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## A Guide to Federal Warranty Legislation-The Magnuson-Moss Act

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## A GUIDE TO FEDERAL WARRANTY LEGISLATION— THE MAGNUSON-MOSS ACT

One of the primary causes of concern in the recent movement toward greater consumer protection has been in the area of product warranties. Limited express warranties, liability disclaimers and ambiguous remedy procedures often have been used by manufacturers and merchants to strip the consumer of all but a bare minimum of protection against defective products. Finding state laws incapable of adequately solving this problem, Congress preempted the field by enacting the Magnuson-Moss Warranty Act.<sup>1</sup> This Act makes major changes in the law of warranties and places much heavier legal burdens upon manufacturers and other warrantors. This comment will attempt to give the practicing attorney an understanding of the Magnuson-Moss Act and subsequent Federal Trade Commission regulations passed pursuant to that Act.

### I. BACKGROUND

Under state law, consumer sales transactions are governed by article two of the Uniform Commercial Code.<sup>2</sup> At first glance, article two appears to have been designed to protect the consumer because it provides that whenever a merchant sells a product, a warranty that the product is merchantable shall be implied at law.<sup>3</sup> Likewise, where the seller knows of a particular purpose for which a consumer is purchasing a product, and knows of the consumer's reliance upon the seller's expertise, then an implied warranty of fitness for that particular purpose arises.<sup>4</sup> A problem occurs, however, in the ability of the warrantor to exclude or modify these implied warranties through the use of standard disclaimers such as: "There are no warranties which extend beyond the description on the face hereof," "As is, with all faults" or any other language which in common understanding calls the buyer's attention to the exclusion of warranties.<sup>5</sup>

The common practice is for a warrantor to give a limited express warranty followed by one of the general disclaimer clauses.<sup>6</sup> The only substan-

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1. 15 U.S.C.A. § 2301 (Cum. Supp. 1976). The complete name of the Act was the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act. Title I of the Act dealt with consumer product warranties specifically, while Title II dealt with a general expansion of Federal Trade Commission (FTC) powers. The scope of this article will be limited to the Title I warranty provisions.

2. The Uniform Commercial Code (hereinafter cited as UCC) has been adopted by every state except Louisiana. See VA. CODE ANN. § 8.1-101 *et seq.* (Added Vol. 1965), *as amended* (Cum. Supp. 1976).

3. UCC § 2-314 (1972 version).

4. *Id.* § 2-315.

5. *Id.* § 2-316.

6. An example of such a warranty would be as follows:

tial limitation upon this practice is that the disclaimer be conspicuous to the average consumer.<sup>7</sup> Only rarely are such disclaimers invalidated for public policy reasons.<sup>8</sup> However, even if a consumer finds himself within the coverage of one of the implied warranties mandated by the UCC, he may find his measure of damages greatly diminished. Under the UCC, parties may limit or alter the damages or remedies available to the consumer.<sup>9</sup> The only restriction upon the warrantor's privilege to do so is in the area of consequential damages.<sup>10</sup> The result is that many consumers find themselves unable to enforce a warranty simply because it would not be feasible to do so.<sup>11</sup>

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This product is guaranteed against all defects in workmanship for 90 days after date of purchase. Defective parts will be replaced at a nominal labor charge upon return of the product to the factory. This express warranty is given in lieu of all other warranties express or implied.

If the product were a small home appliance with an ordinary life expectancy of five years and it malfunctioned after 4 months, the consumer may have no remedy because the 90-day time limit in the disclaimer would have expired. If no express warranty had been given at all, however, the consumer would probably have been able to recover on the basis of a breach of the implied warranty of merchantability. *See id.* §§ 2-314, 2-316.

7. This approach has often been used by jurisdictions wishing to invalidate a disclaimer on legal, rather than policy, grounds. Virginia used this approach in *Lacks v. Bottled Gas Corp.*, 215 Va. 94, 205 S.E.2d 671 (1974). In that case, the Virginia Supreme Court held a disclaimer invalid, stating that at the very least the language of the disclaimer must be printed in larger or other contrasting type or color. Mere underlining was not enough. *See also* *Entron, Inc. v. General Cablevision*, 435 F.2d 995 (5th Cir. 1970); *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964); *Orange Motors v. Dade County Dairies*, 258 So. 2d 319 (Fla. 1972). For a federal interpretation of Virginia's view of disclaimers see *Matthews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973).

8. Some courts are willing to void disclaimers on a public policy basis. The leading case is *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), where the court held that "[the] attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity." 161 A.2d at 95. *Accord*, *Dillon v. General Motors Corp.*, 315 A.2d 732 (Del. Ch. 1974).

