fit comfortably within the broad temporal limits of this definition. Thus, it appears that the Act lays to rest the issue of the warranty-in-the-box, which is problematical under the U.C.C.[274]

But in other important respects the Song-Beverly express warranty is narrower than that of the U.C.C. Oral express warranties, which are effective under U.C.C. section 2-313, are simply not included in this definition. Likewise, even written statements, descriptions, promises, and affirmations are not protected by the Act unless the warrantor undertakes to maintain the product's utility or performance, or provide compensation if that undertaking fails.[275] For example, statements such as "this suit is 100% wool" or "this car gets twenty-five miles per gallon of gas" are not Song-Beverly express warranties, as they promise neither to maintain performance nor to compensate the buyer for non-performance.

However, the definition should not be read so narrowly as to exclude a warrantor's promise that the goods will perform in the future even if the promise is made without specifically mentioning maintenance of performance or compensation. These undertakings are necessarily implied by a promise of future performance. Otherwise, most of the provisions of the Act—which depend upon the existence of an express warranty, are intended to protect consumers, and are not even waivable by the buyer—would be ridiculously easy for a warrantor to circumvent.[276] He could draft his

271. *Id.* § 1791.2(a).
272. *Id.*
273. *See* U.C.C. § 2-313(c).
274. *See* notes 54-73 & accompanying text *supra*.
275. CAL. CIV. CODE § 1791.2(a)(1) (West Supp. 1979).
276. *Accord*, Comment, *Toward an End to Consumer Frustration—Making the*

warranty as follows: "We hereby promise that your new pacemaker is absolutely free of any defects in materials or workmanship and will perform flawlessly for as long as you live." It is hoped that such fine specimens of the draftsman's art will be held to imply the undertaking prescribed by the statutory definition. In order to avoid overly narrow construction of the Act, the 1978 amendments added that if words such as "warrant" or "guarantee" are used, an express warranty is created.[277] At present, the typical consumer warranty does fit the statutory definition even under a strict construction.

On the dichotomy between enforceable warranties and unenforceable opinions, the Act merely repeats the language of the Code.[278] Given the Act's narrow definition of express warranty, and the fact that much puffing is oral, this limitation is probably superfluous. Also excluded from the definition are "expressions of general policy concerning customer satisfaction which are not subject to any limitation."[279] Arguably, however, such an expression might constitute an express warranty if it were subject to specific limitations: "Your satisfaction with the new pacemaker is guaranteed for a period of six months or your money back."

It is important to distinguish between a Song-Beverly express warranty and a service contract which is not governed at all by the Act, beyond the requirement that it "fully and conspicuously discloses in simple and readily understood language the terms and conditions of such contract."[280] Consequently, suppliers may choose to rewrite their warranties so as to look like service contracts and avoid Song-Beverly. Looking beyond the title of the form, service contracts generally are purchased for separate consideration at the buyer's option, relate only to maintenance services, and may be purchased after the date of sale. Thus, if the undertaking is included in the initial purchase price or is required to be purchased, it should not be deemed a service contract.

But even the offeror of a "true" service contract may find that

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Song-Beverly Consumer Warranty Act Work, 14 SANTA CLARA LAW. 575, 581-82 (1974).

277. CAL. CIV. CODE § 1791.2(b) (West Supp. 1979). It is not clear that warranties created by the use of such words even need to be in writing, although I believe that is the most reasonable inference. Meanwhile, the Magnuson-Moss Warranty Act requires that all "written warranties" be labelled "full" or "limited warranty," 15 U.S.C. § 2303(a) (1976), thereby constituting Song-Beverly express warranties.

278. *Compare* U.C.C. § 2-313(2) *with* CAL. CIV. CODE § 1791.2(b) (West Supp. 1979).

279. CAL. CIV. CODE § 1791.2(c) (West Supp. 1979).

280. *Id.* § 1794.4 (West 1973). However, a willful violation of a service contract now triggers the buyer's right to treble damages and attorneys' fees. *Id.* § 1794 (West Supp. 1979). *See also id.* § 1791(*l*) (defining "service contract").

he is not yet out of the Song-Beverly thicket.[281] The manufacturer and retailer of "consumer goods"[282] have also made an implied warranty of the merchantability of those products even without making an express warranty, unless they satisfy the Act's strict disclaimer provisions.[283] If they do not, the manufacturer or retailer will find that he has given an unrestricted one year warranty of merchantability[284] to the very buyer who may have refused to pay for a carefully delimited service contract.

b. *Duties of Express Warrantors.* Operating on assumptions of freedom of contract, the U.C.C. allows the buyer and seller to assume freely whatever duties the manufacturer has inserted in his boilerplate warranty. Song-Beverly, in contrast, imposes several specific obligations on any party who makes an express warranty on a product purchased at retail for consumer purposes.[285] Most of the sections defining the duties discussed below refer only to manufacturers, who normally make express warranties, but section 1795 imposes the same duties on any other party who makes an express warranty.[286] These duties, once created by a conforming express warranty, may not be varied by agreement or waived by the buyer.[287] The Act recognizes that the warranty is a merchandising device and refuses to let the warrantor reap its benefits without assuming a fair share of its burdens.

(1) Disclosure Requirements. Although the emphasis of Song-Beverly is on substantive regulation of warranty obligations, it does make a few attempts to insure that the buyer will comprehend the legal effects of his purchase. Foremost is the requirement that every express warrantor "fully set forth such warranties in readily understood language and clearly identify the party making such express warranty."[288] The statute nowhere elaborates on the meaning of "readily understood language" and the Act provides little by way of example. The effectiveness of this requirement is further undermined by the absence of any specific

281. Moreover, the supplier who wishes to utilize a service contract to reduce his obligations under California law may discover to his dismay that he has increased his burdens under the Magnuson-Moss Warranty Act. *See* notes 480, 497-501 & accompanying text *infra*.

282. CAL. CIV. CODE § 1791(a) (West Supp. 1979).

283. *Id.* § 1792.

284. *Id.* § 1791.1(c).

285. An exception is made for clothing and consumables which are treated separately. *Id.* §§ 1791(a), 1793.35.

286. *Id.* § 1795 (West 1973).

287. "Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void." *Id.* § 1790.1.

288. *Id.* § 1793.1(a).

sanction for the use of bewildering language; and the Act's general remedy provisions may well not apply here.[289] Despite these problems, an affirmative clarity requirement is an improvement over the Code's mandate of the conspicuous use of unintelligible terminology,[290] as in the requirement that disclaimers mention the word "merchantability." The other major disclosure obligation of express warrantors is to provide the buyer with information about the location of available service and repair facilities.[291]

(2) Providing Service and Repair Facilities. The drafters of Song-Beverly realized that the exasperated consumer with a defective product is less interested in a lawsuit than in getting the product fixed. In addition, the manufacturer's standard warranty provides for repair or replacement as the sole remedies. Thus it was logical for the Act to make it the central duty of express warrantors either to repair the non-conforming goods or to reimburse those who do.[292] The Act establishes a chain of responsibility for warranty service in which the express warrantor is always the final link.

Many of Song-Beverly's provisions attempt to solve the practical problems of a purchaser of a defective consumer product: confusion as to which link in the chain of supply is responsible for repair; the inconvenience and expense of returning goods to distant service facilities; and the particular problem of goods which are simply not portable for reasons of size, weight, or installation. The Act requires that the express warrantor, who is usually the manufacturer, either maintain its own service and repair facilities or designate and authorize independent service and repair facilities "reasonably close" to all areas where its consumer goods are sold so as to carry out the terms of the express warranty.[293] If the

289. *See* notes 356-68 & accompanying text *infra*.

290. *See* U.C.C. § 2-316(2). In case of conflict between Song-Beverly and the Commercial Code, the Act prevails. CAL. CIV. CODE § 1790.3 (West 1973). Thus, it could be argued that the U.C.C. requirement that disclaimers mention the word "merchantability" conflicts with and therefore is superseded by the Act's command that warranties be written in "readily understood language." *Id.* § 1793.1(a). On the other hand, mentioning the word "merchantability" is not necessarily confusing. Indeed, since courts often use the "merchantability" requirement of U.C.C. § 2-316(2) as a device to protect consumers from unfair or bewildering disclaimers, annulling that provision would appear to frustrate the Act's apparent purpose to preserve for the consumer all of the benefits the buyer enjoys under the U.C.C. *Cf.* CAL. CIV. CODE § 1790.4 (West Supp. 1979) (Act's remedies are cumulative).

291. CAL. CIV. CODE § 1973.1(b) (West Supp. 1979).

292. *Id.* §§ 1793.2-.5 (West 1973 & Supp. 1979). But there is a duty on any business that provides service or repair to perform those services in a good and workmanlike manner, *id.* § 1796.5 (West Supp. 1979), although no remedies are prescribed for violation of this newly created duty, and § 1794 remedies do not apply to this new section.

293. *Id.* § 1793.2(a).

manufacturer does neither, then the buyer has three options. He may return the goods to the original seller or to any retail seller of like goods by the manufacturer for replacement, repair, or reimbursement at the seller's option.[294] If the buyer attempts either of the latter methods and does not get "appropriate relief," he may solicit an independent service person to repair the goods if their wholesale price exceeds fifty dollars and if they can be repaired economically.[295]

No matter which option the buyer chooses, it is the manufacturer who is liable to the buyer, retailer, or independent service person for all costs of repair, replacement, or reimbursement plus a reasonable handling charge or profit.[296] In order to insure compliance, the Act provides treble damages and attorneys' fees to any retail seller or independent service person injured by the "willful or repeated violation" of these provisions.[297] Furthermore, the manufacturer who makes express warranties on products whose wholesale price exceeds fifty dollars, and who does not maintain local repair facilities, must provide written notice to the buyer regarding his three options.[298]

These options given to the buyer effectively nullify requirements inserted in some warranties that the buyer mail the defective item across the continent to the manufacturer with round-trip shipping and insurance prepaid. But these provisions are not self-enforcing. They require a sophisticated and stubborn consumer to make them work, and that may be their greatest weakness. Although these options certainly improve the buyer's position, their practicality is subject to question. If neither the manufacturer nor the original seller maintains local repair facilities, the buyer can bring the offending item to any retailer of the same goods, who is likely to ignore the buyer's requests unless the buyer's attorney is also present. Moreover, how many independent service people would be willing to perform repairs on the promise that they will

294. *Id.* § 1793.3. Although the requirement to maintain service and repair facilities is framed in language that is clearly mandatory, *id.* § 1793.2(a), the subsequent provisions demonstrate that the express warrantor has the option to maintain local service and repair facilities or else reimburse the other parties who choose to remedy the defective goods. *Id.* §§ 1793.2(a)(2) (West Supp. 1979), 1793.5 (West 1973). The retail seller has the choice of providing the service itself or directing the buyer to a reasonably close independent repair facility. *Id.* § 1793.3(d) (West Supp. 1979).

295. *Id.* § 1793.3(c) (West Supp. 1979).

296. *See id.* §§ 1793.3(c), 1793.3(d), 1793.5, 1793.6 (West 1973 & Supp. 1979).

297. *Id.* § 1794.1. This is one of few instances in which the Act attempts to regulate the relationships between thoroughly commercial parties. Moreover, the Act specifically forbids any waiver of this liability of a manufacturer. *Id.* § 1793.3(c). The specific prohibition was apparently added because Song-Beverly's general prohibition of waivers bars only waivers by the buyer of consumer goods. *Id.* § 1790.1 (West 1973).

298. *Id.* § 1793.3(f) (West Supp. 1979).

have a right to recover from some out-of-state manufacturer? It is more likely that the buyer will be forced to pay, and then it will be his problem to recover from the manufacturer.[299]

(3) Transportation Costs. Transportation costs are placed initially on the buyer. It is his duty to deliver unsatisfactory goods to the repair facility or retail seller.[300] However, if such delivery cannot "reasonably be accomplished" because of size, weight, method of attachment or installation, or nature of the nonconformity, then the buyer may give written notice of the nonconformity to the manufacturer or retail seller. Upon receipt of such notice, the manufacturer or seller must pick up the goods, pay all transportation costs, or make the repairs at the buyer's residence.[301]

The issue of what size, weight, etc. would make delivery by the buyer "unreasonable" is not the type of issue which should have been left so open. Disputes appear inevitable as to whether it is reasonable for an aged widow or young weightlifter to deliver defective TV sets, typewriters, and barbells. In the interest of certainty and predictability, an objective, measurable standard focusing on the product[302] would be preferable to a subjective test varying with the physical attributes of each purchaser.

While the burden of bringing in portable defective goods is placed on the buyer, it is unclear from the statutory language just who is obliged to pay for the return of the goods to the buyer after repair. "The reasonable costs of transporting nonconforming goods after delivery to the service and repair facility until return of the goods to the buyer shall be at the manufacturer's expense."[303] Although this statement appears to say that after bringing the item in for repairs, the buyer's responsibilities and expenses are at an end, this sentence follows the description of the nonportable goods situation in which the manufacturer bears the burden of transportation. Thus, it can be argued that the sentence quoted above refers only to that limited context and that the con-

299. This result would appear to conflict with the Act's unequivocal injunction against holding the buyer responsible in any manner for service or repair costs charged by independent facilities. *Id.* § 1793.3(c). Nonetheless, such practices are almost inevitable since the Act does not, and could not, with practicality or fairness, demand that independent service facilities, which are in no way responsible for the defective goods, perform services without receiving payment or even the promise of payment from the only party with whom they are dealing.

300. *Id.* § 1793.2(c).

301. *Id.*

302. The objective, product-oriented approach has been adopted by the FTC in proposed rules promulgated under Magnuson-Moss. *See* notes 461-63 & accompanying text *infra*.

303. CAL. CIV. CODE § 1793.2(c) (West Supp. 1979).

sumer normally bears the burden of returning portable goods.[304]

This Comment's view is that the latter reading is incorrect, both as a matter of statutory construction and as a matter of equitable allocation of risks. The sentence immediately preceding the sentence quoted above provides: "All reasonable costs of transporting the goods when, pursuant to the above, a buyer is unable to effect return shall be at the manufacturer's expense."[305] If the final sentence only referred to the nonportable goods situation, it would be completely superfluous since all such costs already are charged to the manufacturer. Nor does the final sentence include the limiting language used in the preceding sentence—"pursuant to the above."

Furthermore, fairness demands that the expenses incident to repairing defective goods be borne by the party responsible for the defect. The contract breacher should bear the risk, not the aggrieved consumer whom this statute intends to protect. The buyer is already penalized in the time, trouble, and expense necessary to bring the product to the repair facility. Perhaps placing that duty on the buyer deters frivolous or unjustified returns, but no such policy applies to restoration of the goods to the buyer. On the contrary, charging the manufacturer with one half of the transportation expense would create an incentive to produce fewer defective goods or increase quality control so that fewer unsatisfactory products reach consumers.

If charging the manufacturer would increase costs, then the competitive disadvantage suffered by manufacturers of higher quality products would be reduced.[306] The counter-argument that a manufacturer's costs will be passed on to the buyer misses the point. The buyer is already bearing the cost of shoddy goods. At present, only part of that cost is reflected in the price, which is visible and comparable with other prices at the time of purchase. The second part of the cost is currently hidden until the buyer must pay it when the latent defects become patent. This second cost cannot be determined when the buyer decides which product to purchase, so that shoddy goods benefit from an illusory discount while more durable goods appear to be more expensive. Placing costs incidental to repair on the manufacturer might reduce this distortion and allow competitive market forces to improve product quality.

