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Consumer Product Warranty Litigation in South Carolina

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CONSUMER PRODUCT WARRANTY LITIGATION IN SOUTH CAROLINA

*Nathan M. Crystal**

TABLE OF CONTENTS

I.	CREATION OF WARRANTIES	296
A.	<i>Written Warranties on Consumer Products</i>	296
1.	<i>Scope of the Magnuson-Moss Act</i>	296
2.	<i>Full Written Warranties</i>	301
3.	<i>Limited Written Warranties</i>	302
4.	<i>Other Magnuson-Moss Act Requirements</i> ...	303
B.	<i>Other Warranties: Express Warranties and Implied Warranties Governed Only by the U.C.C.</i> .	306
1.	<i>Express Warranties</i>	306
2.	<i>Implied Warranties of Merchantability</i>	307
3.	<i>Implied Warranties of Fitness for a Particular Purpose</i>	310
II.	WHAT CONSTITUTES BREACH	310
A.	<i>Written Warranties</i>	310
1.	<i>Breach When Goods are "In Warranty"</i>	311
2.	<i>Breach When Goods are "Out of Warranty"</i> .	313
B.	<i>Warranties that are not Subject to the Magnuson-Moss Act</i>	317
III.	REMEDIES FOR BREACH OF WARRANTY	317
A.	<i>Remedy for Breach of Full Written Warranties that are "In Warranty"</i>	317
B.	<i>Remedies for Breach of Limited Warranties, Express Warranties and Implied Warranties</i>	318
1.	<i>Rejection or Revocation of Acceptance</i>	318
2.	<i>Revocation of Acceptance Against Manufacturers</i>	322
3.	<i>Direct Damages for Breach of Warranty</i>	322

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C.	<i>Incidental and Consequential Damages for Breach of Warranty</i>	323
1.	<i>In General</i>	323
2.	<i>Limitations on Recovery of Incidental and Consequential Damages for Breach of Written Warranties</i>	324
D.	<i>Buyers' Security Interests and Rights of Setoff</i> ..	325
E.	<i>Availability of Remedies for Breach of Warranty Against Dealers and Financing Agencies</i>	326
1.	<i>The Role of Dealers and Financing Entities</i> ..	326
2.	<i>Remedies Against Dealers</i>	327
3.	<i>Remedies Against Financing Entities</i>	328
F.	<i>Breach of Warranty as a Defense in Claim and Delivery Actions</i>	332
G.	<i>Class Actions</i>	335
1.	<i>Class Actions in Federal Court</i>	335
2.	<i>Class Actions in State Court</i>	337
IV.	DEFENSES TO WARRANTY ACTIONS	339
A.	<i>Written Warranties</i>	339
1.	<i>Right to Cure</i>	339
2.	<i>Lack of Privity</i>	340
3.	<i>Failure to Provide Notice of Breach</i>	340
4.	<i>Statute of Limitations</i>	341
B.	<i>Other Warranties</i>	341
1.	<i>Disclaimers of Express Warranties</i>	341
2.	<i>Disclaimers of Implied Warranties</i>	342
3.	<i>Warranties on Used Motor Vehicles</i>	345
V.	OTHER THEORIES OF LIABILITY	346
A.	<i>Strict Liability in Tort</i>	346
B.	<i>Common-Law Fraud</i>	349
C.	<i>Liability for Violation of the Federal Odometer Law</i>	350
D.	<i>Liability Under the South Carolina Unfair Trade Practices Act</i>	352
VI.	CONCLUSION	353
	APPENDIX A—NOTICE OF REJECTION/REVOCATION	354
	APPENDIX B—TYPICAL AUTOMOBILE WARRANTY	355

One of the major changes in law in the last twenty years has been the explosive development of the law of products liability.¹ While products liability deals generally with recovery of damages caused by products, it can in fact be subdivided into three areas: personal injury and property damage, commercial economic loss and consumer economic loss. The most dramatic types of products liability cases involve personal injury, especially death, or property damage.² Courts have developed novel theories of liability, such as strict liability in tort, to protect individuals who suffer personal harm or property damage from products.³ Injury from a product, however, may involve economic loss rather than personal injury.⁴ For example, the farmer who loses the profit from a crop because he purchased defective seed and the consumer who buys an automobile with a defective transmission have both suffered economic loss. As the examples show, economic-loss cases can be classified as either commercial or consumer. While such a division was less important a few years ago, it has become very significant with the passage of the Magnuson-Moss Warranty Act, which regulates consumer product warranties.⁵