Virginia, however, specifically rejected that argument in *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967). For additional conflicting authority as to warranty disclaimers in the area of auto warranties see *Annot.*, 54 A.L.R.3d 1217 (1973).

9. Under section 2-719 of the UCC (1972 version), the parties may agree to provide remedies in addition to or in substitution for those provided in the UCC, such as limiting the buyer's remedies to return of the goods and repayment of the purchase price or to repair and replacement of nonconforming goods and parts. If such a substituted remedy is agreed to be exclusive, then no other remedy is available to the consumer.

10. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for personal injury in the case of consumer goods is *prima facie* unconscionable. Limitation of damages where the loss is commercial is not. UCC § 2-719(3) (1972 version). *See also* *Matthews v. Ford Motor Co.*, 479 F.2d 399, 403 (4th Cir. 1973).

11. Warranties often contain express modifications such as: "Warrantor will replace all

Because of these weaknesses in state law, the federal government began to contemplate preempting the states in this area of the law.<sup>12</sup> Subsequent congressional hearings concluded that in order to be effective, any legislation must: (1) require that language of warranties be clear, conspicuous and readily understandable; (2) prohibit the proliferation of different forms of warranties, requiring that warranties be labeled simply "full" or "limited"—with the requirements of a full warranty being clearly stated; (3) guard against disclaimers of implied warranties where express warranties are given and (4) provide consumers with access to reasonable and effective warranties.<sup>13</sup> Bills pursuant to these findings were introduced in each house,<sup>14</sup> the final product of which was the Magnuson-Moss Act.<sup>15</sup>

The drafters of the Act took several steps to limit its scope. First, the Act applies only to written warranties.<sup>16</sup> A written warranty will be consid-

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defective parts, with purchaser bearing transportation costs to and from the factory plus a reasonable labor charge." Assume that this warranty is given on a portable radio costing \$20. The radio becomes defective during the warranty period due to a defective part worth \$5. If the consumer was to take advantage of the warranty, it would cost him \$3 each way for postage and \$10 for labor, in addition to the \$5 part. The net result is that the consumer would be paying \$21 to use the warranty on a \$20 radio and it would be cheaper simply to buy a new one. For further discussion and examples see Leete, *A Look at the Consumer Warranty Problem - The Federal Solution*, 6 U. TOLEDO L. REV. 351 (1975).

12. The impetus toward preempting the states began as early as 1962 when President Kennedy sent to Congress a message on consumer interests. Six additional messages were sent to Congress by subsequent administrations. During the Johnson administration, in response to increased public pressure, a task force was created in 1968 to study the subject. This, and later studies, reached the conclusion that intervention was necessary. [1974] U.S. CODE CONG. & AD. NEWS 7707.

13. *Id.* at 7711. For records of the arguments and data brought forth in the hearings see *Hearings on H.R. 4809 Before Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971).

14. See S. 356, 93d Cong., 1st Sess. (1973); H.R. 7917, 93d Cong., 1st Sess. (1973).

15. 15 U.S.C.A. § 2301 *et seq.* (Cum. Supp. 1976). Magnuson-Moss was passed January 4, 1975 and became effective July 4, 1975. The final rules for enforcement by the FTC are codified in 16 C.F.R. §§ 701-03 (1976). Sections 701 and 702 will become effective December 31, 1976. Section 703 became effective July 4, 1976. However, see note 78 *infra*.

See also 41 Fed. Reg. 34654 (1976) for new proposed rules. These proposed rules supplement the earlier policy statement by the FTC on Magnuson-Moss. See 40 Fed. Reg. 25721 (1975). Both the proposed rules and the policy statement are advisory in nature and have no force of law. However, lack of compliance invites corrective action by the FTC. See 41 Fed. Reg. 34654 (1976).

16. Magnuson-Moss states that its warranty provisions apply to "any warrantor warranting a consumer product to a consumer by means of a written warranty." 15 U.S.C.A. § 2301 (Cum. Supp. 1976). Under section 101 of Magnuson-Moss, a warrantor was defined as a "supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." *Id.* § 2301(5). The final FTC regulation redrafted this

ered within the coverage of the statute if it is an "affirmation of fact or written promise made in connection with the sale of a consumer product . . . which relates to the nature of the material or workmanship" or a written promise to "refund, repair [or] replace" such product.<sup>17</sup> Such a definition appears to increase rather than lessen the consumer's burden of proof for recovery. Under the UCC, the consumer need only show that the warranty became a "basis of the bargain." Under Magnuson-Moss, however, to enforce a warranty the consumer must also relate the defect to material or workmanship.<sup>18</sup>

Second, the Act may only be used to enforce written warranties on "consumer products."<sup>19</sup> They are defined as any tangible property, distributed in commerce,<sup>20</sup> which is normally used for personal, family or household purposes.<sup>21</sup> This definition includes fixtures regardless of whether they are attached.<sup>22</sup> Thus, a client giving only an express oral warranty or not dealing in consumer goods is not within the coverage of the Magnuson-Moss Act and may continue to act solely within the guidelines established under state law.<sup>23</sup>

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definition to cover only persons giving written warranties. 16 C.F.R. §§ 701.1(g), 702.1(d) (1976).