(4) Time for Repair. The party designated to repair the

304. *Id.* As similar language is present in section 1793.3(e) (regarding the return of nonportable defective goods to a retailer), it should be construed according to the same principles discussed here.

305. *Id.* § 1793.2(c).

306. *See* note 26 *supra*.

goods must begin within a "reasonable time" and must complete the repairs within thirty days unless the delay is caused by circumstances beyond the control of the repairing party or the buyer agrees in writing to an extension of time.[307] Since thirty days to repair most defective consumer products is a long time to expect the buyer to wait, it is fair to assume that the thirty day limit is not meant to be extended by multiple attempts to repair the same product, or else this limit is meaningless.

(5) Replace or Refund. If the manufacturer or its representative is unable to repair the goods "after a reasonable number of attempts," it must either replace the goods or reimburse the buyer in an amount equal to the purchase price "less that amount directly attributable to use by the buyer prior to discovery of the non-conformity."[308] With the possible exception of tires and other automotive products, few consumer products provide any accurate means of measuring their use. If applied, this section is likely to give rise to many disputes regarding the amount of use of the product and the portion of the decrease in value directly attributable to that use.

(6) Purchase Receipts and Work Orders. If the consumer goods cost more than fifty dollars, either the manufacturer or seller must provide the buyer with a receipt showing the date of purchase.[309] This obligation is in accord with section 2801 of the California Commercial Code, which invalidates any requirement that buyers send in warranty registration cards as a precondition to warranty service but does not relieve the buyer of the duty to prove the date of purchase.[310] If the manufacturer or seller performs warranty repairs or service, he must also give the buyer a dated work order or receipt.[311]

(7) Clothing and Consumables. When clothing or consumables are expressly warranted, the buyer has the right to return them, if defective, within thirty days or the express warranty period, whichever is greater.[312] The seller must then replace the item or refund the full price; and he can then recover from the

307. CAL. CIV. CODE §§ 1793.2(b), 1793.3 (West Supp. 1979) (service or repair by manufacturer and by retailer or independent service facility respectively).

308. *Id.* § 1793.2(d) (West Supp. 1979); *cf.* 15 U.S.C. § 2304(a)(4) (1976) (virtually identical to the "lemon rule" of Magnuson-Moss, except that it applies only to fully warranted consumer products and requires a full refund); *see* notes 484-89 & accompanying text *infra.*

309. *Id.* § 1795.6(c).

310. CAL. COM. CODE § 2801 (West Supp. 1979), *quoted at* note 178 *supra.*

311. CAL. CIV. CODE § 1795.6(c) (West Supp. 1979).

312. *Id.* § 1793.35.

manufacturer.[313]

2. The Implied Warranty of Merchantability

a. *Creation.* The definition of the implied warranty of merchantability under Song-Beverly is essentially identical to that of the U.C.C. in which "fitness for ordinary purposes" is the basic standard.[314] At that point the similarities end. Whereas the U.C.C.'s implied warranty of merchantability is made by merchants selling all types of goods, Song-Beverly's implied warranty of merchantability may be made by different links in the distributive chain depending on the type of product sold. To make sense out of this scheme, it is helpful to divide all retail goods purchased for personal, family, or household purposes into four categories, which will be labeled as follows: First class consumer goods, used goods, built-in heaters and air conditioners, and clothing and consumables.

First class consumer goods include any new product bought primarily for personal, family, or household purposes, except for clothing and consumables.[315] Whether or not there is an express warranty, every sale of first class consumer goods is accompanied by an implied warranty of merchantability from the manufacturer and the retailer to the retail buyer, and the retailer has a right of indemnity against the manufacturer.[316] This provision eliminates one of the last vestiges of the privity doctrine and shifts the main focus of the implied warranty concept from the seller, a mere conduit, to the manufacturer, who is ultimately responsible for the product's existence and quality.[317] Since the Act's remedies are cumulative, the buyer may also have the benefit of the Code's implied warranty of merchantability by the seller.[318]

While the manufacturer and retailer automatically warrant the merchantability of this category of goods, if any other party, such as the distributor, expressly warrants the goods, that party assumes the same obligations as are imposed on the manufacturer,[319] including the obligations of the implied warranty of merchantability. The usual commercial practice is for the manufacturer alone to make express warranties, but some large retail

313. *Id.* § 1793.35(b).

314. *Compare id.* § 1791.1(a) *with* U.C.C. § 2-314(2). In hard cases, courts will presumably look to the case law construing U.C.C. § 2-314 or defining "defect" in products liability cases. *See* notes 85-94 & accompanying text *supra*.

315. CAL. CIV. CODE § 1791(a) (West Supp. 1979).

316. *Id.* § 1792.

317. The definition of "manufacturer" includes assemblers and producers so that one product could have more than one manufacturer. *Id.* § 1791(g).

318. *Id.* § 1790.4.

319. *Id.* § 1795 (West 1973).

chains do give their own written warranties.[320]

Used goods, not fitting within the definition of consumer goods at all, are accompanied by an implied warranty of merchantability only if a distributor or retail seller expressly warrants them, and it is the express warrantor alone who is charged with any duties regarding the used goods.[321] In 1978, the legislature rewrote this section to state that "the obligation of a distributor or retail seller of used consumer goods shall be the same as that imposed on manufacturers under this chapter in a sale in which an express warranty is given . . . ."[322] A literal reading of this language might yield the startling conclusion that, even absent an express warranty, every sale of used goods will be accompanied by a retailer's implied warranty of merchantability that cannot be disclaimed at all,[323] or not without considerable difficulty.[324] However, the subsections following the amended language clash with this conclusion by tying the obligations of the retailer of used goods to his decision to make an express warranty.[325] Therefore, the more reasonable interpretation of the new section is that the retailer makes an implied warranty of merchantability only when he gives an express warranty.

An air conditioner or heater that becomes a fixed part of a structure is not governed by Song-Beverly at all, even if the retailer gives an express warranty.[326]

Clothing and consumables are treated as a separate class.[327] Consumables are products that are intended for consumption or use for personal care or household services and that usually are "consumed or expended in the course of such consumption or use."[328] This class of products would include, for example, food, cosmetics, and soap. Song-Beverly creates no implied warranties for soft goods and consumables, whether or not they are expressly warranted.

b. *Duration*. For consumer goods,[329] the duration of the implied warranty of merchantability or fitness for a particular

320. *See, e.g.*, Sample of Sears Warranties (on file with the *UCLA Law Review*).
321. CAL. CIV. CODE § 1795.5 (West Supp. 1979).
322. *Id.*
323. *Id.* § 1793 (when any party gives an express warranty, implied warranties may not be disclaimed).
324. *Id.* § 1792.4(a) (disclaimers invalid unless they comply with stringent requirements, *e.g.*, conspicuous, in writing, and attached to the goods).
325. *Id.* § 1795.5(a)-(d) ("obligation of the distributor or retail seller making express warranties").
326. *Id.* § 1795.1.
327. *Id.* § 1793.35.
328. *Id.* § 1791(d).
329. *See id.* § 1791(a).

purpose is the same as the duration of the express warranty, provided the latter is reasonable; but in no event may the implied warranty last less than sixty days or more than one year.[330] The "reasonable" limitation may mean that if a product such as a new car were to be sold with a two month warranty, a court could find that period unreasonably short and extend it. If no duration is stated in the express warranty, or there is no express warranty (on first class consumer goods), the duration of any existing Song-Beverly implied warranty is one year.[331] For used goods accompanied by an express warranty, the same rules apply, but with a one to three month range.[332] The duration of both express and implied warranties is extended or tolled while defective consumer goods costing more than fifty dollars are returned for repairs.[333]

By defining the duration of implied warranties, Song-Beverly has certainly made an improvement in clarity over the Code which says nothing about their duration except that a cause of action for their breach accrues upon delivery.[334] Nor has there been enough U.C.C. case law on the subject to settle the matter.[335] As a result, there are differing views on whether the Act has amplified rather than merely clarified the buyer's rights on this point.[336]

It appears that Song-Beverly defines the duration only of those implied warranties created by the Act and leaves the duration of U.C.C. implied warranties untouched.[337] The result is that

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330. The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be co-extensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above.

Id. § 1791.1(c).

331. *Id.*

332. *Id.* § 1795.5(c).

333. *Id.* § 1795.6.

334. *See* U.C.C. § 2-725.

335. *See* Link-Belt Co. v. Star Iron & Steel Co., 65 Cal. App. 3d 24, 38-40, 135 Cal. Rptr. 134, 142-44 (2d Dist. 1976) (Jefferson, J., dissenting) (discussing the doctrine of "prospective warranty"). *See also* note 476 *infra* (FTC assumes U.C.C. implied warranties last four years).

336. For the view that the buyer is worse off, see Clark & Davis, *supra* note 31, at 590-91. *But see* Comment, *supra* note 276, at 595-96. The advantage of the Song-Beverly approach is not only its certainty; it is also preferable in that it comports with the purchaser's reasonable expectations, since the duration of the warranty is one of the few terms the consumer may read and comprehend.

337. *See* CAL. CIV. CODE §§ 1790.3, 1791.1(c) (West 1973). *See also* note 318 & accompanying text *supra*; note 348 & accompanying text *infra*.

the purchaser may have a Song-Beverly implied warranty of merchantability equal in duration to the express warranty as well as a U.C.C. implied warranty of merchantability of uncertain duration on the same product.

3. The Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose created by Song-Beverly is almost identical to that of U.C.C. section 2-315.[338] An apparent difference is that under the Code, only "sellers" make this warranty, while under Song-Beverly, retailers, distributors, and even manufacturers may do so.[339] This distinction, however, is illusory, because manufacturers and distributors make the warranty only if they sell the goods at retail, that is, directly to the buyer.[340] Thus, they would also qualify as "sellers" under the Code. In addition, the requisite elements of this implied warranty, especially the seller's reason to know of the buyer's reliance and particular purpose, are such as would rarely arise except in a direct sale.

Section 1792.1 of the Act, which defines the manufacturer's implied warranty of fitness, seems completely superfluous. Any party that "engages in the business of selling consumer goods to retail buyers" fits within the Act's definition of "retail seller."[341] Therefore, appearances to the contrary notwithstanding, only "retail sellers" can make this warranty under Song-Beverly as well as under the U.C.C. This superfluity has led to speculation that perhaps a manufacturer creates an implied warranty of fitness if he has knowledge of the buyer's purpose and reliance (as when he advertises a particular use for his product) even if he does not retail the goods himself.[342] This approach would serve the salutary goal of holding manufacturers responsible for some of their advertising claims. But as admirable as this approach may be, it is clear that it has not been adopted by the California legislature, which decided to impose the implied warranty of fitness on a manufacturer only when the goods "are sold at retail in this state by a manufacturer."[343] The duration of the implied warranty of fitness is determined in precisely the same manner as that of the implied warranty of merchantability.[344]

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338. *Compare* CAL. CIV. CODE § 1791.1(b) (West 1973) *with* U.C.C. § 2-315.

339. CAL. CIV. CODE § 1791.1(b) (West 1973).

340. *Id.* § 1792.1 (West Supp. 1979). *See also id.* § 1792.2 (implied warranty of fitness made by retailer or distributor).

341. *Id.* § 1791(e).

342. *See* Comment, *supra* note 276, at 597.

343. *See* CAL. CIV. CODE § 1792.1 (West Supp. 1979).

344. *Compare id.* § 1791.1(c) *with id.* § 1795.5(c).

C. *Remedies*

The U.C.C. does not distinguish between implied and express warranties in its remedies for breach. The buyer's right to reject, revoke acceptance, cover, and sue for damages is the same whichever warranty is breached.[345] Song-Beverly takes a different approach. The aggrieved purchaser under Song-Beverly has one set of remedies for breach of express warranty, a different set for breach of implied warranty, and yet a third set for willful violations of the Act's provisions of an implied warranty, an express warranty, or a service contract.

1. Remedies for Breach of Express Warranty

Under Song-Beverly, the remedies available for a non-willful breach of an express warranty are limited to repair, replacement, or refund at the seller's option;[346] the Act provides no judicial remedies whatsoever.[347] Of course, the California Commercial Code remedies are not impaired;[348] but given the ubiquitous limitation-of-remedies clause in consumer warranties, the consumer is seldom contractually entitled to more than the right to repair, and Song-Beverly statutorily enforces that right with much greater vigor.

If the express warrantor breaches its obligation to repair, replace, or refund, the failure is not treated as a breach of express warranty. Instead, since these duties are defined by statute, they will be analyzed as violations of the Act itself.[349]

2. Remedies for Breach of Implied Warranties

In contrast to the remedies for breach of express warranties, the Act's remedies for a non-willful breach of implied warranties are strictly judicial. "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and where applicable by a breach of the implied warranty of fitness has the

345. *See* U.C.C. §§ 2-601 (rejection), 2-608 (revocation of acceptance), 2-711 (cover), 2-714(2) (damages for breach of warranty), 2-715 (incidental and consequential damages).

346. "Where . . . service or repair of the goods is necessary because they do not conform with the applicable *express warranties*, service and repair shall be commenced . . . ." CAL. CIV. CODE § 1793.2(b) (West Supp. 1979) (emphasis added). *See also id.* §§ 1793.3(a), 1793.35(a) (West 1973), 1793.5 (all prescribing repair, replacement, or refund as the remedy for breach of express warranty).

347. For example, Song-Beverly confers no right to sue for specific performance or damages upon the breach of express warranty. *Cf.* U.C.C. § 2-711 (buyer's remedies in general).

348. CAL. CIV. CODE § 1790.4 (West Supp. 1979) (remedies cumulative).

349. *See* notes 356-68 & accompanying text *infra*.

remedies provided in . . . [the California Commercial Code]."[350] The court may also award a prevailing consumer reasonable costs and expenses, including attorneys' fees.[351] This section does not give the buyer a right to have the product repaired, despite the fact that repair is the buyer's most desirable remedy. The probable explanation for this apparent deficiency is that the buyer has already been granted the remedies of repair, replacement, or refund for breach of the express warranty. While the remedies for breaches of express and implied warranties are distinct, they also are cumulative.[352] The absence of a right to repair for breach of an implied warranty rarely will harm the consumer because there generally will not be a breach of the implied warranty of merchantability without a breach of express warranty. The merchantability standard of fitness for ordinary use appears narrower than the express warranty of freedom from any defects in material or workmanship. It is possible that minor defects, such as flaws in an automobile's upholstery, would violate the express warranty but not the implied warranty of merchantability. As to duration, implied warranties will never exceed a term of one year on new goods[353] and three months on used goods,[354] while the duration of express warranties can, and often does, exceed one year on all or part of a product.