This article is limited to the third division of the field of products liability: cases that involve economic loss suffered by consumers. The article does not include a complete discussion of strict liability in tort because that theory applies primarily to recovery of damages for personal injuries and property damage. However, strict liability theory is discussed to the extent it applies to economic loss suffered by consumers. While the article is limited to economic loss in consumer cases, some of the discus-

1. For a discussion of the history of the development of products liability see Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

2. Property damage means damage that results from a sudden occurrence, for example, the damage that results when an automobile strikes a wall because of a defective tire. *Cloud v. Kit Mfg. Co.*, 563 P.2d 248 (Alaska 1977). In *Gasque v. Eagle Machine Co.*, 270 S.C. 499, 243 S.E.2d 831 (1978), the South Carolina Supreme Court held that the term "property" within the meaning of S.C. CODE ANN. § 36-2-318 (1976) included lost profits, a form of economic loss.

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965). South Carolina has adopted strict liability in tort by statute. S.C. CODE ANN. § 15-73-10 (1976).

4. Economic loss may be divided into direct economic loss (sometimes called "loss of bargain") and indirect economic loss. Loss of bargain means the difference between the value of the product with a defect and the value it would have had if it had been defect-free. S.C. CODE ANN. § 36-2-714(2) (1976). Indirect economic loss means incidental and consequential damage resulting from a defective product, such as towing expenses or lost wages. See *id.* § 36-2-715(1),(2).

5. 15 U.S.C. §§ 2301-2312 (1976).

sion, such as the material on disclaimers of warranties, has relevance in commercial cases.

The article is divided into five parts. Part I discusses creation of warranties. Part II deals with breach of warranties. Part III examines remedies for breach; defenses to warranty claims are discussed in Part IV. Other theories of liability are the focus of Part V.

I. CREATION OF WARRANTIES

Traditionally, warranties have been divided into four categories: express warranties, implied warranties of merchantability, implied warranties of fitness for a particular purpose and warranties of title.⁶ Because of the passage of the Magnuson-Moss Act,⁷ this classification is no longer appropriate for consumer products. Instead, warranties on consumer products should be classified into two categories: written warranties and other warranties. Written warranties may be classified as either "full" or "limited."⁸ A single consumer product may have full written warranties that apply to some parts and limited written warranties on others.⁹ Other warranties may be subdivided into the traditional classifications. Although both types of warranties are affected by the Magnuson-Moss Act, written warranties are controlled to a much greater extent.

Sellers of consumer products may provide maintenance or repair services through service contracts rather than by warranty. The Magnuson-Moss Act recognizes the existence of service contracts.¹⁰ For litigation purposes, service contracts are treated much like limited warranties.¹¹

A. *Written Warranties on Consumer Products*

1. *Scope of the Magnuson-Moss Act.* — Written warranties on consumer products are subject to the provisions of the Magnuson-Moss Act.¹² For an attorney involved in consumer-

6. S.C. CODE ANN. §§ 36-2-313 (1976) (express warranties), 36-2-314 (implied warranty of merchantability), 36-2-315 (implied warranty of fitness for a particular purpose). The Code also contains a warranty of title. *Id.* § 36-2-312.

7. 15 U.S.C. §§ 2301-2312 (1976).

8. *Id.* § 2303(a).

9. *Id.* § 2305.

10. *Id.* § 2301(8).

11. *Id.* §§ 2306 (disclosure), 2308(a)(2) (disclaimers of implied warranties), 2310(d) (remedies).

12. *Id.* §§ 2301-2312.

product warranty litigation, understanding the concept of a written warranty is important.

The Act defines a written warranty to mean:

(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 product.¹³

As normally written, the typical written warranty is an amalgam of traditional warranty provisions having three parts: (1) a narrowly drawn express warranty; (2) a limitation on implied warranties; and (3) a clause that modifies remedies in the event of breach. The automobile warranty included in the appendix is illustrative.