17. 15 U.S.C.A. § 2301(6) (Cum. Supp. 1976).

18. UCC § 2-313 provides that any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty. The UCC makes no requirement that the promise relate to material or workmanship, but only to the goods in a general sense. Thus, the question is raised, in a situation where a seller promises in a written warranty that a lawn chair is rust-proof and at the first rain it becomes covered with rust, whether it would meet the defect-in-workmanship requirement of Magnuson-Moss. Apparently it would not and the warranty could only be enforced through state law. Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 *FORDHAM L. REV.* 273, 274 (1975).

19. 15 U.S.C.A. § 2302(a) (Cum. Supp. 1976).

20. The term "distributed in commerce" is used to justify the legislation by relating it to an exercise of the commerce power granted by the Constitution. See U. S. CONST. art. I, § 8.

21. 15 U.S.C.A. § 2301(1) (Cum. Supp. 1976). In its guidelines for interpretation, the FTC expressly enumerated certain products which would be considered consumer goods: "boats, photographic films and chemicals, clothing, appliances, jewelry, furniture, typewriters, motor homes, automobiles, mobile homes, vehicle parts and accessories, stereos, carpeting, small aircraft and food." 40 Fed. Reg. 25721, 25722 (1975).

In June of 1976, the FTC withdrew small aircraft from this list. 41 Fed. Reg. 26757 (1976).

22. This includes such products as large appliances, central air conditioning and water heaters. 40 Fed. Reg. 25721, 25722 (1975); 41 Fed. Reg. 34654 (1976) (proposed rule § 700.1(d)).

23. It should be noted that when goods may be classed as either consumer goods or another classification, the FTC will consider them consumer goods for the purposes of Magnuson-Moss. Therefore, the attorney in doubt as to product classification should advise his client to comply with both state and federal law. 40 Fed. Reg. 25721, 25722 (1975); 41 Fed. Reg.

## II. DISCLOSURE PROVISIONS

The first major problem area addressed by Magnuson-Moss is presale disclosure of consumer warranty terms.<sup>24</sup> Section 102 imposes the requirement that any warrantor of a consumer product costing over fifteen dollars<sup>25</sup> "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty."<sup>26</sup> Magnuson-Moss enumerates thirteen items which the FTC may require these warranties to contain.<sup>27</sup> The more significant of these include clear identification of the names and addresses of the warrantors,<sup>28</sup> the identity of the party or parties to whom the warranty is extended,<sup>29</sup> the parts or products warranted,<sup>30</sup> a statement of what course of action the warrantor will follow in the event of a defect or malfunction and what expenses the consumer may have to bear,<sup>31</sup> and a summary of the legal remedies available to the consumer in case of the warrantor's breach.<sup>32</sup> The written warranty containing these

34654 (1976) (proposed rule § 700.1(b)). Products which are purchased solely for commercial and industrial use are not within the Act's coverage. 16 C.F.R. §§ 701.1(b), 702.1(b) (1976).

24. 15 U.S.C.A. § 2302 (Cum. Supp. 1976).

25. Magnuson-Moss sets the dollar limit at five dollars. The FTC in its final regulations raised the limit to fifteen dollars. 16 C.F.R. § 701.2 (1976). The FTC change is probably valid, since agency construction of a statute should be followed unless there are compelling indications that it is wrong. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

The fifteen dollar limit of Magnuson-Moss means actual cost, excluding tax and service charges. The minimum price will be interpreted to include multiple-packaged items which may individually sell for less than fifteen dollars, but have been packaged to be sold as a unit in a manner that does not permit separation. Thus, ten items sold together as a twenty dollar unit would fall within the Act, whereas each item, if sold individually for two dollars apiece, would not. 40 Fed. Reg. 25721, 25722 (1975); 41 Fed. Reg. 34654 (1976) (proposed rule § 700.1(h)).

26. 15 U.S.C.A. § 2302(a) (Cum. Supp. 1976).

27. *Id.* § 2302(a)(1)-(13). The FTC has adopted the majority of these requirements. For a listing see 16 C.F.R. § 701.3(a)(1) (1976).

28. This requirement may be satisfied by a statement referring the consumer to an authorized dealer of the manufacturer and by providing to the consumer a listing of such dealers. 16 C.F.R. § 701.3(a)(5) (1976).