The result of this cumulation of remedies is that the buyer will normally have the right to repair, replacement, or refund when there is a breach of implied warranty. It may seem unnecessary, then, to provide costly and time-consuming judicial remedies; but they do have several possible justifications. First, they give the buyer leverage when he is pursuing his other remedies. Second, they allow him to get rid of defective goods which already have been repaired more than once. Finally, they provide a remedy when the non-conformity causes an irreparable diminution in the value of the product to the buyer. When the brakes fail just once on a new family stationwagon causing injury, the buyer's confidence in that vehicle may never be restored, even after repair, and he should be allowed to reject or revoke acceptance.[355]

350. CAL. CIV. CODE § 1791.1(d) (West Supp. 1979); *see* CAL. COM. CODE §§ 2601-2725 (West 1964 & Supp. 1979).

351. CAL. CIV. CODE §§ 1791.1(d), 1794 (West Supp. 1979).

352. *Id.* § 1790.4.

353. *Id.* § 1791.1(c).

354. *Id.* § 1795.5(c).

355. *See* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968) (buyer allowed to reject new automobile which stalled on the way home from the showroom and subsequently would not move due to defective transmission).

> For a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety. Once their faith is shaken, the vehicle loses not only its

3. Remedies for Willful Violations—Treble Damages and Attorneys' Fees

One of Song-Beverly's most important provisions is also one of the most enigmatic. Section 1794 currently provides:

> Any buyer of consumer goods injured by a *willful* violation of the provisions of this chapter or a willful violation of the implied or express warranty or service contract may bring an action for the recovery of three times the amount of actual damages and other legal and equitable relief, and, if the buyer prevails in *any* action brought under this section, he or she may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff . . . .[356]

At the heart of the enigma lies the word "willful," capable of meaning anything from voluntary or conscious to malicious.[357] It is the view of this Comment that any conscious refusal to fulfill the warrantor's statutory obligations or any violation in which the warrantor intended the result which in fact occurred should be deemed a "willful" violation, regardless of the alleged "purity of his heart" or "emptiness of his head."[358] Ignorance of the law could not be a valid defense without rendering this entire provision nugatory.[359] However, if, for example, the warrantor is unable to meet the thirty day limit for repairs despite reasonable attempts to do so, the resulting violation is unintentional and should not be held "willful." But if he refuses to repair or refund after a reasonable number of attempts to repair, that refusal is a willful violation of the Act.

More difficult yet is the question of how to deal with violations of disclosure and other formal requirements not directly related to remedying defective goods. Examples include the duties to inform the buyer of repair facility locations,[360] to draft warran-

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> real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension.

Id. at 458, 240 A.2d at 205. On the other hand, allowing revocation of acceptance for less serious defects might be quite wasteful in light of the large loss of market value which occurs immediately upon the transformation of a new vehicle into a used one.

356. CAL. CIV. CODE § 1794 (West Supp. 1979) (emphasis added). *See also id.* § 1791.1(d) (making section 1794 applicable to breaches of implied warranties).

357. BLACK'S LAW DICTIONARY 1773-74 (4th ed. 1968).

358. This is the traditional subjective test of good faith. *See* WHITE & SUMMERS, *supra* note 66, at 177-78.

359. For example, if the warrantor refuses to repair a product which is in fact defective or refuses to provide a replacement or refund if he is unable to repair within 30 days, the buyer should be entitled to treble damages. CAL. CIV. CODE § 1794 (West Supp. 1979).

360. *Id.* § 1793.1(b).

ties in readily understood language,[361] to inform the buyer of his options when there are no local designated repair facilities,[362] and to provide the buyer with purchase and work receipts.[363] Even if violations of such duties are found "willful," the buyer may be unable to prove that he was "injured" by them. The practical problem is that the mass of consumers who are misled or remain ignorant of their rights are truly injured by these violations. These are precisely the people who will never appear in a court of law seeking treble damages for violations of Song-Beverly, even if damages could be proven with reasonable certainty. A small minimum penalty for each formal violation would be more effective and enforceable than totally speculative damages multiplied by three.[364]

Nevertheless, it is possible that even these formal violations of the Act could lead to the imposition of substantial liabilities upon willful violators. Section 1794.2 bars treble damages in a judgment based solely on a breach of implied warranty;[365] but if the judgment is based both on a breach of implied warranty and a willful violation of the Act, arguably the treble damage provision would apply to all resulting damages, including those caused by the breach of implied warranty. Any willful violation that results in personal injury, such as an unjustified refusal to repair a defective car, could conceivably result in an enormous recovery to the plaintiff.

Treble damages are not recoverable under the Song-Beverly Act in a class action pursuant to section 1781 of the Civil Code or section 382 of the Code of Civil Procedure.[366] However, the Act does enumerate wrongs which may be redressed by means of these statutes. The Consumers Legal Remedies Act,[367] in which section 1781 appears, makes unlawful a long list of unfair and deceptive business practices and provides for actual damages, punitive damages, injunctive and other relief. The unlawful practices include "[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."[368] It is possible that the quoted language

361. *Id.* § 1793.1(a).
362. *Id.* § 1793.3(f).
363. *Id.* § 1795.6(c).
364. The Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1665 (1976), providing for a minimum $100 recovery plus actual damages, costs, and attorneys' fees, *id.* § 1640(a), is instructive in this regard.
365. CAL. CIV. CODE § 1794.2 (West 1973). This section will now have to be revised in order to make sense in conjunction with the new version of section 1794, which no longer contains any subsections. *See* text accompanying note 356 *supra*.
366. *Id.*
367. *Id.* §§ 1750-1784.
368. *Id.* § 1770(n).

would include in its purview such invalid warranty terms as out-of-state shipping requirements, improper warranty disclaimers, and warranty registration card requirements. A class action with possible punitive damages is a remedy capable of making warrantors sit up and take notice.

D. *Disclaimers of Warranty Versus Limitations of Remedy*

Despite the U.C.C.'s restrictions on disclaimers of warranty and limitations of remedy,[369] both techniques are used to eliminate many of the duties and liabilities which the implied warranties would otherwise impose. As a result, the U.C.C. implied warranties function less as rules of law than as easily rebuttable presumptions of the parties' contractual intent.

Under Song-Beverly in contrast, the pretense of dickered agreements or freedom of contract, is for the most part, abandoned. The suppliers are given a simple choice:

> Nothing in this chapter shall affect the right of the manufacturer, distributor, or retailer to make express warranties with respect to consumer goods. However, a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods.[370]

What this section prohibits is uncharacteristically plain; it is only the area in which disclaimers are permitted that requires explanation. Since only the implied warranties "guaranteed by this chapter" may not be disclaimed by the express warrantor, the seller is not prevented from excluding his implied warranties created by the California Commercial Code. But when can the supplier disclaim the Song-Beverly implied warranties, and when is it in his interest to do so?

Most consumer products are sold with conforming express warranties, and the prohibition clearly applies to them. Other products such as food and clothing generally are sold without express warranties. The manufacturer could therefore disclaim the implied warranties, but he has no need to do so because soft goods and consumables are never impliedly warranted under the Act. The only products which are given a Song-Beverly implied warranty of merchantability absent an express warranty are "first class consumer goods." Yet these new appliances and machine-like products usually are sold with written express warranties, so that no disclaimer is permitted. Used goods acquire the Song-

369. *See* U.C.C. §§ 2-316, 2-719.

370. CAL. CIV. CODE § 1793 (West Supp. 1979). The 1978 revision makes it clear that no supplier may disclaim Song-Beverly implied warranties on an expressly warranted product.

Beverly implied warranty of merchantability only by virtue of the existence of a Song-Beverly express warranty;[371] absent an express warranty, no disclaimer is needed unless the seller has created an implied warranty of fitness for a particular purpose.

The result is that the situations in which a disclaimer of Song-Beverly implied warranties is both permitted and necessary will occur only infrequently. But if it does happen that a manufacturer or retailer wishes to sell a new consumer appliance with no warranties whatsoever, the Act describes exactly what he must do:

> No sale of goods, governed by the provisions of this chapter, on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:
>
> (1) The goods are being sold on an "as is" or "with all faults" basis.
>
> (2) The entire risk as to the quality and performance of the goods is with the buyer.
>
> (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.[372]

This provision raises questions about the interaction of Song-Beverly and the Commercial Code. The first question is whether a retailer of consumer goods need comply with the Act's stringent disclaimer requirements in order effectively to exclude the seller's U.C.C. implied warranty of merchantability. If so, the disclaimer provisions of U.C.C. section 2-316 have been completely superseded in the field of consumer warranties. An affirmative answer to this question is strongly suggested by Civil Code section 1792.3 which announces, "*No* implied warranty of merchantability and, where applicable, *no* implied warranty of fitness shall be waived, except . . . where the provisions of this chapter affecting 'as is' or 'with all faults' sales are strictly complied with."[373] Thus, the restrictions are not limited to disclaimers of the Song-Beverly implied warranties.[374] There is no doubt that the retailer must comply with this provision in order to disclaim his Song-Beverly implied warranty of merchantability.

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371. *See* notes 314-28 & accompanying text *supra*.

372. CAL. CIV. CODE § 1792.4(a) (West 1973).

373. *Id.* § 1792.3 (emphasis added).

374. Moreover, it is clear that the drafters of the Act knew how to restrict the effects of a provision to the Act's implied warranties. *Id.* § 1793 (express warrantor may not disclaim implied warranties "guaranteed by this chapter"). *See also id.* §§ 1794, 1794.1 (treble damages for "violation of the provisions of this chapter").

A second problem is the questionable effect of a Song-Beverly disclaimer by a manufacturer on the seller's U.C.C. implied warranty of merchantability. While a complying manufacturer's disclaimer may not expressly exclude the seller's U.C.C. obligations, it would be unjust for a buyer to be permitted to assert that he harbored a reasonable expectation that the product he purchased with a conspicuous Song-Beverly disclaimer sign on it was guaranteed by anyone to be fit for any purpose.[375]

But the importance of these problems and of the seller's duties in general is somewhat diminished by the fact that Song-Beverly makes the manufacturer ultimately liable for all retailers' costs incurred in remedying defective goods.[376] The Act does not, however, abridge any cause of action the buyer might have against the seller under the U.C.C., since the Act's remedies are cumulative. Taking these conflicting provisions together, it seems that the seller is free of liability if any party refunds, repairs, or replaces the goods, but is still exposed to lawsuits if the defect is not remedied.[377]

Curiously, Song-Beverly makes no mention of disclaimers of express warranties, but it is clear that they are disfavored. It could be argued that given the partial prohibition against, and stringent limitations on, disclaimers of implied warranties, disclaimers of express warranties must a fortiori be prohibited. It is also likely that the drafters of the Act felt that the problem was adequately addressed in the Commercial Code.[378] Moreover, an express war-

375. The buyer might retort that § 1791.3 says only that a Song-Beverly disclaimer excludes implied warranties that would otherwise attach under Song-Beverly; and the seller's U.C.C. implied warranty of merchantability would not. It could also be argued that the Act is intended to make the buyer's rights and remedies cumulative and not to diminish the rights he would have under the U.C.C. *See* CAL. CIV. CODE § 1790.4 (West Supp. 1979). The answer to this contention is that under the U.C.C., the buyer should not have any implied warranty rights in the face of a conspicuous sign attached to the goods, clearly informing him that he and no other party will bear all of the risks and expenses of defective goods. There are scattered decisions under the U.C.C. which have held that the manufacturer's disclaimer does not protect the retailer. *E.g.*, Shofner v. Williams & Pearson Furniture Co., 8 U.C.C. Rep. Serv. 48 (Tenn. Ct. App. 1970). But none of these cases involved so devastating a disclaimer; rather, they represent further evidence of some courts' unflagging efforts to protect consumers from incomprehensible and unfair disclaimers. In the context of a Song-Beverly disclaimer, such efforts would be completely misplaced absent other indicia of unconscionable conduct. This issue is significant if the duration of U.C.C. implied warranties exceeds the duration of Song-Beverly implied warranties. *See* notes 329-37 & accompanying text *supra*.

376. *See* CAL. CIV. CODE §§ 1793.3(c), .5 (West 1973 & Supp. 1979).

377. It is difficult not to recognize the possibility that the drafters of Song-Beverly simply never considered some or all of these questions, thereby rendering futile any quest for the specific legislative intent. It is nonetheless important to attempt to solve such problems through a careful reading of the statutes in the light of the broader, less obscure legislative purposes.

378. *See* U.C.C. §§ 2-316(1), -317; notes 209-12 & accompanying text *supra*.

ranty automatically creates statutory rights and duties whose waiver the Act deems contrary to public policy, therefore unenforceable and void.[379]

More surprising, and far more important, is the Act's failure to mention limitations of remedy, the most prevalent of which are the exclusive repair or replace remedy and the denial of consequential damages. The absence of any explicit prohibition has led some commentators to the simple conclusion that limitations of remedy are valid under Song-Beverly.[380] Another writer has zealously advocated the opposite conclusion based on the statutory intent to preserve the buyer's rights under the implied warranties, a goal which would be undercut by permitting remedy limitations.[381]

This Comment takes the latter view, with some qualifications, but in so doing, relies on specific statutory language in addition to the presumed legislative intent. First, a distinction between warranty disclaimers and remedy limitations cannot be easily dismissed as absurd, as it is firmly built into the structure of the Commercial Code which provides the conceptual foundation upon which Song-Beverly builds. It is unlikely that the same drafters who incorporated into the Song-Beverly Act many sections of the Code and who explicitly restricted disclaimers of warranty simply forgot to bar limitations of remedy.

A more plausible explanation is that the drafters believed that the provisions of the Act itself implicitly solved the remedy limitation problem so that no additional restrictions were necessary. The key to this explanation is the nature of Song-Beverly's remedial scheme. Unlike the Code, which provides for a single set of remedies for breach of any warranty, Song-Beverly grants one set of extra-judicial remedies for breach of express warranties and a totally different set of judicial remedies for breach of implied warranties.

Thus, for a non-willful breach of express warranty, Song-Beverly grants the buyer only the right to seek repair, replacement, or refund. In essence, the Act actually approves and adopts with modifications the exclusive repair or replace limitation of remedy clause prevalent in consumer warranties. For example, the Act requires manufacturers who make express warranties to maintain local repair facilities in order "to carry out the terms of

379. CAL. CIV. CODE § 1790.1 (West 1973), *quoted at* note 287 *supra*.

380. Clark & Davis, *supra* note 31, at 591.

381. "It is absurd to suggest that they would have taken such care to preserve the rights of the buyer under implied warranties and at the same time leave him with a remedy that manufacturers and sellers could modify or avoid by a waiver." Comment, *supra* note 276, at 607.

such [express] warranties. . . ."[382] Similarly, the buyer is permitted to return defective goods "in accordance with the terms and conditions of the *express* warranty."[383] The Act's provisions enable the warrantor to preclude the purchaser from obtaining judicial relief for breach of express warranty and, consequently, from recovering any damages.

In marked contrast, the statutory remedy granted for breach of implied warranties—an action for damages under the California Commercial Code—is judicial.[384] Any limitation of the buyer's rights forcing him to forego this remedy would constitute a waiver of the Act's provisions, and, as such, would automatically be void.[385] The fact that Song-Beverly fashions the remedy for breach of express warranty "in accordance with the terms and conditions of the express warranty"[386] while it defines the remedy for breach of implied warranty without regard for the terms of the express warranty is additional evidence that the implied warranties were not meant to be affected by remedy limitations.