To be a written warranty the warranty must be in connection with the sale of a consumer product, which is defined as: "any tangible personal property which is distributed in commerce 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)."¹⁴ Local transactions are covered because the Act applies to any product that is "distributed in commerce," which is defined as trade between states or trade that affects business between states.¹⁵ The regulations promulgated by the Federal Trade Commission under the Act state that a product will be deemed to be a consumer product if its use for personal, family or household purposes is not uncommon.¹⁶ Automobiles

13. *Id.* § 2301(6).

14. *Id.* § 2301(1).

15. *Id.* § 2301(13),(14).

16. 16 C.F.R. § 700.1(a) (1979).

and typewriters, which may be used for either consumer or commercial purposes, are thus subject to the Act.¹⁷ The regulations contain provisions on the treatment of building materials and fixtures.¹⁸ Fixtures are subject to the Act, while building materials are covered if sold separately, rather than as part of a finished building.¹⁹ The Act does not apply to warranties in connection with the rendering of services, but if goods are sold in connection with services, all warranties must comply with the Act.²⁰ Thus, if an automobile repair shop warrants parts and labor, the warranty must comply with the Act, but not if only the labor is covered.

The Act generally applies to manufacturers of consumer products rather than suppliers of component parts or dealers. Suppliers of component parts usually are not covered because they usually do not sell consumer products within the meaning of the Act.²¹ Dealers are not subject to the Act because the Act states that a written warranty may only be enforced against the person actually making the warranty.²² The regulations, however, state that the Act may apply to a dealer who adopts a manufacturer's warranty.²³ Of course, a dealer might make a written warranty of its own in addition to the manufacturer's warranty and such a warranty would be subject to the Act.

A written warranty under the Act must meet certain requirements. Most, but not all, express warranties that are in writing

17. *Id.* The regulation implies that a product often sold for consumer purposes is still subject to the Act when sold for commercial purposes, for example, a sale of 10 automobiles to a business. This conclusion comes from a reading of the final regulation on disclosure of warranty terms which state that "products which are purchased solely for commercial or industrial use are excluded solely for purposes of this Part" thus implying that the other provisions of the Act apply. *Id.* § 701.1(b). *But see* Magnuson-Moss Warranty Act: Implementation and Enforcement Policy, 40 Fed. Reg. 25,721 (1975) (last sentence of section on products covered states: "However, nothing in the Act prohibits a limitation or elimination of coverage where the product is put to commercial, rental, or other use not described in section 101(1).") Application of the Act to commercial transactions could lead to inefficiency because it limits the ability of commercial entities to control risk through contract. For example, the provision preventing disclaimers of implied warranties would apply.

18. 16 C.F.R. § 700.1(c),(d) (1979).

19. *Id.* § 700.1(e),(f).

20. *Id.* § 700.1(h). This application of the Act might result in less protection for consumers. To avoid the red tape of the Act, some repairers will stop giving warranties on parts.

21. *Id.* § 700.3(c).

22. 15 U.S.C. § 2310(f) (1976); 16 C.F.R. § 700.4 (1979).

23. 16 C.F.R. § 700.4 (1979). *See* text accompanying note 200 *infra*.

constitute written warranties under the Act.²⁴ An example should clarify the distinction. Suppose a supplier of a consumer product states the energy efficiency rating of the product or gives instructions on how the product should be maintained. Such statements constitute express warranties under state law because they are promises with respect to the goods and form part of the basis of the bargain.²⁵ Such statements, however, are not written warranties under the Act. To be a written warranty, the statement must be one of three types. First, a statement is a written warranty if it provides that the goods are defect free. Neither statement does this. Second, it is a written warranty if it provides that the goods will meet a specified level of performance over a specified period of time. Neither statement does this because neither contains a time period. Third, a statement is a written warranty if it obligates the warrantor to repair or replace the product if it fails to meet the specifications contained in the undertaking. Neither statement obligates the warrantor to take remedial action.²⁶