29. This part of the warranty should also include any limitation on its enforceability by any party other than the first purchaser at retail. *Id.* § 701.3(a)(1).

In Virginia, since by statute any consumer may enforce the warranty because there is no requirement of privity, it seems that no such provision would be required. *See* VA. CODE ANN. § 8.2-318 (Added Vol. 1965). The form in other jurisdictions would depend upon what version of UCC § 2-318 that particular state has adopted.

30. This does not, however, mean that every component part of a consumer good covered must be specifically listed. A reasonable listing should be sufficient. 40 Fed. Reg. 60168, 60173 (1975).

31. 16 C.F.R. § 701.3(a)(3) (1976).

32. The FTC in its proposed regulations suggested two possible statements to satisfy this requirement:

provisions must be made available to the consumer prior to the sale of the product.<sup>33</sup> Consequently, a warranty does not satisfy the requirements of Magnuson-Moss if it is placed inside a sealed package.<sup>34</sup>

In implementing the provisions for presale availability of warranty terms, the FTC has distinguished among various forms of sales techniques. In retail outlets, the availability of terms is maintained through a series of binders containing copies of all manufacturers' warranties on every product sold in the store. These binders must be kept readily available for consumer inspection.<sup>35</sup> They must be conspicuously displayed in close proximity to the warranted product, or, in the absence of such display, a notice posted as to the availability of the binders.<sup>36</sup> If the seller conducts any business in consumer products through catalogue sales, he must disclose the warranty terms on the same page as the item is advertised or inform the consumer that a written copy of the warranty will be made available to him upon request.<sup>37</sup> Mail order sales are treated as catalogue

(1) This warranty gives you specific legal rights. You also have implied warranty rights. In the event of a problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court, or;

(2) This warranty gives you specific legal rights. You also have implied warranty rights, including an implied warranty of merchantability which means that your product must be fit for the ordinary purposes for which such goods are used. In the event of a problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

40 Fed. Reg. 29892, 29893 (1975).

The final regulations, however, did not adopt these forms, but instead merely require that the warrantor make a simple summary statement, such as: "This warranty gives you specific legal rights and you may also have other rights which vary from state to state." 16 C.F.R. § 701.3(a)(9) (1976).

33. 15 U.S.C.A. § 2302(b)(1)(A) (Cum. Supp. 1976).

34. Under the UCC, there is no requirement that the warranty provisions be given to the consumer prior to sale. In many situations, the package merely reads "Guaranteed" on the outside of the box and the full warranty statement is sealed inside the container with the product. This prevented the consumer from having an opportunity to examine the terms of the warranty until after he had arrived home with the goods and examined them. This was a substantial deterrent to the consumer who wanted to compare warranties given by different manufacturers on similar products before buying. See generally Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 *FORDHAM L. REV.* 273, 279 (1975).

35. 16 C.F.R. § 702.3(a)(1) (1976). The binder must be boldly labeled "Warranties" and each department in which a consumer product is sold must maintain a binder containing copies of warranties on products sold in that department. There is a duty upon the seller to keep such binders updated and indexed.

36. *Id.* § 702.3(a)(1)(ii)(B), (iv). The requirement that the warranty be in a binder is not necessary if the text of the warranty is found on the package. *Id.* § 702.3(a)(1)(iii).

37. *Id.* § 702.3(c).

sales under the regulations.<sup>38</sup> Door-to-door sales also fall within the coverage of Magnuson-Moss, and any seller soliciting in such a manner must inform the buyer that he has a copy of the warranty available for inspection before any sale is consummated.<sup>39</sup>

The FTC, under powers vested in it by Magnuson-Moss, has also given particular attention to presale disclosure in the area of used car sales.<sup>40</sup> The proposed regulations require a dealer to affix to the rear window of any used motor vehicle offered for sale a disclosure statement containing, in a clear and conspicuous form: (1) the name, address and executive officer of the dealership; (2) the make, model, mileage and year of the vehicle; and (3) the identity of any government entity which may have previously used, owned or leased the vehicle.<sup>41</sup> In addition, the disclosure statement must describe any work performed by or on behalf of the dealer which relates to any damage or defect which may affect the useful life or performance of the vehicle.<sup>42</sup> Permanent records of such disclosures must be maintained by the dealer for three years.<sup>43</sup>

These disclosure regulations do not prevent a dealer from selling a used vehicle without a warranty. He must, however, disclose the full meaning of the terms to be used in disclaiming any warranty liability. The mere use of the term "as is" is not a sufficient disclosure to the consumer that no warranty is being given.<sup>44</sup>

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38. *Id.*

39. *Id.* § 702.3(d)(2). For the purposes of Magnuson-Moss, "door-to-door sale" means a sale of consumer products in which the seller or his personal representative personally solicits the sale, including those in response to or following an invitation by a buyer, and the buyer's agreement to offer to purchase is made at a place other than the place of business of the seller. *Id.* § 702.3(d)(1)(i).