This result is in keeping with the apparent statutory intent to make the implied warranties, which are very difficult to disclaim, the absolute minimum in buyer's rights. It also accords with more basic principles of warranty law. Express warranties are created by agreement or at least by some affirmative action of the warrantor; thus there is little reason not to permit him clearly and conspicuously to modify remedies based on the express warranty since he did not have to create it in the first place. The opposite is true of implied warranties of merchantability. They are creatures of law imposed on the parties to protect the consumer from his own lack of bargaining power and expertise. Therefore, the Song-Beverly Act does not permit waivers of implied warranty rights or remedies to thwart its provisions.

IV. THE MAGNUSON-MOSS WARRANTY ACT

Until 1975, consumer warranty law was generally defined by the states. In that year, Congress entered the field with the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss).[387] This statute has recently spawned an abundance of legal commentary,[388] and a complete

382. CAL. CIV. CODE § 1793.2(a)(1) (West Supp. 1979) (emphasis added).
383. *Id.* § 1793.3(a) (emphasis added). *See also id.* § 1793.35 (West 1973).
384. *Id.* § 1791.1(d).
385. *Id.* § 1790.1 (West 1973). *See also id.* § 1790.3.
386. *Id.* § 1793.3(a) (West Supp. 1979).
387. Pub. L. No. 93-637, 88 Stat. 2183 (1975). Only Title I of the Act deals with consumer warranties. 15 U.S.C. §§ 2301-2312 (1976). Title II deals with the increased jurisdiction and powers of the FTC and will not be discussed extensively.
388. *See, e.g.*, Clark & Davis, note 31 *supra*; Eddy, *Effects of the Magnuson-Moss*

analysis and evaluation of the Act's provisions is therefore unnecessary. The focus here instead will be to analyze the effects of Magnuson-Moss on the California consumer's rights and remedies.

The major purposes of the Magnuson-Moss Warranty Act are to make consumer product warranties easier to understand and compare, to improve competition in the marketing of consumer products, to prevent deception, and to encourage informal settlement of warranty-related disputes.[389] Unlike the U.C.C. and the Song-Beverly Consumer Warranty Act, Magnuson-Moss contains little regulation of the substance of warranty terms and creates no implied warranties at all.

A. *Scope of the Magnuson-Moss Warranty Act*

As in the case of the Song-Beverly Act, the requirements of Magnuson-Moss apply only to a limited range of purchases. Generally, a sale of goods is governed by Magnuson-Moss only if a "written warranty" is made to a "consumer" concerning a "consumer product" manufactured after July 5, 1975.

1. "Written Warranty"

The key element in this legislation, as in Song-Beverly, is the presence of a formal written warranty, which is defined as follows:

> The term "written warranty" means—
>
> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such prod-

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Act upon Consumer Product Warranties, 55 N.C.L. Rev. 835 (1977); Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335 (1976).

389. 119 CONG. REC. 972 (1973) (remarks of Sen. Moss). *See* 15 U.S.C. §§ 2302(a), 2310(a)(1) (1976); H.R. REP. NO. 1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702.

uct.[390]

This definition is similar to the Song-Beverly "express warranty," although it appears to be broader as it clearly encompasses promises of future freedom from defects.[391] Even a claim of only present freedom from defects with no reference to future quality is a "written warranty" under Magnuson-Moss, while it definitely is not an "express warranty" under Song-Beverly unless formal words such as "warrant" or "guarantee" are used.[392] Yet even under Magnuson-Moss, promises of performance are not covered unless they relate to a specified future period of time. Consequently, for lack of specificity, the promise that a dress "will not shrink" might not by itself constitute a "written warranty."[393] Oral warranties again are left to the Commercial Code.

One would expect that the confusion surrounding the U.C.C. "basis of the bargain" requirement would have convinced legislators to abandon or at least clarify the term; yet it appears again. Fortunately, it is not necessary to rely exclusively on U.C.C. jurisprudence to derive its meaning in this context. The FTC, which is charged with responsibility for enforcing the Act and prescribing rules under it, has published its final interpretations of many of the Act's provisions.[394] The Commission's view is that to be "part of the basis of the bargain," the warranty must be conveyed at the

390. 15 U.S.C. § 2301(6) (1976). Note that both subsections (A) and (B) are modified by the "basis of the bargain" language of the last clause.

391. *See* notes 268-84 & accompanying text *supra* (discussing Song-Beverly "express warranty").

392. *See* CAL. CIV. CODE § 1791.2 (West Supp. 1979); notes 268-84 & accompanying text *supra*.

393. However, this result may frustrate the Act's apparent purpose of protecting the consumer's reasonable expectations. It is difficult to justify enforcing a warranty which promises that a dress "will not shrink for one year" while excluding from the Act's coverage the promise that the dress simply "will not shrink." The average consumer would have little reason to believe the more chronologically specific promise provides any greater protection than the unlimited undertaking. While the Act appears to exclude purposefully promises and affirmations which are too vague to be reasonably relied upon or effectively enforced, this purpose can be served without frustrating the more basic consumer protection goals of the statute. Perhaps the courts should deal with this problem by the implication of a specific time period if the undertaking is otherwise sufficiently specific and reliable to lead a reasonable person to believe the promise is enforceable. Courts have frequently chosen a liberal interpretation of statutes, particularly remedial statutes, in order to effectuate the legislative intent. *See, e.g.*, Dooley v. Pennsylvania R.R., 250 F. 142 (D. Minn. 1918); Morgan v. Reasor Corp., 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968) (construing provisions of Unruh Act liberally in order to protect consumers); CAL. COM. CODE § 1106 (West 1973) (remedies to be liberally administered). *See also* J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 573-575 (2d ed. 1904).

394. Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. § 700 (1978). These interpretations attempt to clarify the Act's requirements although they are not substantive rules. Noncompliance with them, however, may result in "corrective action" by the FTC under the applicable statute. *Id.*

time of sale without any additional cost. Thus, a "written warranty" is distinguished from a service contract.[395] This approach to warranties also eliminates the necessity of any pre-sale reliance by the buyer.[396]

While not excluded from the definition of "written warranty," "expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations . . ."[397] generally are not regulated by the Act.[398] If, however, the expression of general policy does contain specific limitations as to the products covered, the amount to be refunded, or the duration of the promise, it is no longer exempt.[399]

Like Song-Beverly, Magnuson-Moss does not extensively regulate service contracts, although it does require that their terms be fully, clearly, and conspicuously disclosed in readily understood language.[400] But Magnuson-Moss goes further to prohibit disclaimers of implied warranty if the supplier enters into a service contract within ninety days after the sale.[401] The effect of this prohibition is to retain for the buyer of a service contract an unrestricted one-year Song-Beverly implied warranty of merchantability on "consumer goods" as well as a Commercial Code implied warranty of merchantability of uncertain duration on any goods.[402]

2. "Consumer Product"

Magnuson-Moss defines "consumer product" as:

any tangible personal property which is distributed in com-

395. *Id.* § 700.11(b).

396. Even if the buyer's reliance were required, he would have little difficulty asserting such reliance if the warrantor complied with the rule requiring pre-sale availability of warranty terms. 16 C.F.R. § 702 (1978). *See* notes 427-34 & accompanying text *infra*. If the warrantor did not comply with this rule, he should be estopped from asserting the buyer's non-reliance, which may have been caused by the unavailability of the warranty prior to the sale. A warrantor should not be permitted to profit by violating the law.

397. *Id.* § 700.5(a).

398. They are not subject to the Act's disclosure and designation requirements, 15 U.S.C. § 2303(b) (1976), while they are subject to enforcement provisions such as those regarding deceptive warranties, *id.* §§ 45 (FTC Act provision regarding unfair or deceptive practices), 2310(c). Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. § 700.5(a) (1978).

Under the Song-Beverly Consumer Warranty Act, such general policy statements do not create express warranties. CAL. CIV. CODE § 1791.2(c) (West Supp. 1979).

399. 16 C.F.R. § 700.5(b) (1978).

400. 15 U.S.C. § 2306(b) (1976). In addition, the Act authorizes the FTC to prescribe by rule the form and manner in which service contract terms are to be disclosed. *Id.* § 2306(a).

401. *Id.* § 2308(a).

402. The Magnuson-Moss Warranty Act creates no implied warranties and defines "implied warranty" as arising under state law. *Id.* § 2301(7).

> merce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).[403]

This "normal use" test is both broader and narrower than Song-Beverly's "buyer's primary purpose" test.[404] Under Magnuson-Moss, the car sold to General Electric is a consumer product; the computer sold to the computer enthusiast as part of his hobby is not, or at least not until computers are "normally" so used. The test is objective, and ambiguities are to be resolved in favor of coverage.[405]

If personal property such as an air conditioner or water heater is intended to be attached to real property and meets the above tests, it is a consumer product. Whether such items are classified as real or personal property under state law is irrelevant.[406] Even building materials may be consumer products when sold over the counter.[407]

The Commission, however, was not content with a single definition for consumer products. It determined that, with respect to the rules regarding disclosure of warranty terms and pre-sale availability of warranty terms, a narrower definition would apply which excludes products "purchased solely for commercial or industrial use."[408] Both rules are also limited to products costing the consumer more than fifteen dollars.[409] As these definitions do not exclude used consumer goods, those are presumably covered. Leased consumer products might be covered if the lease were essentially equivalent to a sale, *e.g.*, if the lease extended over the useful life of the product, title passed at the end of the lease, or the present value of the cost of the lease equaled the product's fair market value.[410]

3. "Consumer"

Under Magnuson-Moss, a "consumer" is a buyer or transferee of a "consumer product" or other person entitled by the terms of the warranty, service contract, or state law to enforce the warranty or service contract.[411] The peculiar result of this defini-

403. *Id.* § 2301(1).
404. *See* CAL. CIV. CODE § 1791(a) (West Supp. 1979).
405. 16 C.F.R. § 700.1(a) (1978).
406. *Id.* § 700.1(d).
407. *Id.* § 700.1(e).
408. *Id.* §§ 701.1(b), 702.1(b).
409. *Id.* §§ 701.3(a), 702.3(b)(1). Multiple packaged items costing over $15 which are not sold separately are covered even if sold individually. *Id.* § 700.1(g).
410. *See* Digest of FTC Staff Opinions B-1 (1977) (on file with the *UCLA Law Review*).
411. 15 U.S.C. § 2301(3) (1976). *But see* notes 491-93 & accompanying text *infra*.

tion is to transform even the largest corporation into a "consumer" with respect to its acquisition of products "normally used for personal, family, or household purposes."[412]

B. *Disclosure Requirements*

The primary means by which Magnuson-Moss attempts to protect consumers is full and clear disclosure of warranty terms and conditions.[413] Disclosure is portrayed as the cure for many ills: deceptions, consumer ignorance, inadequate warranties, and shoddy products. The legislative reasoning is that clear disclosure promotes consumer awareness, which should lead to greater selectivity in purchases on the basis of warranty provisions. Buyer selectivity should, in turn, foster competition among manufacturers to provide better warranties, the enforcement of which ultimately will promote improved product quality.[414]

One need not be overly skeptical to question many of the links in this chain of reasoning, absent an empirical basis to support them. Is it clear that consumers who did not read warranties in the past will now begin to do so? The warranties, albeit clearer, are also likely to be longer; and even if consumers' awareness is increased, their potential selectivity cannot be realized if manufacturers in any given product line continue to give essentially similar warranty coverage. If the preceding elements fail, then, manufacturers, who were aloof from competitive pressures to improve warranties in the past, can hardly be expected to change in response to non-existent pressures.

Indeed, it is not even clear that all manufacturers will bother to comply with the Act's requirements unless and until the FTC takes action to enforce them. Recently, the Commission has begun to enforce its disclosure and pre-sale disclosure rules.[415] But

412. *See* text accompanying note 403 *supra*.

413. The rationale is stated in the introduction to the disclosure requirements: "In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor . . . shall . . . fully and conspicuously disclose . . . ." 15 U.S.C. § 2302(a) (1976).

414. *Id.* Congressman Moss explained the purposes of Magnuson-Moss when he introduced the legislation to the House:

> Perhaps one of the potentially most important and long range effects of this bill resides in its attempt to assure better product reliability. The bill . . . attempts to organize the rules of the warranty game in such a fashion as to stimulate manufacturers, for competitive reasons, to produce more reliable products. This is accomplished using the rules of the marketplace by giving the consumer enough information and understanding about warranties so as to enable him to look to the warranty duration of a guaranteed product as an indicator of product reliability.

119 CONG. REC. 972 (1973). *Accord, id.* 968 (remarks of Sen. Magnuson).

415. In early September 1978, the FTC issued its very first complaint alleging violations of Magnuson-Moss, its disclosure and pre-sale disclosure rules, and section 5

even if these rules are vigorously enforced and scrupulously observed,[416] it is not altogether clear that the consumer will receive benefits sufficient to outweigh the government's and manufacturer's time, trouble, and expense—all of which the consumer ultimately bears.[417]

On the other hand, the contention that disclosure requirements are unnecessary because consumers ignore warranties rests on reasoning that is somewhat circular. It is quite possible that the reason consumers have traditionally ignored their filigree-bordered guarantees is that the documents traditionally have been unavailable prior to the sale and incomprehensible even afterwards.[418] Not until buyers are able to understand, compare, and enforce warranties will there be any competitive pressure on warrantors to improve their warranties. Consequently, the verdict on disclosure must await a reasonable period of widespread warrantor compliance.

1. Disclosure of Terms in Written Warranties

With the above reservations, a brief look at the disclosure requirements themselves is in order. Section 102(a) authorizes the Commission to establish rules requiring disclosure of thirteen listed items and possibly others.[419] The FTC's disclosure rule as finally adopted mandated a slightly shorter list of disclosures, each in clear and conspicuous language, including: the parties who are entitled to enforce the warranty; what parts or properties are covered and excluded; what the warrantor will and will not do in the

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of the FTC Act. FTC News Summary, September 8, 1978. The complaint was issued against George's Radio and Television Co., Inc., a major home appliance retailer headquartered in Washington, D.C. The complaint alleges that the defendant failed to designate its own warranties as "full" or "limited"; failed to include in its warranties many of the disclosures required by the Act; and failed to properly comply with the rule requiring retailers to make warranties readily available to consumers prior to the sale. *Id.* The proposed order accompanying the complaint would require total compliance with Magnuson-Moss and its rules, a surveillance program by defendant to assure compliance, and the posting of notices in each department of defendant's retail outlets describing basic facts concerning warranties in layman's language. *Id.*

Shortly after issuing its first complaint under Magnuson-Moss, the Commission also took action against Montgomery Ward for violation of the rule requiring pre-sale availability or warranties. FTC News Summary, October 13, 1978. Since Montgomery Ward took part in the rule-making proceedings prior to the adoption of this rule, it will not be in a good position to plead ignorance of the law, nor will such ignorance constitute a defense. *See* 40 Fed. Reg. 60,168, 60,183 (1975).

416. *See* note 565 & accompanying text *infra*.

417. *See generally* Eddy, note 388 *supra* (challenging the wisdom of legislation such as Magnuson-Moss whose efficacy in solving consumer problems, according to the author, is not supported by firm empirical evidence). *But see* Akerlof, note 26 *supra*; note 306 & accompanying text *supra*.

418. *See* notes 16-19 & accompanying text *infra*.