While the Act is far from clear, advertisements as to the quality of products probably do not constitute written warranties. A written warranty must be made "in connection with a sale."²⁷ Advertisements do not seem to comply with this requirement because they are only indirect factors in many sales. Further, the Act seems to draw a distinction between advertisements and written warranties because it authorizes the Commission to prescribe rules for the presentation of information "with respect to any written warranty . . . when such information is contained in advertisements."²⁸

To be a written warranty, the affirmation, promise or undertaking must constitute part of the "basis of the bargain" between the supplier and the consumer.²⁹ The intent of this requirement is unclear. One interpretation is that it was intended to incorporate the concept of the "basis of the bargain" found in the express warranty section of the U.C.C.³⁰ The difficulty with this interpretation is that many courts have construed this provision as requir-

24. 16 C.F.R. § 700.3(b) (1979).

25. See S.C. CODE ANN. § 36-2-313 (1976).

26. 16 C.F.R. § 700.3(b) (1979).

27. 15 U.S.C. § 2301(6) (1976).

28. *Id.* § 2302(b)(1)(B).

29. *Id.* § 2301(6).

30. See S.C. CODE ANN. § 36-2-313 (1976).

ing proof of reliance by the buyer.³¹ In the context of written warranties that consumers often never read, this interpretation could present problems. A better interpretation is that the intent of the requirement was to clarify when component-part suppliers and dealers make written warranties within the meaning of the Act. A warranty made by a component-part supplier is not part of the basis of the bargain between a supplier and a consumer unless the warranty is intended to run to the consumer. Thus, a warranty by a manufacturer of a refrigerator that is installed in a boat constitutes a written warranty to the consumer, while a warranty on the material used in the hull does not.³² A written warranty by a manufacturer does not constitute part of the basis of the bargain between the dealer and the consumer unless the dealer "adopts" the warranty.³³

While the Act provides that it only applies to consumer products manufactured after July 4, 1975, many pre-Act products are subject to regulation.³⁴ The Commission has the authority to promulgate rules dealing with warranties and warranty practices in connection with the sale of used motor vehicles, regardless of date of manufacture.³⁵ The Commission has promulgated a regulation providing for coverage of pre-Act products that are repaired or rebuilt after the effective date of the Act.³⁶

Written warranties subject to the Magnuson-Moss Act are divided into full and limited warranties.³⁷ For products that cost more than ten dollars, the warrantor must designate on the face of the written warranty whether it is full (duration of warranty) or limited.³⁸ For products that cost less than ten dollars, the warrantor may designate the type of warranty, but this is not required. If the product costs less than ten dollars and no designation is made, it is in effect a limited warranty.

While the term "full" implies a warranty without restrictions, the term is a misnomer. As the discussion below shows, full warranties may contain substantial restrictions. In fact, the difference between full and limited warranties is much smaller than

31. See text accompanying notes 86-91 *infra*.

32. 16 C.F.R. § 700.3(c) (1979).

33. *Id.* § 700.4.

34. 15 U.S.C. § 2312(a) (1976); 16 C.F.R. § 700.2 (1979).

35. 15 U.S.C. § 2309(b) (1976). See Part IV. B. 3. *infra*.

36. 16 C.F.R. § 700.2 (1979).

37. 15 U.S.C. § 2303(a) (1976).

38. *Id.* § 2303(a),(d); 16 C.F.R. § 700.6 (1979).

one would expect from the terms.

2. *Full Written Warranties.* — The Act provides that if a manufacturer makes a full warranty it must comply with certain minimum standards.³⁹ If a warranty is denominated a full warranty, it is deemed to incorporate these standards, regardless of the actual terms of the warranty.⁴⁰ To comply with minimum standards the warranty must meet four requirements.

First, the warranty must provide that the warrantor will remedy any nonconformity within a reasonable time without charge to the consumer.⁴¹ Related to this is the requirement that a full warranty may not impose any duty, other than notification, on the consumer unless the warrantor can demonstrate that such a duty is reasonable.⁴² The Commission has issued for comment a proposed rule that provides guidance to warrantors as to what duties are reasonable.⁴³ Second, a full warranty may not include a disclaimer of implied warranties nor impose any limitation on the duration of implied warranties.⁴⁴ Third, the warranty may not

39. 15 U.S.C. § 2304(a) (1976).