Door-to-door sales are already heavily regulated in this jurisdiction under the Virginia Home Solicitation Sales Act. *See* VA. CODE ANN. §§ 59.1-21.1 to -21.6 (Repl. Vol. 1973), *as amended* (Cum. Supp. 1976).

40. In 15 U.S.C.A. § 2309(b) (Cum. Supp. 1976), the FTC was ordered to promulgate rules dealing with warranties in used motor vehicle sales within one year after the passage of Magnuson-Moss. These proposed rules appeared in 41 Fed. Reg. 1089 (1976).

41. *Id.* at 1089-90. This includes post offices, driver training and all other public uses.

42. This requirement only applies to repairs which cost over \$100. *Id.* at 1090.

43. *Id.* It should be noted again that to fall within the federal regulations, commerce must be involved. However, the Act's definition of commerce as any "trade, traffic, commerce, or transportation (A) between a place in a State and any place outside thereof, or (B) which affects such trade . . ." is so broad as to bring practically any used automobile sale within the coverage of Magnuson-Moss. 15 U.S.C.A. § 2301(14) (Cum. Supp. 1976).

44. Under the UCC, the mere words "as is" or "with all faults" were effective to disclaim any warranty liability without further disclosure to the consumer of what he was giving up. *See* UCC § 2-316. The FTC, however, in its proposed regulations, requires that in any sales contract or other writing evidencing the sale of a used motor vehicle, the dealer must explain the terms used as follows:

### III. FEDERAL WARRANTY STANDARDS

The greatest impact of Magnuson-Moss is felt in its substantive regulation of written warranties.<sup>45</sup> This phase of the Act centers around the mandatory designation of written warranties as either "full" or "limited."<sup>46</sup> The statute requires a warrantor of consumer products<sup>47</sup> to display clearly and conspicuously at the top of the warranty its designation.<sup>48</sup> Whether the designation may be "full" depends upon whether the warranty complies with the minimum federal warranty standards.<sup>49</sup> There is no requirement that all warranties become full warranties. The intention of Magnuson-Moss was to let the market structure make it a business disadvantage not to offer a full warranty, and thus eventually to force all sellers to give full warranties in order to compete successfully.<sup>50</sup>

The first of the federal minimum warranty standards requires that the warrantor remedy the defective consumer product within a reasonable time after its malfunction.<sup>51</sup> The remedy must be provided without charge to the consumer.<sup>52</sup> This includes free installation of component parts or the product itself, regardless of who paid for installation initially.<sup>53</sup> The war-

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As is. This used motor vehicle is sold as is *without* any warranty, either express or implied. The purchaser will bear the *entire expense* of repairing or correcting any defects that presently exist or that may occur in the vehicle.

41 Fed. Reg. 1089, 1090 (1976). Cf. For state interpretation of term "as is" see Annot., 24 A.L.R.3d 465 (1969). For a broader view of UCC law on used cars specifically see Annot., 22 A.L.R.3d 1387 (1968).

45. The section addressing this issue is 15 U.S.C.A. § 2303 (Cum. Supp. 1976).

46. 15 U.S.C.A. § 2303(a)(1)-(2) (Cum. Supp. 1976).

47. The dollar limit for this section of the Act was originally ten dollars. It was changed by the final FTC regulations. See note 25 *supra*.

48. The designation should appear clearly and conspicuously as a caption, or prominent title, clearly separated from the text of the warranty. 40 Fed. Reg. 25722 (1975); 41 Fed. Reg. 34655 (1976) (proposed rule § 700.6(a)).

49. 15 U.S.C.A. § 2303(a)(1)-(2) (Cum. Supp. 1976).

50. With disclosure of warranty terms before sale and the designation of warranties, the consumer should be able to shop around before buying. The competitive nature of our economy will eventually create a situation where a warrantor will have to offer a full warranty to effectively compete. See 120 CONG. REC. S21,977 (daily ed. Dec. 18, 1974) (remarks of Senator Magnuson).

51. 15 U.S.C.A. § 2304(a)(1) (Cum. Supp. 1976). None of the proposed regulations has addressed the issue of what a reasonable time is.

52. *Id.* Section 104(d) of Magnuson-Moss defines "without charge" as meaning that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of the warranted product. 15 U.S.C.A. § 2304(d) (Cum. Supp. 1976).