419. 15 U.S.C. § 2302(a) (1976).

event of a defect; a detailed explanation of the steps a consumer should follow to obtain warranty service; any informal dispute settlement mechanisms, if available; any limitations on implied warranties or on relief such as consequential damages; and statements that state law may render such limitations void and give the buyer additional rights.[420]

420. The disclosure rule now reads as follows:

(a) Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information: (1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

(2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty;

(3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

(4) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;

(6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Act, accompanied by the following statement:

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

(8) Any exclusions of or limitations on relief such as incidental or consequential damages accompanied by the following statement, which may be combined with the statement required in sub-paragraph (7) above:

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.

(9) A statement in the following language:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(b) Paragraph (a)(1)-(9) of this Section shall not be applicable with respect to statements of general policy on emblems, seals or insignias

Most important of the items omitted was "[a] brief, general description of the legal remedies available to the consumer."[421] While such a description might be of great value to the consumer, it is not difficult to understand the reluctance of warrantors to append fifty different treatises on consumer warranty law to each of their products costing over fifteen dollars.

A possible compromise between the warrantor's interest in uniformity and the consumer's interest in disclosure might be reached on the basis of the Act's provision empowering the FTC to devise substantive warranty terms that warrantors may incorporate into their warranties.[422] The FTC could draft brief descriptions of consumers' legal remedies for each state. Warrantors would be able to incorporate them by reference[423] and the Commission could even amend the disclosure rule to require their incorporation in full.

An additional difficulty with the disclosure rule is the demand that all of the listed items be disclosed "conspicuously."[424] The Act does not define the term. The Uniform Commercial Code definition suggests that a conspicuous clause is one that a reasonable person ought to have noticed, as when capitals or contrasting type styles or colors are used to draw attention.[425] A warrantor who took the rule at face value would have to produce a very gaudy document indeed. The requirement that a large number of warranty terms all be conspicuous must quickly reach

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> issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (1) the disclosures required by paragraph (a)(1)-(9) are published by such third parties in each issue of a publication with a general circulation, and (2) such disclosures are provided free of charge to any consumer upon written request.

16 C.F.R. § 701.3 (1978). The rules further require:

> When a warrantor employs any card such as an owner's registration card, a warranty registration card, or the like, and the return of such card is a condition precedent to warranty coverage and performance, the warrantor shall disclose this fact in the warranty. If the return of such card reasonably appears to be a condition precedent to warranty coverage and performance, but is not such a condition, that fact shall be disclosed in the warranty.

Id. § 701.4. In California, however, the conditioning of a warranty on the return of a warranty registration card by the buyer is invalidated. CAL. COM. CODE § 2801 (West Supp. 1978); *see* note 178 *supra*.

421. 15 U.S.C. § 2302(a)(9) (1976).

422. *Id.* § 2302(d).

423. *Id.*

424. *Id.* § 2302(a).

425. U.C.C. § 1-201(10). The broad "conspicuous" disclosure rule of Magnuson-Moss is likely to render futile the U.C.C. requirement that disclaimers of implied warranties be conspicuous. *Id.* § 2-316(a). Moreover, this U.C.C. provision may even be preempted by Magnuson-Moss in the field of consumer warranties. *See* notes 547-59 & accompanying text *infra*.

a point of diminishing returns. One might also carp at the length of the required disclosures since the longer a document is, the less likely a consumer is to read it.[426] On the other hand, as nearly all of the terms listed are fundamental elements of consumer warranties, the detailed explanation of procedures for obtaining warranty service will surely be invaluable when the product malfunctions and the warranty is read, perhaps for the first time.

2. Pre-Sale Availability of Warranty Terms

The goal of increasing competition by means of disclosure cannot possibly be served unless the disclosed information is available to the buyer before he makes his purchase decision. As authorized by the Act,[427] the FTC has promulgated a pre-sale availability of warranty rule.[428] This rule requires sellers of consumer products costing more than fifteen dollars to make the text of written warranties available to buyers prior to the sale. The rule is flexible, allowing sellers to use any one or more of the following methods:[429] (1) displaying the warranty in close conjunction with each product; (2) maintaining binders with copies of the warranties in each department where the products are sold, these binders must be clearly labeled, indexed, updated, and most important, prominently displayed in the store so as to attract attention; (3) displaying a package of the product on which the text of the warranty is disclosed so that it is clearly visible to prospective buyers; (4) placing a notice containing the text of the written warranty close to the warranted product.[430]

While the "binder" method may be the retailer's only feasible alternative for some products, such as jewelry or other items locked in display cases, this method has been criticized as inconvenient, inconsonant with normal consumer buying patterns, and therefore, unlikely to be used by consumers.[431] Moreover, despite the FTC's attempts at flexibility,[432] it appears that few sellers are

426. One critic commented that the proposed disclosure rule "fails to recognize, as Shakespeare did that 'They are sick that surfeit with too much, as they that starve.' " 40 Fed. Reg. 60,168, 60,182 (1975).

427. 15 U.S.C. § 2302(b)(1)(A) (1976).

428. 16 C.F.R. § 702 (1978).

429. *Id.* § 702.3(a)(1)(i)-(iv).

430. Warrantors must provide the sellers with the warranty material necessary to comply and they too are given various options as to methods of compliance. *Id.* § 702.3(b).

431. 40 Fed. Reg. 60,168, 60,183 & n.194 (1975).

432. For example, the Commission approved the National Retail Hardware Association's request to use a microfiche reader system, 41 Fed. Reg. 53,472 (1976), and a Sears' request to use an ultrafiche viewing system, 42 Fed. Reg. 15,679 (1977), to comply with this rule.

presently complying fully with any of the alternative methods.[433] It now remains to be seen whether the FTC's recent initiation of enforcement activities will result in widespread compliance, and if so, whether consumers will avail themselves of the additional warranty information. If so, the consumer should have little difficulty in establishing that the warranty was, in fact, part of the "basis of the bargain" and enforceable under U.C.C. section 2-313.[434]

3. The Used Car Rule

One of the most frequent and troubling sources of consumer frustration has been the used car industry.[435] Often a used car salesman orally represents that the vehicle is in excellent condition or that the dealer will repair any defects appearing within a certain period of time.[436] These oral assurances are followed by a high pressure closing room sale in which the buyer signs a host of lengthy, technically worded documents that he neither reads nor understands but which include warranty disclaimers and merger clauses.[437] Because of the parol evidence rule,[438] these clauses excise from the contract the oral promises that induced the consumer to buy the car in the first place.

Congress responded to this problem by authorizing the FTC

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433. *See* note 565 *infra*.

434. *See* notes 54-73, 394-96 & accompanying text *supra*. This interaction appears to have been intended by the drafters of Magnuson-Moss. *See* 40 Fed. Reg. 60,168, 60,182 (1975).

435. *See generally* BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STAFF REPORT ON THE PROPOSED TRADE REGULATION RULE ON SALE OF USED MOTOR VEHICLES (1978) [hereinafter cited as STAFF REPORT]. Summarizing a large body of evidence, the report concludes:

> [U]sed car dealers often fail to disclose material facts about the condition of a car or disclose part, but not all, of the facts to leave a misleading impression. Such practices also occur with respect to known prior uses and specific warranty terms which put the burden of repair expenses on the buyer. Sometimes a dealer will disclose some minor defect, leaving a major defect undisclosed. Another common practice is representing cars to be safe while failing to disclose unsafe conditions . . . .
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> Besides use of silence and half-truths, deception often occurs through untrue statements. Such affirmative misrepresentations are made regarding a used car's mechanical condition, prior use, mileage, and the buyer's responsibilities for post-sale repairs. Coupled with the universal practice of appearance reconditioning, designed to make used cars look new, and consumer reliance upon looks as an indication of quality, affirmative misrepresentations of material facts mislead consumers into making erroneous assumptions as to the value of used cars offered for sale.

Id. at 440-41 (citations omitted).

436. *Id.* at 274-77.

437. *Id.* at 267-68, 279-83.

438. *See* U.C.C. §§ 2-202, -316(1); note 212 & accompanying text *supra*.

to generate a special rule for used automobile warranties.[439] This authority is described in very broad terms. In particular, the FTC is empowered to require disclosure of the absence of any warranty as well as to prescribe the form and content of such disclosure.[440] Although the final rule has not yet been promulgated, the proposed rule and Sample Checklist Disclosure Form were endorsed recently in a lengthy Bureau of Consumer Protection staff report.[441] The proposed trade regulation rule would require used car dealers to perform a pre-sale inspection of each car and to display on the vehicle a form disclosing the vehicle's condition, mileage, prior use, the availability of a warranty or service contract, and other information needed for rational purchase decisions.[442]

Of all recent attempts to improve consumer warranty protection, this rule may prove to be the most elegant and effective. To begin with, the disclosure form converts a traditional vehicle of consumer frustration, the mass standard form, into an instrument of consumer protection and public safety through disclosure of product quality. Such disclosure enables consumers to comparison shop, thereby fostering competition in price and quality. Reducing quality uncertainty also favors the honest car dealers who are currently at a competitive disadvantage to less scrupulous salesmen.[443]

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439. 15 U.S.C. § 2309(b) (1976).

440. *Id.* This provision permits the FTC to use any authority that the Commission is granted by title I of Magnuson-Moss or other law, such as the FTC Act, in promulgating this rule. The trade regulation rule proposed by the *Staff Report* relies on the authority of section 5 of the FTC Act, 15 U.S.C. § 45(a)(2) (1976), which directs the Commission to prevent the use of "unfair or deceptive acts or practices in or affecting commerce." Consequently, the rule will be issued under the rule-making procedures of section 18 of the FTC Act, 15 U.S.C. § 57a(1)(B) (1976), rather than under Magnuson-Moss. STAFF REPORT, *supra* note 435, at 433. The Commission chose this route because its investigation demonstrated abuses beyond the concerns of Magnuson-Moss and because a Magnuson-Moss rule would not apply to cars manufactured before July 4, 1975. *Id.; see* 15 U.S.C. § 2312(a) (1976) (effective date of Magnuson-Moss).

441. STAFF REPORT, note 435 *supra*.

442. Proposed Used Motor Vehicle Trade Regulation Rule, *id.* app. F, at 2 (to be codified at 16 C.F.R. § 445.2), disclosure form *reprinted in* Appendix *infra*. Unlike an earlier version of the proposed rule, 41 Fed. Reg. 1089, 1090 (1976), the rule would drop the requirement that dealers disclose repairs they have made on the vehicles. STAFF REPORT, *supra* note 435, at 10-11. *See also* Wall St. J., Nov. 14, 1978, at 14, col. 3.

443. Akerlof, note 26 *supra*; STAFF REPORT, *supra* note 435, at 16-17, 130-41, 196-209, 458-59.

> The last major improvement in market functioning from increased defect information comes from lessening the current incentive to engage in deceptive representations of good quality (or not to disclose poor quality). As previously discussed, the market currently rewards those who engage in such practices at the expense of honest dealers. Requiring defect disclosure would alter the dishonest dealer's incentive to

Second, the disclosures themselves create substantive rights. If the seller places a check in the box stating that the brake system is "OK" or that the vehicle has not been flooded or wrecked, he has created an express warranty enforceable under the U.C.C.[444] and possibly under Song-Beverly[445] but not under Magnuson-

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> deceive by committing his assertions to writing, making them actionable by the purchaser. Such binding representations stand in sharp contrast to the market today, which allows a dishonest dealer to avoid the legal consequences of his actions if he keeps his representations oral and sells "as is." In addition to aiding honest dealers vis-a-vis their dishonest competitors, defect disclosure will benefit consumers to the extent that prices are lowered from the elimination of deception.

Id. at 208-09 (footnotes omitted).

444. U.C.C. § 2-313. This result was intended. STAFF REPORT, *supra* note 435, at 484-85. To the extent that the proposed rule requires dealers to create warranties, it appears to violate Magnuson-Moss: "Nothing in this chapter . . . shall be deemed to authorize the Commission to . . . require that a consumer product or any of its components be warranted." 15 U.S.C. § 2302(b)(2) (1976). However, this prohibition applies only to "this chapter," *i.e.*, Magnuson-Moss. The prohibition does not affect the FTC's authority to promulgate rules pursuant to the FTC Act, such as the proposed used car rule. *See* note 440 *supra*. This conclusion is supported by another provision of Magnuson-Moss: "Nothing contained in this chapter shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act . . . ." 15 U.S.C. § 2311(a)(1) (1976).

445. With respect to used goods, Song-Beverly's provisions are invoked only if the used goods are accompanied by a Song-Beverly express warranty. CAL. CIV. CODE § 1795.5 (West Supp. 1979); *see* notes 321-25 & accompanying text *supra*. The *Staff Report* takes the position that checking "OK" on the disclosure form does not, by itself, qualify as a Song-Beverly express warranty. STAFF REPORT, *supra* note 435, at 494 n.42. But a closer analysis of the disclosure form and the Song-Beverly Act may yield a different result. The form states, *inter alia*: "If anything we've marked 'OK' is not OK, state law says we have to fix it or give you back some money. And if the problem's bad enough, you can make us take the car back. . . . [W]e have to pay to fix things marked 'OK' if you find the problem in a reasonable time after you buy." *Id.* app. F, at 2. A Song-Beverly express warranty includes a written statement in which a retailer "undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance . . . ." CAL. CIV. CODE § 1791.2(a)(1) (West Supp. 1979). A promise to fix or pay for defects might well constitute such an undertaking.

If the dealer has created an express warranty within the meaning of Song-Beverly, he also impliedly warrants the merchantability of the components marked "OK" for a period of thirty to ninety days. *Id.* § 1795.5(c). In that case, the form's statement that the buyer has a "reasonable time" after the sale to discover defects, language drawn from the U.C.C. and intended to be a restatement of state law, STAFF REPORT, *supra* note 435, at 509, would presumably preempt the conflicting state statute by virtue of the Supremacy Clause. The Commission, however, appears to have anticipated and forestalled the preemption of more consumer-protective state laws by tacking on to the proposed rule a "Declaration of Commission Intent" not to preempt state laws that add to the dealer's responsibilities. Proposed Used Motor Vehicle Trade Regulation Rule, *id.* app. F, at 30 (to be codified at 16 C.F.R. § 455.9).

Another possible conflict between Song-Beverly and the Proposed Rule arises from the disclosure form's statement that "[y]ou lose your implied warranties when you buy 'as is.'" *Id.* app. F, at 2 (to be codified in 16 C.F.R. § 455.2). Song-Beverly prohibits express warrantors from disclaiming Song-Beverly implied warranties. CAL. CIV. CODE § 1793 (West Supp. 1979). The Proposed Rule expressly preserves

Moss.[446] Such warranties cannot be disclaimed.[447]

Third, the form serves an important educational function. It advises the consumer of his legal rights upon breach of the aforementioned express warranties. It explains the meaning of implied warranties in clear and simple language. Particularly useful in the used car sale is the exhortation: "Ask us to put all promises in writing." Consumers are warned, in effect, that oral promises are not worth the paper they are printed on. Finally, the form facilitates informal dispute settlement as well as judicial enforcement of warranty rights by giving the buyer excellent documentary evidence of the terms of the contract. For once, the small print at the bottom favors the consumer: "The information on this form is part of any contract to buy this vehicle."[448] At the same time, this provision protects the seller against false claims of oral warranties more efficiently and equitably than the exception-ridden parol evidence rule.[449]

Perhaps the best measure of the rule's potential effectiveness

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such provisions: "[i]f your state law does not allow you to sell 'as is,' that portion of your state law overrides this part and you cannot sell 'as is.' " Proposed Used Motor Vehicle Trade Regulation Rule, STAFF REPORT, *supra* note 435, app. F, at 30 (to be codified in 16 C.F.R. § 455.3(A)). The rule also provides that if state law requires particular "as is" language in order to disclaim warranties, that state law must also be complied with. *Id.* Consequently, if the U.C.C. implied warranty of merchantability attaches to the sale of used goods in California, *see* U.C.C. § 2-314; notes 104-05 & accompanying text *supra*, and if the explicit disclaimer language requirement of Song-Beverly applies to disclaimers of U.C.C. implied warranties, *see* CAL. CIV. CODE §§ 1792.3, 1792.4 (West 1973); notes 372-74 & accompanying text *supra*, then a dealer cannot disclaim even the U.C.C. implied warranties by checking the "No Warranty ('As is')" box unless he also satisfies Song-Beverly's demands. A pragmatic and fair resolution of this issue would be to hold simply that the disclosure form's explanation of the "as is" sale satisfies Song-Beverly by clearly informing the buyer that he bears all the risks of defects in the vehicle.