40. *Id.* § 2304(e).

41. *Id.* § 2304(a)(1). The Act and regulations provide some guidance as to the meaning of "without charge." The regulations state that if the product only has utility when installed, a full warranty must provide for installation free of charge. 16 C.F.R. § 700.9 (1979). The Act, 15 U.S.C. § 2304(d) (1976), states that the warrantor is not required to compensate the consumer for incidental expenses. The term "incidental expenses" is not defined in the Act and the legislative history is silent. It could refer to incidental damages as defined in the Uniform Commercial Code, S.C. CODE ANN. § 36-2-715(1) (1976), but if so, it would considerably water down the "without charge" concept because of the breadth of the U.C.C. definition. Apparently the Commission does not think that this is the meaning because one of the proposed rules defining duties that a full warrantor may not impose on a consumer provides that the warrantor must reimburse the consumer for transportation expenses, which would be an incidental expense under the U.C.C. definition. 42 Fed. Reg. 39,223 (1977) (to be codified in 16 C.F.R. § 705).

It seems inconsistent with the policy of the Act to read the term "without charge" as broadly as the U.C.C. definition of "incidental damages." A better interpretation is that incidental expenses are costs incurred as a result of a product failure but not costs incurred in order to get the product remedied. Thus, a warranty provides for remedy without charge even if the warrantor need not reimburse the consumer for lost wages as a result of a product failure, but it provides for a charge if the consumer is not entitled to reimbursement for towing the vehicle to a repair shop. In essence, the term "incidental expenses" should be read to mean "consequential damages" as defined in the U.C.C. *See* S.C. CODE ANN. § 36-2-715 (1976).

42. 15 U.S.C. § 2304(b)(1) (1976).

43. 42 Fed. Reg. 39,223 (1977) (to be codified in 16 C.F.R. § 705).

44. 15 U.S.C. §§ 2304(a)(2), 2308(a) (1976). The rationale for the Act's prohibition on disclaimers whenever a written warranty is made is protection of reasonable buyer expectations. Buyers naturally assume that written warranties provide them greater protection than no warranty. Yet, without a written warranty, the consumer would have the

exclude or limit consequential damages for breach of written or implied warranties unless such limitation appears conspicuously on the face of the warranty.⁴⁵ The right to limit consequential damages, however, is also subject to state-law restrictions.⁴⁶ In most states, including South Carolina, attempts to limit consequential damages for personal injuries or property damage are ineffective.⁴⁷ The clause probably would be effective, however, to bar consequential economic damages, such as lost wages resulting from a breakdown in a car.⁴⁸ Fourth, a warranty must provide that if the warrantor is unable to remedy the defect after a reasonable number of attempts, the consumer has a right to elect a refund or replacement of the product.⁴⁹ The section authorizes the Commission to provide by rule what constitutes a reasonable number of attempts for different consumer products. The Commission, however, has not promulgated any rules under the section, and the prospect of quick action is unlikely.

Even under a full warranty the warrantor may modify and control its liability to some extent. The express warranty portion of the full warranty may have a limited duration.⁵⁰ Nothing in the minimum standards prevents a full warranty from being limited to repair of the product, so long as the warrantor is bound to allow the consumer to elect a refund or replacement if the defect cannot be remedied after a reasonable number of attempts. Further, the warrantor is not required to perform its duties under a full warranty if it can show that the damage to the product resulted from causes other than a defect or malfunction, for example, from a failure to provide reasonable and necessary maintenance.⁵¹

3. *Limited Written Warranties.* — Any written warranty on a consumer product that is not a full warranty is a limited warranty.⁵² There are no minimum standards for limited warranties, but there are some restrictions on their provisions. Subject to

protection of the U.C.C.'s implied warranty of merchantability, while a written warranty that contains limitations may be less generous than the implied warranty. H.R. REP. NO. 1107, 93rd Cong., 2d Sess., 40 reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7722.

45. 15 U.S.C. § 2304(a)(3) (1976).