53. If the warranted product is a consumer product which is functional only when attached to some other product, such as an accessory part for an automobile or storm windows for a dwelling, the warrantor must bear the expense of installing the repaired or replaced part

rantor will not be required to provide any remedy to the consumer, however, if he can prove that the defect or malfunction was caused by consumer damage to the good through unreasonable use or failure to provide necessary maintenance.<sup>54</sup>

Second, the warrantor may only impose limited duties upon the consumer. He may, of course, require reasonable notice of the failure of the product.<sup>55</sup> He may also require that the consumer make the defective product available to the warrantor free and clear of all liens or other encumbrances.<sup>56</sup> Any other duty which the warrantor seeks to impose, however, must be reasonable, and this reasonableness must be demonstrated in an administrative or judicial hearing.<sup>57</sup> Under the federal standards, the warrantor may not exclude or limit consequential damages for breach of any written or implied warranty unless such exclusion conspicuously appears on the face of the warranty.<sup>58</sup> Likewise, he may not limit the time duration of any implied warranty.<sup>59</sup> Finally, the manufacturer, if unsuccessful in fixing or replacing the defective product, must allow the consumer a choice between a full refund or a new product.<sup>60</sup> Any warranty not complying with these standards will still be valid, but it must be designated as "limited." A product may carry both full and limited warranties on its component parts, provided that those warranties are clearly and conspicuously differentiated.<sup>61</sup>

Two significant provisions of Magnuson-Moss apply to both full and limited warranties. First, the Act proscribes any form of guarantee being conditioned on a tying arrangement (*i.e.*, a requirement that the consumer use, in connection with such product, any article or service which is identified by brand or corporate name).<sup>62</sup> To provide for the rare situa-

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regardless of whether or not the consumer originally paid for installation by the warrantor or his agent. 40 Fed. Reg. 25722 (1975); 41 Fed. Reg. 34656 (1976) (proposed rule § 700.9).

54. 15 U.S.C.A. § 2304 (Cum. Supp. 1976).

55. *Id.* § 2304(b)(1). This is the same as existed under the UCC. See UCC § 2-607(3)(a).

56. 15 U.S.C.A. § 2304(b)(2) (Cum. Supp. 1976).

57. *Id.* § 2304(b)(1); *accord*, 40 Fed. Reg. 25723 (1975).

58. 15 U.S.C.A. § 2304(3) (Cum. Supp. 1976). The limitation of damages is not allowable where prohibited under state law. *Id.* In Virginia, consequential damages may be limited for anything other than personal injury to a consumer. See VA. CODE ANN. § 8.2-719 (Added Vol. 1965). According to the FTC, this disclosure requirement applies to situations such as the obligation of a warrantor to provide reimbursement for food loss from a defective freezer. 40 Fed. Reg. 25723 (1975).

59. 15 U.S.C.A. § 2304(a)(2) (Cum. Supp. 1976).

60. *Id.* § 2304(a)(4).

61. *Id.* § 2305.

62. *Id.* § 2302(c). The typical situation would be a washing machine manufacturer conditioning his warranty upon the use of Brand X detergent, which is sold by a company in which

tion in which a tying arrangement is in the best interest of the consumer, Magnuson-Moss provides the FTC power to grant a waiver of this prohibition.<sup>63</sup> For such a waiver to be granted, the FTC must be convinced that "the warranted product will function properly only if the identified article or service is used in connection therewith and that the waiver is in the public interest."<sup>64</sup>

The second and more profound provision is the limitation of implied warranty disclaimers.<sup>65</sup> Under section 108, a supplier may not disclaim or modify any implied warranty to a consumer with respect to a consumer product if the supplier makes a written warranty.<sup>66</sup> Only the duration of an implied warranty may be limited. Even that limitation only applies to certain situations: (1) where the written warranty is designated as a limited warranty;<sup>67</sup> (2) where the duration of an implied warranty is at least equal to the duration of a written warranty of reasonable length;<sup>68</sup> (3) where the time limit is conscionable<sup>69</sup> and (4) where the limitation of duration is set forth in clear and unmistakable language, prominently displayed on the face of the warranty.<sup>70</sup>

#### IV. ENFORCEMENT

Magnuson-Moss provides a two-prong method of enforcement. The first is through governmental action and the second by consumer action. A failure to comply with the provisions of the statute is deemed a violation

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the washing machine manufacturer had a stock interest. *See also* 41 Fed. Reg. 34656 (1976) (proposed rule § 700.10).

63. 15 U.S.C.A. § 2302(c) (Cum. Supp. 1976).

64. 40 Fed. Reg. 25722, 25723 (1975). The waiver requests must be published in the Federal Register and should include supporting evidentiary materials. An example of such a request appears in 40 Fed. Reg. 58698 (1975), where a swimming pool company requested a waiver to have its brand of filters required by purchasers of pools it manufactured. *See also* 40 Fed. Reg. 49409 (1975) (piano manufacturer sought to condition warranty upon consumer's use of authorized technicians for tuning and maintenance).