Finally, perhaps the most useful advantage afforded to the consumer by Song-Beverly is the buyer's ability to recover attorney's fees and, in the case of willful violations, treble damages, and the bargaining leverage that such a recovery entails. *See* CAL. CIV. CODE §§ 1791.1(d), 1794, .2(b) (West 1973 & Supp. 1979).

446. This curious result is mandated by Magnuson-Moss itself: "This chapter . . . shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law." 15 U.S.C. § 2311(d) (1976). Since the proposed rule will issue under the authority of the FTC Act, *see* note 440 *supra*, Magnuson-Moss does not apply.

447. *See* U.C.C. § 2-316(1); CAL. CIV. CODE §§ 1790.1, 1793 (West 1973).

448. Proposed Used Motor Vehicle Trade Regulation Rule, STAFF REPORT, *supra* note 435, app. F, at 30 (to be codified in 16 C.F.R. § 455.9).

449. *See* U.C.C. §§ 2-202, -316(1); notes 212, 436-38 & accompanying text *supra*. The Commission inserted this language in order to prevent any attempt to exclude the disclosure form's warranties by means of the parol evidence rule. STAFF REPORT, *supra* note 435, at 485. In addition, the proposed rule forbids dealers from making any written or oral statements that contradict the information on the disclosure form as well as any other false or misleading statements about the condition or history of the vehicles. Proposed Used Motor Vehicle Trade Regulation Rule, *id.* app. F, at 14 (to be codified in 16 C.F.R. § 455.4).

is the degree and nature of industry resistance. Representatives of the National Automobile Dealers Association contend that the required inspections may cost hundreds of dollars per car to perform,[450] costs which must be passed to the consumer. The FTC Staff Report responds that inspections carried out under a similar statute in Wisconsin cost only an average of fifteen dollars per car,[451] that two-thirds of the dealers studied would have performed the inspection regardless of the statute in order to appraise the vehicle or perform legally mandated safety inspections,[452] and that used car prices fell after enactment of the inspection and disclosure law.[453]

The assertion that consumers will ultimately pay for such disclosure ignores the fact that consumers already are paying a hidden price for quality uncertainty in used cars; they pay dearly for unexpected defects which are translated into expensive repair bills, wasted time and trouble, higher incidence of traffic accidents, lost wages, and helpless frustration when the dealer refuses to honor his salesman's promises.[454] It is both more fair and more efficient to require dealers to disclose the information that they have already collected in their appraisal or safety inspections. This proposed rule enables both buyer and seller to bargain freely over their contract's terms, to allocate the risks as they see fit, and to enforce that agreement when its obligations are breached. Consumers, proponents of freedom of contract, and honest used car dealers should welcome this proposed rule.

C. *Warranty Designation and "Full" Warranty Standards*

Of the requirements created by Magnuson-Moss, the one that consumers are most likely to have noticed and warrantors most likely to have complied with is the warranty designation provision. Perhaps recognizing that even the most lucid of warranties will not always be read or understood, the Act divides the universe of warranties into two groups with clear labels. Every written warranty on a consumer product costing over ten dollars must be conspicuously designated either "full (statement of duration)

450. STAFF REPORT, *supra* note 435, at 213-19; FTC News Summary, Nov. 13, 1978.

451. STAFF REPORT, *supra* note 435, at 224-25.

452. *Id.* at 228-29. Dealers outside of Wisconsin were also found routinely to inspect the vehicles for defects both before and after they purchased them. *Id.* at 71-83.

453. *Id.* at 242-45.

454. *Id.* at 61-65. For the less educated and affluent consumers, who are the most likely to be victimized by deceptive practices, unexpected repair expenses are especially painful and may lead to missed payments on the car, repossession, and even a deficiency judgment. *Id.* at 64-65. California's Rees-Levering Act, CAL. CIV. CODE §§ 2981-2984.4 (West 1973), permits a deficiency judgment if the buyer was properly notified of the impending resale. *Id.* § 2983.2.

warranty," if it meets specific minimum standards set forth in section 104, or "limited warranty," if it does not.[455]

Despite section 104's deceptive title, "Federal Minimum Standards For Warranty," a warrantor choosing to give a limited warranty or no warranty at all is free to ignore these requirements.[456] The Act does not require that any warranty be given or prescribe the duration of any warranty.[457] However, a warrantor who does choose to give a full warranty automatically is subject to the following provisions:[458] prompt repair without charge or unreasonable conditions; no limit on duration of implied warranties, no conspicuous limitations of consequential damages; the "lemon rule"; and horizontal privity.

1. Prompt Repair Without Charge or Unreasonable Conditions

The most basic obligation on the maker of a full warranty is to remedy any defect or nonconformity with the warranty "within a reasonable time and without charge."[459] By itself, this provision merely obligates the warrantor to honor his own express promises; but section 104(b)(1) adds:

> In fulfilling the duties . . . [of Full Warrantors], the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.[460]

Pursuant to this section, the FTC has completed hearings on a proposed rule that would prohibit full warrantors from imposing certain duties which the Commission deems unreasonable preconditions to service under a full warranty.[461] Among these are: requiring a consumer to assume the cost of postage or shipping from and to a warranty service point; requiring a consumer to mail, ship, or carry a product weighing more than thirty-five

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455. 15 U.S.C. § 2302(a) (1976).

456. *Id.* §§ 2303(a)(2) (limited warranty does not meet minimum standards), 2303(b)(3)(e).

457. *Id.* § 2302(b)(2). But the Commission is empowered to toll the warranty or service contract when the product fails or the warrantor fails to perform his duties for an unreasonably long period of time not less than 10 days. *Id.* § 2302(b)(3). California consumers need not wait for this anemic rule. Song-Beverly automatically tolls all warranties during repairs of products costing over $50. CAL. CIV. CODE § 1795.6(a) (West Supp. 1979).

458. 15 U.S.C. § 2304(e) (1976).

459. *Id.* § 2304(a)(1).

460. *Id.* § 2304(b)(1).

461. 42 Fed. Reg. 39,223 (1977) (if adopted, to be codified in 16 C.F.R. § 705).

pounds or having any hazardous characteristics;[462] requiring that a built-in product be removed and returned for warranty service; and requiring a consumer to return any registration card shortly after the purchase of a product.[463] In California, the impact of a rule invalidating these requirements would not be momentous because, under the Song-Beverly Act and the California Commercial Code, such requirements are already invalid for any type of Song-Beverly "express warranty," whether full or limited.[464]

In addition, the proposed rule would prohibit: requiring a consumer to return a product in its original package; requiring a consumer to return a product for service only to the selling dealer if there are two or more service points; requiring that a consumer give notice of a defect within an unreasonable period of time; and requiring the consumer to notify the warrantor of problems in writing.[465] Elimination of these last four requirements is highly desirable, as they serve no purpose but consumer harassment. They trap the unwary consumer; they bear little if any relation to the warrantor's ability to perform his obligations; and they are transparent devices whereby some unscrupulous warrantors attempt to avoid being held to their express promises.

The surprising aspect of this issue is that such duties are permissible in limited warranties no matter how unreasonable the duties are, unless they are barred by state law.[466] In other states, extremely unreasonable duties imposed on consumers may run afoul of U.C.C. section 2-302's unconscionability provision. Even in California, unreasonable pre-conditions to warranty service, which essentially are limitations of the buyer's remedies, may be invalid if they do not provide the "fair quantum of remedy for breach of the obligations or duties outlined in the contract,"[467] as required by the Commercial Code.[468]

One condition which the Act forbids in all warranties is the requirement that the buyer use a particular brand of article or service in connection with the warranted product.[469] The Com-

462. Examples include sharp edges, inadequate lift points, or a design which does not permit safe handling. *Id.* at 39,224.

463. *Id.* at 39,224-25.

464. *See* CAL. CIV. CODE § 1793.2 (West Supp. 1979) (requiring local service and repair facilities and placing transportation costs of non-portable goods on manufacturer); CAL. COM. CODE § 2801 (West Supp. 1979) (voiding warranty registration requirements); notes 177-80, 300-04 & accompanying text *supra*.

465. 42 Fed. Reg. 39,223, 39,225 (1977) (if adopted, to be codified in 16 C.F.R. § 705).

466. Only makers of full warranties are bound by the "minimum standards." *See* text accompanying note 456 *supra*.

467. U.C.C. § 2-719, Comment 1; *see* notes 232-49 & accompanying text *supra*.

468. CAL. COM. CODE § 2719 (West Supp. 1978).

469. 15 U.S.C. § 2302(c) (1976). *Compare id. with* § 3 of the Clayton Act, 15 U.S.C. § 14 (1976).

mission can waive this prohibition of tie-ins if convinced that the product functions properly only with the required article or service and that a waiver would be in the public interest.[470]

Another important facet of the first "minimum standard" for full warranties is the requirement that the product be remedied "without charge."[471] The Act defines this term so as to prevent the warrantor from charging the buyer with any of the costs incurred in remedying the product.[472] This would do away with service charges and the like. The warrantor need not, however, compensate the consumer for the consumer's incidental expenses unless they are incurred because of an unreasonable delay in the remedy or the imposition of an unreasonable duty upon the consumer.[473] Of course, if the damage was caused by the buyer's misuse, the warrantor is not obligated to remedy the product.[474]

2. No Limit on Duration of Implied Warranties

The full warranty may not impose any limitation on the duration of the implied warranties.[475] A limited warranty, in contrast, may limit implied warranties only to its own duration and only if the limitation is conscionable, in clear and unmistakable language, and prominently displayed on the face of the warranty.[476] These rules appear to be at odds with Song-Beverly's

470. 15 U.S.C. § 2302(c) (1976).

471. *See* text accompanying note 459 *supra*.

472. 15 U.S.C. § 2304(d) (1976).

473. *Id.*

474. *Id.* § 2304(c). Misuse includes failure to provide reasonable and necessary maintenance. *Id.*

475. *Id.* § 2304(a)(2).

476. *Id.* § 2308(b).

A recent consent decree between the FTC and Renault USA, Inc. illustrates the importance of this prohibition and its effect upon state law. As Renault's punishment for restricting implied warranties on the drive train of its cars manufactured since 1975 to only one year when the written warranty covered two years or 20,000 miles, that restriction is now void due to section 2308(c) of Magnuson-Moss, and the implied warranty will now extend for as long as allowed by state law. FTC News Summary, Feb. 16, 1979. The FTC believes that this will give Renault owners in most states an implied warranty lasting four years from the date of purchase, *id.*, apparently on the assumption that the duration of U.C.C. implied warranties coincides with the four year period of limitations of U.C.C. § 2-725(1). Renault, therefore, could have avoided this extension by contractually shortening the limitations period to one year, as permitted by U.C.C. § 2-725(1).

However, the consent decree depends on state law, and in California, Song-Beverly absolutely limits the duration of implied warranties to one year. CAL. CIV. CODE § 1791.1(c) (West Supp. 1979). Thus, it is possible that the consent decree will be of no benefit to Renault owners in this state. But, as I have argued, Song-Beverly's one year limit probably applies only to the Song-Beverly implied warranties and not the U.C.C. implied warranties. *See* notes 329-37 & accompanying text *supra*. Consequently, California consumers should receive the same extension granted the residents of other U.C.C. states.

limitation of the duration of implied warranties to that of the express warranty.[477] But the conflict is illusory. First, Magnuson-Moss prohibits only warrantors from limiting the duration of implied warranties;[478] state legislatures are not mentioned. Second, and more important, Magnuson-Moss defines "implied warranty" as an implied warranty arising under state law,[479] so that no additional limitation in the written warranty is necessary to limit the implied warranty to the duration of the written warranty. Another aspect of the restriction on limiting the duration of implied warranties is that since the duration can only be limited by a written warranty, a service contract cannot limit them at all.[480]

3. No Inconspicuous Limitation of Consequential Damages

The full warranty may not exclude or limit consequential damages for breach of any written or implied warranty unless it is done conspicuously on the face of the warranty.[481] This may be an improvement over the buyer's rights under the U.C.C., which does not explicitly require that remedy limitations be conspicuous.[482] But Song-Beverly, as previously discussed,[483] probably invalidates such limitations with respect to a breach of implied but not express warranties regardless of whether the express warranty is full or limited.[484]

4. The "Lemon Rule"

After a reasonable number of unsuccessful attempts to remedy defects, the full warrantor must permit the customer to elect either a replacement without charge or a refund.[485] This is popularly known as the "Lemon Rule." The Commission is empowered to specify what constitutes a reasonable number of attempts in various situations.[486]

The term "refund" is defined to mean "refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission)."[487] Pursuant to this

477. CAL. CIV. CODE §§ 1791(a) (new consumer goods), 1795.5(c) (used goods) (West Supp. 1979).
478. 15 U.S.C. § 2304(a)(2) (1976).
479. *Id.* § 2301(7).
480. *Id.* § 2308(b); FTC Advisory Opinion, Nov. 17, 1978, 47 U.S.L.W. 2393 (1978).
481. 15 U.S.C. § 2304(a)(3) (1976).
482. *See* U.C.C. § 2-719. *But see* Zicari v. Joseph Harris Co., 33 A.D.2d 17, 304 N.Y.S.2d 918 (1969); notes 248-49 & accompanying text *supra*.
483. *See* notes 380-86 & accompanying text *supra*.
484. *Id.*
485. 15 U.S.C. § 2304(a)(4) (1976).
486. *Id.*
487. *Id.* § 2301(12).

statutory mandate, the Federal Trade Commission dutifully instituted rule-making proceedings to fix the amount of depreciation which a warrantor could deduct when he elected to refund or was forced to do so by the "Lemon Rule." But in January, 1978, the FTC terminated those proceedings. After lengthy analysis of various methods of calculating depreciation, the Commission concluded that such a rule would be impracticable, costly, difficult to administer or enforce, and of little concern to warrantors anyway.[488] The result is that in the absence of a depreciation rule, full refunds must be made.

In this respect, the buyer is better off under Magnuson-Moss than under Song-Beverly, where a depreciation deduction is allowed; but the Song-Beverly Lemon Rule is not limited to fully warranted products and may yield treble damages if the warrantor refuses to replace or refund.[489] Moreover, the buyer may also rely on the U.C.C. to assert a "failure of essential purpose."[490] This would permit him to revoke acceptance for substantial defects and receive a full refund and, possibly, consequential damages as well.