46. See *id.* § 2311(b)(1).

47. See, e.g., S.C. CODE ANN. § 36-2-719(3) (1976).

48. Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Civ. App. 1972).

49. 15 U.S.C. § 2304(a)(4) (1976).

50. *Id.* § 2303(a)(1).

51. *Id.* § 2304(c).

52. *Id.* § 2303(a)(2).

these restrictions, the warrantor is free to determine the terms of the warranty. First, a limited warranty may not contain a complete disclaimer of implied warranties.⁵³ The Act, however, allows a limited warrantor to limit the duration of implied warranties to the duration of a written warranty of reasonable duration, if such limitation is conscionable, set forth in clear and unmistakable language, and prominently displayed on the face of the warranty.⁵⁴

Second, the limited warranty, like the full warranty, may limit remedies to repair of the product. This right, however, is subject to restrictions on limitations on remedies imposed by state law.⁵⁵ Under the U.C.C., if a limited remedy "fails of its essential purpose," the limitation is ineffective.⁵⁶ Most courts have held that a limitation on remedies fails of its essential purpose if the warrantor fails to repair a defect after a reasonable number of attempts.⁵⁷

Third, the warranty may, like the full warranty, limit or exclude consequential damages. Once again such limitations are subject to restrictions imposed by state law. Under the U.C.C. a limitation or exclusion of consequential damages is unconscionable if it applies to personal injuries but is probably valid when applied to economic loss.⁵⁸

4. *Other Magnuson-Moss Act Requirements.* — The above discussion has focused on two aspects of the Magnuson-Moss Act: designation of warranties as either full or limited and limitations on the substantive provisions of written warranties. The Act contains other provisions dealing with written warranties. While these are more important to the lawyer drafting a consumer product warranty rather than one involved in litigation, a brief summary of the provisions for sake of completeness of discussion of the Act is worthwhile.

(a) *Disclosure requirements.* — Whether the warrantor chooses to make a full or limited warranty, the Act provides that if the product costs more than fifteen dollars, the warrantor must

53. *Id.* § 2308(a).

54. *Id.* § 2308(b). For a discussion of this provision see Part II. A. 2 *infra*.

55. 15 U.S.C. § 2311(b)(1) (1976).

56. S.C. CODE ANN. § 36-2-719(2) (1976).

57. *E.g.*, *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D. Del. 1973). See also Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of U.C.C. Section 2-719(2)*, 65 CALIF. L. REV. 28, 72 n. 158 (1977).

58. See S.C. CODE ANN. § 36-2-719(3) (1976).

"fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty."⁵⁹ The Act authorizes the Commission to promulgate rules regarding disclosure of warranty terms and conditions, and outlines provisions that the regulations may cover. The Commission has promulgated final disclosure regulations.⁶⁰

(b) *Informal dispute resolution mechanisms.* — The Act authorizes either full or limited warrantors to create informal dispute resolution mechanisms so as to promote nonadversarial resolution of warranty disputes.⁶¹ Commission regulations contain requirements that are designed to promote fairness and efficiency in such mechanisms.⁶² A mechanism must be adequately staffed and funded; it must be sufficiently insulated from the warrantor to assure independent decisionmaking; and individuals who decide disputes must comply with conflict of interest rules.⁶³

If a mechanism exists, and if the warranty so provides, the consumer may not bring a lawsuit for breach of warranty under the Act unless he exhausts his remedies under the mechanism.⁶⁴ Because the mechanism is generally required to reach a decision within forty days, this requirement is not particularly burdensome.⁶⁵

The decision of the mechanism is not legally binding, but the regulations require the warrantor to act in good faith in deciding whether to comply with the decision.⁶⁶ Nevertheless, the decision does have legal significance in two ways: first, it is admissible evidence in subsequent litigation, and second, any information obtained by the mechanism in its investigation must be made available to the parties.⁶⁷ At this time no mechanism that complies with the Act has been established. Whether warrantors will conclude that a mechanism is economically worthwhile remains in doubt.⁶⁸

59. 15 U.S.C. § 2302 (1976); see 16 C.F.R. § 701.3(a) (1979).