65. 15 U.S.C.A. § 2308 (Cum. Supp. 1976).

66. *Id.* This makes the ability to disclaim under UCC § 2-319 ineffective in transactions covered by Magnuson-Moss. The greater benefits which a consumer may have had under the implied warranty of merchantability will be deemed to apply rather than those of any attempted disclaimer.

67. 40 Fed. Reg. 25723 (1975). A warranty to include such a time limitation must be labeled by the warrantor as a "limited" warranty. Magnuson-Moss allows no warranty to be designated as "full" if it in any way places a restriction upon the rights received by the consumer under an implied warranty. *See* 15 U.S.C.A. § 2304(a)(2) (Cum. Supp. 1976).

68. 40 Fed. Reg. 25723 (1975).

69. *Id.*

70. *Id.*

of section 5 of the Federal Trade Commission Act.<sup>71</sup> Pursuant to such violations, the FTC has the power to issue cease and desist orders.<sup>72</sup> In addition, Magnuson-Moss gives the FTC and the Justice Department the power to seek temporary restraining orders and preliminary injunctions in federal district court.<sup>73</sup>

For injunctive relief to issue, the government's success in prosecuting the violation must be likely and the restraining order must be determined to be in the public interest after a weighing of the equities involved.<sup>74</sup> If the FTC rather than the Attorney General is bringing the action, the request for injunction must be followed within 10 days by a formal complaint under section 5 of the Federal Trade Commission Act, or the injunction will be dissolved.<sup>75</sup>

Congress, in passing Magnuson-Moss, realized, however, that ultimate enforcement of the Act should be by the consumer rather than by the government. Consequently, primary emphasis was placed upon informal settlement procedures.<sup>76</sup> Such an informal scheme, if implemented properly, would minimize enforcement costs while adequate insuring fundamental fairness in settling the warranty dispute. Pursuant to section 110 of the Act,<sup>77</sup> the FTC has proposed minimum requirements for an informal settlement procedure.<sup>78</sup> To provide fairness, the FTC regulations prohibit any party to a dispute or an agent of a party from acting as a decision-

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71. 15 U.S.C.A. § 45 (a)(1) (1975). This section states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are deemed unlawful."

72. See 15 U.S.C.A. § 2310 (Cum. Supp. 1976).

73. *Id.* § 2310(c)(1). The district court's jurisdiction covers actions by the FTC or Attorney General "to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any prohibition" contained in Magnuson-Moss. *Id.* For FTC guidelines defining deceptive warranty see 40 Fed. Reg. 25723 (1975). See also 41 Fed. Reg. 34655 (1976) (proposed rule § 700.3).

The district court of proper venue shall be that where the defendant resides or transacts business. Whenever it appears to the court that other persons should be parties to the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district. 15 U.S.C.A. § 2310(c)(1) (Cum. Supp. 1976). See also FED. R. CIV. P. 45(e).

74. 15 U.S.C.A. § 2310(c)(1) (Cum. Supp. 1976).

75. *Id.*

76. *Id.* § 2310(a)(1) (Cum. Supp. 1976) states: "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."

77. *Id.*

78. 16 C.F.R. § 703.3-8 (1976). As to consumer products sold in new homes, these sections will become effective for any contract signed after January 3, 1977. 41 Fed. Reg. 27828 (1976).

maker in the mechanism.<sup>79</sup> If the mechanism has less than three decision-makers, none may be directly involved in the manufacture, distribution or sale of *any* product;<sup>80</sup> if over three persons participate, then two-thirds must be detached from any such involvement.<sup>81</sup> The mechanism must have written operating procedures, a copy to be provided to the consumer free of charge.<sup>82</sup> A decision must be made within forty days of the commencement of the dispute. This decision may provide for any remedy available under either the written warranty or Magnuson-Moss. If the decision goes against the consumer, he must be informed of his remaining right to pursue legal remedies. If it is against the warrantor, he must comply with the decision of the mechanism, by making remedies available to the disgruntled consumer.<sup>83</sup>

Magnuson-Moss does not require a warrantor to establish an informal settlement mechanism; it merely encourages him to do so. Since the statute provides for consumer recovery of costs and attorneys' fees if he prevails in a formal judicial proceeding, the warrantor may find the establishment of an informal mechanism to be much more economical than litigation.<sup>84</sup> If the warrantor provides a settlement mechanism, he may compel the consumer to resort initially to that means of redress merely by incorporating such a requirement into the terms of the written warranty.<sup>85</sup> Consequently, as a general rule, no civil suit may be brought by a disgruntled consumer without first exhausting his administrative remedies through the settlement mechanism.