5. Horizontal Privity

The full warrantor's duty to remedy defects extends from the warrantor "to each person who is a consumer with respect to the consumer product."[491] Since the definition of "consumers" includes transferees of the buyer, the horizontal privity bar appears not to apply to full warranties.[492] But the Commission has taken the view that the transfer must occur "during the duration" of the warranty, so that if the duration of a full warranty is defined solely in terms of the first purchaser, any transferee is no longer a consumer with respect to that product and, therefore, is not entitled to any remedy.[493]

As the foregoing review of the "minimum warranty standards" has made clear, a warranty designated as "full" rarely gives the California consumer significantly greater rights than are granted under California law. There is, however, a degree of uncertainty as to which duties imposed on buyers will be ruled unreasonable under a full warranty and as to what constitutes a reasonable number of attempts to repair. Given the minimal difference, warrantors in this state might well decide to reap whatever competitive advantages flow from a full warranty

488. 43 Fed. Reg. 4054 (1978) (to be codified in 16 C.F.R. § 704).
489. CAL. CIV. CODE §§ 1793.2(d), 1794 (West Supp. 1979).
490. U.C.C. § 2-719(2).
491. 15 U.S.C. § 2304(b)(4) (1976).
492. *Id.* § 2301(3).
493. Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. § 700.6(b) (1978).

designation, since the added costs, though uncertain, are not likely to be excessive.

The current trend among warrantors generally has been not to rewrite their warranties completely. Instead, they usually leave the terms and conditions unchanged, note that state law may provide a contrary result, and simply add the label "full" or "limited" at the top.[494] It is too early to say whether or not these labels will spur competition among warrantors. Since a substantial minority of warrantors currently are using full warranties, this would be an appropriate time to inquire into the actual additional costs of giving and honoring full warranties as well as the extent of consumer awareness of these terms.

The federal government should prime the competitive pump with a widespread campaign of publicity about different types of warranties and consumers' rights under them. Few serious efforts have yet been made in this direction, and this seems to be one of the major obstacles to the success of any consumer warranty legislation. Until a significant number of consumers realize the importance of warranties, they are not going to read them, enforce them, or give warrantors any incentive to improve their warranties or products. At this point, California consumers are less in need of more warranty rights than of knowledge of their rights and how to enforce them.

Currently, the few products whose warranty coverage is widely advertised are items such as car tires and batteries whose value is measured almost solely in terms of reliability rather than aesthetic or other qualities. The FTC is authorized to determine the manner and form in which warranty information may be advertised[495] and is currently developing such a rule. This presents an excellent opportunity to encourage warrantors themselves to publicize warranty provisions. The rule should adopt the most flexible stance with respect to full warranty advertisement, even if it means relaxing the Commission's stringent "Guides Against the Deceptive Advertising of Guarantees."[496] Otherwise, there will be little incentive for advertisers to rush into the legal minefield of warranty advertising when they can tread the safer path of puffery.

494. *See, e.g.*, Random Sample of Sears Warranties (on file with the *UCLA Law Review*).

495. 15 U.S.C. § 2302(b)(1)(B) (1976).

496. 16 C.F.R. § 239 (1978). The guidelines require that any advertized guarantee must conspicuously disclose detailed information regarding the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform under the warranty. *Id.* § 239.1. *Compare id. with* 15 U.S.C. § 2302 (1976) *and* 16 C.F.R. § 701.3 (1978).

D. *Disclaimers of Warranty Versus Limitations of Remedy*

With the exception of the durational limits discussed above,[497] Magnuson-Moss forbids any disclaimer or modification of implied warranties if a written warranty is given or a service contract is entered into within ninety days after the sale.[498] This provision is similar to section 1793 of Song-Beverly, with a few distinctions.[499] First, to the extent that the definition of written warranty under Magnuson-Moss is broader than the express warranty under Song-Beverly, disclaimers are now permitted in fewer situations.[500] Second, Magnuson-Moss includes service contracts in the prohibition, so that a manufacturer wishing to circumvent a Song-Beverly implied warranty of merchantability by the use of a service contract and disclaimer will fail.[501] Third, under Magnuson-Moss a disclaimer of implied warranties violating this section is rendered void under state law as well as under the Act.[502] Song-Beverly, in contrast, only prohibits disclaimers of "the implied warranties guaranteed by this chapter."[503] In other words, Song-Beverly does not bar disclaimers of Code implied warranties while Magnuson-Moss does.

The question of limitations of remedy is again more problematic. This Comment has urged that under Song-Beverly, the existence of an express warranty bars not only disclaimers of Song-Beverly implied warranties, but also limitations of remedy for breach of those implied warranties.[504] It could also be argued that under Magnuson-Moss there is a statutory intent not to permit an express warranty to diminish the rights or remedies the buyer would have under implied warranties alone.[505]

But unlike Song-Beverly, Magnuson-Moss contains provi-

497. *See* U.S.C. §§ 2308(b), 2304(a)(2) (1976); notes 475-80 & accompanying text *supra*.

498. 15 U.S.C. § 2308(a) (1976).

499. *See* text accompanying notes 369-72 *supra*.

500. *See* notes 390-99 & accompanying text *supra*.

501. Song-Beverly's prohibition of disclaimers of implied warranties does not govern service contracts. *See* notes 280-84 & accompanying text *supra*.

502. 15 U.S.C. § 2308(c) (1976) ("A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law").

503. CAL. CIV. CODE § 1793 (West Supp. 1979).

504. *See* notes 380-86 & accompanying text *supra*.

505. The Act's legislative history provides support for this general principle: "This subsection [15 U.S.C. § 2308(a) (1976)] is designed to eliminate the practice of giving an express warranty while at the same time disclaiming implied warranties. This practice often has the effect of limiting the rights of the consumer rather than expanding them as he might otherwise be led to believe." H.R. REP. NO. 1107, 93d Cong., 2d Sess. 40, *reprinted in* [1974] U.S. CODE. CONG. & AD. NEWS 7702, 7722. But the statute and its legislative history mention only disclaimers and modifications of the implied warranties and nothing is said about limitations of remedies.

sions which rebut this contention. Exclusions of consequential damages are limitations of remedy,[506] and they are expressly permitted even in full warranties.[507] In addition, all of the unreasonable duties imposed on purchasers "as a condition of securing remedy . . ."[508] which are forbidden only in full warranties,[509] are also properly classified as limitations of remedy. Since these limitations of remedy are permitted in limited warranties, it is difficult to claim that remedy limitations were meant to be barred or that the drafters forgot about them. Furthermore, the fact that the disclosure rule requires that all warranties disclose any "exclusions of or limitations on relief"[510] is inconsistent with a prohibition of remedy limitations.[511]

Thus, it seems that Magnuson-Moss forbids disclaimers of implied warranties when there is a written warranty, but like the U.C.C., permits limitations of remedy for breach of those implied warranties. In California, however, such remedy limitations are effective only with respect to U.C.C. implied warranties and not Song-Beverly implied warranties. This is so because Magnuson-Moss explicitly preserves consumer rights and remedies under state law[512] while Song-Beverly nullifies limitations of remedy for breach of a Song-Beverly implied warranty.[513] Therefore, the consumer should be able to bring an action under Song-Beverly for a breach of implied warranty regardless of any remedy limitation which attempts to waive that remedy.

E. *Remedies*

Aside from disclosure requirements of various types, the major contribution of Magnuson-Moss to consumer protection is strengthened remedies. It is hoped that the prospect of strengthened consumer recourse, new causes of action, and governmental

506. *See* U.C.C. § 2-719(3).
507. 15 U.S.C. § 2304(a)(3) (1976).
508. *Id.* § 2304(b)(1).
509. *Id.*
510. 16 C.F.R. § 701.3(a)(8) (1978).
511. Moreover, unlike Song-Beverly, Magnuson-Moss gives no judicial remedy for breach of an implied warranty; rather it creates a cause of action for breach of obligations "under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1) (1976). There is a subtle difference between a breach of warranty and a breach of obligation under a warranty. The language used by Magnuson-Moss implicitly recognizes that a breach of warranty only entitles the buyer to the written warranty's remedy which is usually limited to repair or replacement. Only if the warrantor breaches his limited remedy obligations under the warranty is the buyer given the right to sue. Such an arrangement of remedies necessarily assumes that limitations of remedy are valid.
512. *Id.* § 2311(b)(1).
513. *See* notes 380-86 & accompanying text *supra*.

enforcement will prompt warrantors to perform their contractual and statutory obligations more diligently.

1. Private Remedies

a. *Prerequisites to Individual and Class Actions.*

(1) Informal Dispute Settlement Mechanism. The Act seeks to encourage but does not require warrantors to establish informal dispute settlement mechanisms (IDSMs) in order to fairly and expeditiously resolve consumer complaints.[514] As authorized by the statute,[515] the FTC has promulgated a rule prescribing in detail the minimum requirements for an IDSM under the Act.[516] The IDSM is essentially a form of non-binding arbitration. A thorough discussion of the minimum requirements is unnecessary because, sadly, this innovative concept has not been adopted by manufacturers.[517] The cause of this failure is probably rooted in the rule's conflicting goals: to create an alternative to the courts which both protects the consumer and yet is sufficiently attractive to manufacturers to encourage them to go to the effort and expense of instituting an IDSM.

While a warrantor may require a consumer to resort to a qualifying IDSM before suing under Magnuson-Moss,[518] a consumer who finds the mechanism not to his liking can bypass it and sue under state law.[519] If the consumer tries it but does not like it, he may sue under Magnuson-Moss.[520] None of the costs of the IDSM are to be borne by the consumer.[521]

If the manufacturer is not enticed by this prospect, he may avoid all this trouble by inaction. Manufacturers may already be handling enough of their disputes informally and facing few lawsuits, so that they feel no impetus to exchange familiar problems for unfamiliar ones. Indeed, the flaws of the current judicial system of dispute resolution—costs, delays, the necessity for attorneys—all work for the manufacturer.

Whether the manufacturer will use the mechanisms depends on the extent to which consumers will enforce their strengthened rights and remedies. Statutory provisions for attorneys' fees and

514. 15 U.S.C. § 2310(a)(1) (1976).
515. *Id.* § 2310(a)(2).
516. 16 C.F.R. § 703 (1978).
517. The only IDSM approved by the Commission has been that of the Home Owners Warranty Program. 42 Fed. Reg. 2029 (1977). *See also* L.A. Times, Apr. 9, 1978, § 9, at 1, col. 5.
518. 15 U.S.C. § 2310(a)(3) (1976).
519. *Id.*
520. *Id.* But the decision reached in the IDSM will be admissible into evidence in any related civil action. *Id.*
521. 16 C.F.R. § 703.3(a) (1978).

treble damages[522] could shift the balance of inconvenience, but not as long as they lie dormant in the codes with hardly an annotation to adorn them. A few well publicized class action warranty suits could go a long way toward making IDSMs a reality.[523]

(2) Opportunity to Cure. Before a civil action is brought, the warrantor must be given a "reasonable opportunity to cure such failure to comply."[524] Again, this prerequisite does not bar state remedies.[525] Nor does it apply if resort to an IDSM is required.[526] In any event, consumers rarely attempt to sue until the warrantor has had many opportunities to cure, so this provision is not likely to restrict consumer remedies significantly.

b. *Causes of Action and Damages.* A consumer damaged by a failure of a warrantor to comply with any obligation under the Act or under a written warranty, service contract, or state law implied warranty may bring suit for damages and other legal and equitable relief.[527] If the consumer prevails, the court may grant him costs, expenses, and attorneys' fees in addition to actual damages.[528] The question is whether this cause of action adds anything to the California consumer's rights or remedies.

The cause of action for breach of the Act's provisions is certainly new, but there is one obstacle: damages. The buyer may be unable to prove he was damaged by the warrantor's impermissible disclaimer of implied warranties, or his failure to designate the warranty "full" or "limited," or to disclose its terms clearly. While the Act necessarily assumes that such behavior is detrimen-

522. *See* 15 U.S.C. § 2310(d)(2) (1976) (attorneys' fees and costs); CAL. CIV. CODE § 1794 (West Supp. 1979) (attorneys' fees and treble damages).

523. *See, e.g.*, note 537 *infra*.

524. 15 U.S.C. § 2310(e) (1976). Unfortunately, neither the statute nor the legislative history even attempt to clarify the meaning of this term. One possible inference which could be drawn from the statute is that the warrantor must be given only a single chance to remedy the defect since the term "a reasonable opportunity to cure" is in the singular. In contrast, Magnuson-Moss elsewhere requires that a full warrantor refund or replace defective goods after "a reasonable number of attempts" to repair them; this similar provision is in the plural. *Id.* § 2304(a)(4). On the other hand, the presence of the modifier "reasonable" may invite more flexible results which would vary with the circumstances of each case, circumstances such as the complexity of the product, the costs and inconvenience to the buyer of having to return it, and the difficulty of repair. The problem with the flexible approach is that it casts a cloud of uncertainty over every action brought under Magnuson-Moss, because the "reasonable opportunity to cure" is a condition precedent to almost all Magnuson-Moss lawsuits. Therefore, in the absence of congressional amendment or FTC clarification, the better approach is to allow the warrantor a single opportunity to remedy defects.

525. *Id.* § 2311(b)(1).

526. *Id.* § 2310(e).

527. *Id.* § 2310(d)(1).

528. *Id.* § 2310(d)(2).

tal to the interests of consumers, the individual consumer is not going to have an easy time proving how he was injured. The actual injury resulting from non-disclosure is consumer ignorance and lessened competition. The ignorant consumer, however, will not sue, and lessened competition is too remote and uncertain an injury to compensate. There are no minimum civil penalties. In short, most breaches of the Act's obligations will only be remedied by the FTC, if at all.

Notwithstanding the absence of statutory penalties for violations of the disclosure and designation requirements, it is still possible that a court might follow the maxim that "[f]or every wrong there is a remedy"[529] and attempt to construe the Act liberally so as to effectuate its purpose.[530] For example, failure to make warranties available prior to the sale might estop the warrantor from asserting any warranty term which reduces the buyer's rights or remedies; terms adverse to the buyer's interests would be held not to be part of the contract both because of the violation of Magnuson-Moss and because the buyer never actually agreed to them.[531] Similarly, a warranty which is neither designated "full" nor "limited" could simply be treated as a full warranty and thus invoke all of the Act's full warranty obligations and prohibitions.[532]

The second category of causes of action created by Magnuson-Moss is for breach of obligations under a written or implied warranty or service contract. As these causes of action also exist under state law, the advantage would be the possible recovery of attorneys' fees, costs, and expenses. But Song-Beverly also provides for reasonable costs and expenses including attorneys' fees as well as treble damages and other legal and equitable relief for willful breaches of its provisions.[533] Therefore, the California consumer's private remedies are not greatly strengthened by the federal legislation.

c. *Jurisdiction*. A civil action under section 2310(d) may be brought in any state court of competent jurisdiction as well as in federal court;[534] but suit in federal court requires at least $50,000 in controversy.[535] This requirement effectively precludes

529. CAL. CIV. CODE § 3523 (West 1970).

530. *See* note 393 *supra*. The primary purpose of Magnuson-Moss was to "make warranties on consumer products more readily understood and enforceable." H.R. REP. NO. 1107, 93d Cong., 2d Sess. 20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702.

531. *See* notes 164-86 & accompanying text *supra*.

532. *See* 15 U.S.C. § 2304 (1976); notes 458-93 & accompanying text *supra*.

533. CAL. CIV. CODE § 1794 (West Supp. 1979).

534. 15 U.S.C. § 2310(d)(1) (1976).

535. *Id.* § 2310(d)(3)(B). In a one-page decision which may qualify as a

nearly all individual consumer warranty claims. Class actions must also have at least 100 named plaintiffs each with a minimum claim of twenty-five dollars.[536] These limits are attainable only when the breach of warranty relates to expensive items.[537] No such restrictions hamper class actions in state courts where, consequently, virtually all warranty-related lawsuits will be brought.

2. Government Enforcement

Noncompliance with any of the obligations imposed by Magnuson-Moss is a violation of the Federal Trade Commission Act.[538] The state attorney general and the FTC are authorized to bring actions in federal court to restrain any violation of Magnuson-Moss or the making of any "deceptive warranty" regardless of the amount in controversy.[539] A deceptive warranty is one which would mislead a reasonable individual either because of the presence of false information or the absence of correct information.[540]

Magnuson-Moss also equips the Commission with even more formidable weapons against deceptive practices. The FTC is empowered to issue cease and desist orders against unfair or deceptive acts, including violations of Magnuson-Moss; and each

landmark, if only because it is the first published case to base its holding on Magnuson-Moss, a Nebraska Federal District Court promptly dispatched an aggrieved lemon-owner to the state courts: "The claim before the Court now does not meet the minimum jurisdictional amount of $50,000.00 and, therefore, cannot be considered by this Court." Barnette v. Chrysler Corp., 434 F. Supp. 1167, 1168 (D. Neb. 1977). Since the consumer in the latter case sought only approximately $7,000 in damages plus costs and attorneys' fees, the court had no occasion to consider how the amount in controversy is to be computed. The statute provides that the $50,000 is "computed on the basis of all claims to be determined in the suit" but exclusive of interest and costs. 15 U.S.C. § 2310(d)(3)(B) (1976). This language suggests that not only are the claims of multiple plaintiffs to be aggregated, but that the multiple claims of one or more plaintiffs—including refund of the purchase price, towing or repair costs and other consequential damages, damages resulting from negligence or fraud, and possibly even trebled or punitive damages—are to be included in the computation, at least so long as they arise out of the common nucleus of operative facts which spawned the breach of warranty. *But see* Novosel v. Northway Motor Corp., 47 U.S.L.W. 2311 (N.D.N.Y. 1978) (claim for $10,000 compensatory and $50,000 punitive damages fails because neither New York law nor Magnuson-Moss grants punitive damages).

536. 15 U.S.C. § 2310(d)(3) (1976).

537. A recent newsworthy example of such a class action was a $1.1 billion suit brought under Magnuson-Moss against the Firestone Tire & Rubber Co. arising out of alleged defects in the Firestone 500 radial tires. The complaint names 146 plaintiffs who purport to represent all past and present owners of the allegedly defective tires. L.A. Times, Sept. 18, 1978, § 3, at 17, col. 1. It is unclear what effect the subsequent recall of these tires will have on such lawsuits. *See* Wall St. J., Oct. 23, 1978, at 4, col. 1.

538. 15 U.S.C. §§ 45(a)(1), 2310(b) (1976).

539. *Id.* § 2310(c)(1).

540. *Id.* § 2310(c)(2).

violation thereafter could result in a judicially imposed $10,000 penalty.[541] Most controversial is the new provision which would allow these penalties to be imposed upon parties who are not subject to the cease and desist order. Any party engaging in the deceptive practice who had "actual knowledge that such act or practice is unfair or deceptive and is unlawful" would be held liable.[542]

Thus, if the FTC were to issue a cease and desist order against a warrantor whose written warranties falsely purport to disclaim all implied warranties, and then were to send copies of the order to all other warrantors guilty of the same "deception," the Commission could commence an action in federal court to obtain $10,000 penalties from each violator and for each violation.[543] The effects of such an action on warranty practices could be substantial. Thus far, no court has had a chance to rule on the due process aspects of this type of proceeding, and that issue could prove to be a major obstacle to such far-reaching remedies.[544]

Another issue which may arise in the future is the right of an individual consumer to enforce the sections of the FTC Act which provide the FTC with the foregoing remedies. Most cases in the past have ruled that only the FTC can seek judicial enforcement of them.[545] However, a minority view has developed in a few recent decisions which suggest that a private cause of action may be implied.[546]

F. *Preemption of State Law*

The Magnuson-Moss Warranty Act does not attempt to supplant state law; its goal is to supplement the consumer's rights. Thus it proclaims the following: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."[547] This simple statement appears to allow the buyer to pick and choose among state and fed-

541. *Id.* § 45(*l*).
542. *Id.* § 45(m)(1)(B).
543. *Id.*
544. While the proceeding requires notice to all parties bound by the order, it permits punishing parties who had no opportunity to be heard on the issue of the illegality of the allegedly unfair or deceptive practice. *See* Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651, 682 (1975).
545. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).
546. *See* Guernsey v. Rich Plan Of The Midwest, 408 F. Supp. 582 (N.D. Ind. 1976); *cf.* Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977) (limited implied private right of action exists under postal statute). *See generally* Cort v. Ash, 422 U.S. 66, 78 (1975) (discussing factors relevant to determination of whether a private remedy is implicit in a statute not explicitly providing one).
547. 15 U.S.C. § 2311(b)(1) (1976).

eral laws to maximize his rights and remedies. For the most part, he can.[548]

However, the drafters of Magnuson-Moss, while generally faithful to the cause of consumer protection, occasionally look to the interests of warrantors in achieving uniformity among the states. Manufacturers understandably prefer one set of required warranty disclosures to fifty different sets. As a result, a statutory preemption scheme was devised in which state statutes regulating consumer warranty labeling or disclosure are nullified if they cover the same ground as, but are not identical to, the disclosure, designation, or full warranty provisions of Magnuson-Moss.[549]

In 1975 and 1976, the State of California applied to the FTC requesting a determination of the validity of the Song-Beverly Act and other statutes in light of the preemption provisions of Magnuson-Moss.[550] It therefore became necessary to make sense out of this scheme and to reconcile the apparent contradiction between the preservation of state law consumer rights and remedies and the preemption of state statutes dealing with disclosure in and

548. State personal injury law is also left untouched. *Id.* § 2311(b)(2).

549. *Id.* § 2311. This section provides in part:

> (b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.
>
> . . . .
>
> (c)(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—
>
> (A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;
>
> (B) which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections), and
>
> (C) which is not identical to a requirement of section 102, 103, 104 (or rule thereunder),
>
> or shall not be applicable to written warranties complying with such sections (or rules thereunder),
>
> (2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

Id. Thus, the Act's preemption provision voids only state disclosure and labeling statutes which are not identical to the Magnuson-Moss provisions or rules thereunder. The Act does not mention state requirements in clear conflict with it, presumably due to the Supremacy Clause. U.S. CONST. art. VI. In any event, conflicting state provisions would also be preempted by Magnuson-Moss since they are by definition not identical to the Act's requirements. It should also be noted that the preempted state provisions are not completely abrogated; they are merely rendered inapplicable to warranties which meet the federal requirements.

550. 42 Fed. Reg. 54,004 (1977).

designation of consumer warranties.[551] There are three circumstances in which a state statute may avoid preemption: first, if the statute creates a consumer "right or remedy" under state law; second, if it is not within the scope of the labeling or disclosure requirements of sections 102, 103, or 104 of Magnuson-Moss or rules thereunder; or third, if the state statute is found to better protect consumers without unduly burdening interstate commerce.[552]

On the first ground for avoiding preemption, the state took the position that state warranty disclosure requirements can create consumer rights.[553] The Commission rejected this approach, arguing that it would frustrate the preemption scheme's purpose of uniform disclosure standards by automatically preserving all state warranty disclosure provisions even if the state provisions conflicted with the federal standards.[554] The Commission instead found that no provision of Song-Beverly was within the scope of the disclosure or designation requirements of Magnuson-Moss and, therefore, the state act was not subject to preemption.[555] Only a California Civil Code section regarding disclosure of service and repair facilities was seriously considered,[556] but it was found to be outside the scope of the Magnuson-Moss provisions because it did not require labeling or disclosure *in* written warranties.[557]

It would be interesting to see how U.C.C. section 2-316(2), requiring the use of the word "merchantability" in disclaimers of the implied warranty of merchantability, would fare under those preemption standards. According to the Commission, it can create no consumer rights;[558] it does relate to disclosure *in* written warranties; and it is not identical to Magnuson-Moss' provisions. Thus, the preemption scheme, adopted in the interests of uniform-

551. *Compare* 15 U.S.C. § 2311(b) *with id.* § 2311(c).

552. *See* note 549 *supra*.

553. 42 Fed. Reg. 54,004, 54,005 n.7 (1977).

554. If, for example, a state disclosure or labeling requirement, preserved by operation of (b), were directly contradictory to the Federal rules, under the terms of (b) the normal preemption rules would not prevail, and the Federal provision, not the state provisions, would fall.

. . . .

The phrase "right or remedy of any consumer" in § 111(b), therefore, does not include any right to a specific manner of disclosure or labeling of information.

Id. at 54,005.

555. *Id.* at 54,006-07. But two state provisions regarding mobilehome warranty disclosure, CAL. CIV. CODE §§ 1797.3, 1797.5 (West Supp. 1979), were preempted. 42 Fed. Reg. 54,008 (1977).

556. CAL. CIV. CODE § 1793.1(b) (West Supp. 1979).

557. 42 Fed. Reg. 54,004, 54,008 (1977).

558. *See* note 554 *supra*.

ity, might nullify a statute enacted in almost every state and frequently used to protect consumers.[559]

CONCLUSION

It would be naive to claim that the legislative attempts to reform the law of warranty have been overwhelmingly successful. Few effects of these statutes are visible at all outside the pages of the codes and law journals. There are few reported cases even mentioning Song-Beverly or Magnuson-Moss.[560]

Perhaps the problem is that a vastly improved law of consumer warranties does not necessarily improve the lot of consumers. Consumer rights may be so much a function of the laws of the marketplace that consumer protection statutes, which endeavor to change legal relationships without also changing their economic roots, are bound to fail. It may be, as Professor White jokingly suggests, that "the courts always produce just results, and the statutes have little or no impact on them."[561] Moreover, due to the economic realities of the legal system, consumers rarely go to court when their products simply do not live up to the quality promised by the seller. It may be that vastly unequal bargaining power and expertise will always produce unjust results and that these attempts to protect consumers will have no effect beyond increasing paperwork for warrantors and costs for warrantees.[562]

Nevertheless, it would be premature to write off these statutes as hopeless failures. The impact of legislation need not be felt immediately, particularly when the rules implementing it are still being promulgated and government enforcement has just be-

559. But even if U.C.C. § 2-316(2) were not preempted, it is already rendered obsolete by Magnuson-Moss' extensive disclosure requirements. *See* notes 420, 425 *supra*. Of course, Magnuson-Moss has no effect on the U.C.C. outside of the consumer warranty context.

560. *See* note 535 *supra*.

561. White, *Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition*, 75 MICH. L. REV. 1262, 1277 (1977).

562. It may even be that under the present marketing arrangements in our society, unethical practices are an inevitable consequence of serving the wants of the poorest risks. Society now virtually presents the very poor risks with twin options: of foregoing major purchases or of being exploited.

. . . .

. . . In the final analysis, the consumer problems of low-income families cannot be divorced from the other problems facing them. Until society can find ways of raising their educational level, improving their occupational opportunities, increasing their income, and reducing the discrimination against them—in short, until poverty itself is eradicated—only limited solutions to their problems as consumers can be found.

D. CAPLOVITS, THE POOR PAY MORE 180, 192 (1967).

gun.[563] Attempting to measure the impact of a statute on the basis of the reported cases has been aptly likened to archeology, where it is fashionable to "study a society through its excreta."[564] Preliminary investigations indicate that many major manufacturers and retailers have begun to comply with the disclosure requirements of Magnuson-Moss,[565] although it is too early to tell if consumers will use this information in choosing products. Moreover, the 1978 amendments to Song-Beverly both clarify and magnify the consumer's rights and remedies.[566]

It is the view of this Comment that the current California and federal law of consumer warranty can be fashioned into an effective instrument of consumer protection. But that potential will probably remain unfulfilled unless there is a widespread campaign to educate consumers and their prospective attorneys about consumer rights under warranty law and prompt action by the appropriate governmental agencies to enforce compliance with these statutes.[567]

HENRY WEINSTOCK

563. *See* note 415 *supra*.

564. White, *supra* note 561, at 1263.

565. Interview with Dale Sekovich, Investigator, Los Angeles Regional Office of the FTC, in Los Angeles (Nov. 6, 1978). With respect to the rule requiring disclosure of warranty terms, 16 C.F.R. § 701 (1978), most large manufacturers are presently complying, while most small manufacturers are not. Regarding the pre-sale availability rule, *id.* § 702, few small retailers are complying at all, while many of the big retailers are only complying halfheartedly. *Id.* For example, many retailers are maintaining warranty binders but are not placing them in sufficient locations or prominently displaying them so as to attract the buyer's attention. *See id.* § 702.3(1)(ii).

566. *See* note 255 *supra*.

567. The FTC and State Attorneys General are authorized to bring actions to restrain the making of deceptive warranties and other violations of Magnuson-Moss, 15 U.S.C. § 2310(c) (1976).

APPENDIX

PROPOSED USED CAR DISCLOSURE FORM

Here's Who Pays if Something Doesn't Work

When You Buy

Items Marked "OK"

If anything we've marked "OK" is not OK, state law says we have to fix it or give you back some money. And, if the problem's bad enough, you can make us take the car back.

This is true whether you buy with a warranty or "as is". You get a reasonable time after you buy to make sure that items marked "OK" are really OK. Tell us as soon as you know that something's not OK.

Items Marked "Not OK"

You pay all the costs to fix things marked "not OK".

OK	NOT OK		OK	NOT OK	
☐	☐	Frame & Body	☐	☐	Brake System
☐	☐	Engine	☐	☐	Steering System
☐	☐	Transmission & Drive Shaft	☐	☐	Suspension System
☐	☐	Differential	☐	☐	Tires
☐	☐	Cooling System	☐	☐	Wheels
☐	☐	Electrical System	☐	☐	Exhaust System
☐	☐	Fuel System	NO	YES	
☐	☐	Accessories	☐	☐	Flooded or Wrecked (once an insurance "total loss")

What's wrong with things marked "not OK" and how much repairs should cost:

_____

_____

_____

(Look at the back of this form for the details of our inspection.)

After You Buy

☐ **No Warranty ("As Is")** This means you will pay all costs to fix things that break after you buy. And you will also pay all costs to fix things marked "not OK" above. But we have to pay to fix things marked "OK" if you find the problem in a reasonable time after you buy.

A seller's spoken promises may be no good when you buy "as is". Ask us to put all promises in writing. You can make a seller keep written promises even when you buy "as is".

You lose your implied warranties when you buy "as is".