A consumer may, however, institute a civil suit immediately and con-

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79. 16 C.F.R. § 703.4(a)(1) (1976). The decision-maker will not be considered an agent for the purpose of this section, however, if his sole relationship to a party is his employment by the warrantor as a judge in the informal settlement mechanism.

80. *Id.* § 703.4(b). Direct involvement as defined by the FTC does not include the acquiring or owning of a corporate interest solely for investment purposes. *Id.*

81. *Id.*

82. *Id.* § 703.5(a). The written operating procedures required by the FTC are fully enumerated in the final rules and regulations. *Id.* § 703.5.

83. The suit is commenced when the consumer gives notice of the defect in the product. The warrantor, if he is deemed at fault by the informal settlement proceeding, will be given a specific date to perform. Ten working days after the date for such performance, the mechanism will check to see if such remedy has been given. If there has been no action by the warrantor, then the administrative remedy will be deemed exhausted and the consumer may turn to his legal remedies. *Id.* § 703.5.

84. 15 U.S.C.A. § 2310(d)(2) (Cum. Supp. 1976). Against this possibility, however, the warrantor must weigh the added expense of establishing such a mechanism. In addition to the obvious employment of new personnel to run the mechanism, there are also extensive record-keeping procedures and requirements set forth by the FTC with which any such mechanism must comply. For a listing of these requirements see 16 C.F.R. § 703.6 (1976).

85. 15 U.S.C.A. § 2310(a)(3) (Cum. Supp. 1976).

tend that the settlement mechanism falls short of FTC requirements.<sup>86</sup> The burden of proving that the mechanism is in compliance falls upon the warrantor. If compliance is demonstrated, the consumer must resort to the mechanism; if compliance is not established, then the civil suit may continue.<sup>87</sup> If the mechanism is valid, the consumer, if still "unsatisfied," may then bring a civil action for damages and other equitable relief. Magnuson-Moss provides that the action may be brought in any court of competent jurisdiction in any state or the District of Columbia, or in an appropriate federal district court.<sup>88</sup> In order to establish federal jurisdiction, however, the amount in controversy must be greater than \$50,000 and if there are multiple plaintiffs, each individual claim must be at least \$25.<sup>89</sup> If the action is brought under the Federal Rules of Civil Procedure as a class action,<sup>90</sup> the member named plaintiffs must number at least one hundred.<sup>91</sup> Thus, it appears that due to these stringent federal requirements, most of the actions will take place in state courts.<sup>92</sup>

## V. CONCLUSION

The Magnuson-Moss Act will have a profound effect upon the sale of consumer goods. For consumer protectionists the entry of the federal government into the warranty area signals a new era in which weaknesses in state law can no longer be used to defraud the consumer. It is uncertain, however, whether the consumer will benefit in the long run. The extensive record-keeping and dispute settlement mechanisms imposed upon the warrantor by Magnuson-Moss will result in new expenses by requiring the

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86. 40 Fed. Reg. 60216, 60217 (1975).

87. *Id.*

88. 15 U.S.C.A. § 2310(c)(1) (Cum. Supp. 1976).

89. *Id.* § 2310(d)(3).

90. See FED. R. CIV. P. 23. Under section 110 of Magnuson-Moss, a class action may not proceed beyond a determination of the representative capacity of the named plaintiffs. Once the named plaintiffs are proven to be representative of the entire class, they must submit to a hearing by the informal settlement mechanism on behalf of the class. Only after employing the mechanism and failing to obtain a remedy may the suit be continued. 15 U.S.C.A. § 2310(a)(3) (Cum. Supp. 1976).

91. 15 U.S.C.A. § 2310 (d)(3)(C) (Cum. Supp. 1976).

92. As a federal statute, any dispute arising under Magnuson-Moss would invoke federal jurisdiction. The stringent requirements of the Act, however, show that the intent was not to overburden federal courts with small warranty claims. Thus, the majority of cases will take place in state court.

Since most disgruntled consumers will have claims of less than five hundred dollars, the proper court in Virginia would be a general district court. VA. CODE ANN. § 16.1-77 (Repl. Vol. 1975). The proper district court would be determined by the general venue statute found in the Code of Virginia. VA. CODE ANN. § 8-38 (Repl. Vol. 1950), as amended (Cum. Supp. 1976).

hiring of additional personnel and the establishment of new warranty departments. These costs will ultimately be passed on to the consumer. Attempts by the government to streamline warranty enforcement procedures ease the burden on the courts, but not necessarily on the warrantor.

The paradox of the Magnuson-Moss Act is that while increased regulation coupled with market forces and new enforcement mechanisms will undoubtedly provide a greater amount of protection for the injured consumer, the cost of this greater warranty protection will be borne by the purchaser himself in the form of higher prices or lower quality goods.

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