60. See 16 C.F.R. §§ 701.1-701.4 (1979).

61. 15 U.S.C. § 2310(a)(3) (1976). See also 16 C.F.R. § 703 (1979).

62. 16 C.F.R. § 703 (1979).

63. *Id.*

64. 15 U.S.C. § 2310(a)(3)(i) (1976).

65. 16 C.F.R. § 703.5(d) (1979).

66. *Id.* § 703.5(j).

67. *Id.* § 703.5(g).

68. Ford has been experimenting with a procedure like a mechanism in North Carolina. See Ford News Release, Sept. 22, 1977 (on file with author). See generally Note,

(c) *Anti-tie-in provisions.* — Products that cost more than five dollars, whether sold under full or limited warranties, are subject to the anti-tie-in provision of the Act.⁶⁹ The general purpose of this section is to foster competition in the repair and service of consumer products. Subject to waiver by the Commission, the section prohibits a warrantor from conditioning any implied or written warranty on the consumer using any service or product that is identified by brand, corporate, or trade name, unless such product or service is provided without charge under the terms of the warranty.⁷⁰ For example, a manufacturer of vacuum cleaners is prohibited from conditioning its warranty on the consumer using only “Genuine Zippy Bags.” The company, however, could condition its warranty on the use of “standard No. 10 vacuum bags.” If a warranty provides only for repair or replacement of defective parts, but does not cover labor charges, the section prohibits the warrantor from requiring the consumer to have the work done only at designated dealers. However, if labor charges are included in the warranty, such a designation is not prohibited because it is “provided without charge to the consumer.”⁷¹

(d) *Presale availability of warranties.* — The Act requires the Commission to establish rules providing when the terms of written warranties must be made available to consumers prior to sale.⁷² The Commission has promulgated a presale availability of warranty rule that requires the seller of a consumer product that costs more than fifteen dollars to make available to the buyer the text of the warranty prior to the time of sale. The rule requires manufacturers who make written warranties to provide sellers with warranty materials to enable them to comply with the rule.⁷³

Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms, 52 S. CAL. L. REV. 235 (1978).

69. 15 U.S.C. § 2302(c) (1976).

70. See Application of Sohmer & Co., 40 Fed. Reg. 49,409 (1975), *denied*, 41 Fed. Reg. 17,821 (1976).

71. 16 C.F.R. § 700.10 (1979).

72. 15 U.S.C. § 2302(b) (1976).

73. 16 C.F.R. § 702 (1979). The Commission has dealt with numerous petitions for interpretations on how the requirement could be met.

B. Other Warranties: Express Warranties and Implied Warranties Governed Only by the U.C.C.

Even if a transaction does not involve a "written warranty" as defined in the Magnuson-Moss Act, a warranty under the Uniform Commercial Code may exist. The U.C.C. codifies three warranties that relate to the quality of consumer goods—express warranties,⁷⁴ implied warranties of merchantability,⁷⁵ and implied warranties of fitness for a particular purpose.⁷⁶ In addition, the Code creates a warranty of the title of consumer goods.⁷⁷ For example, if a consumer purchases a used car from a dealer, the consumer has a cause of action for breach of the warranty of title in the event the vehicle was stolen. This warranty presents few substantive problems and is not discussed further in this article.

1. *Express Warranties.* — Express warranties that do not constitute written warranties may be created in a variety of ways: oral promises made by sales personnel,⁷⁸ advertisements,⁷⁹ models,⁸⁰ descriptions contained in contracts of sale,⁸¹ or labels.⁸² For a representation to constitute an express warranty, it must be part of the "basis of the bargain."⁸³ One issue that arises from this requirement is whether the representation is material or constitutes mere sales talk or "puffing."⁸⁴ This is a question of fact that depends on a variety of factors such as the specificity of the representation and the buyer's reliance.⁸⁵

A problem that has divided courts is whether the consumer must have relied on any representation for it to constitute part of the basis of the bargain.⁸⁶ Some have held that reliance is required. This approach precludes recovery in cases like those involving advertisements that the purchaser did not know

74. S.C. CODE ANN. § 36-2-313 (1976).

75. *Id.* § 36-2-314.

76. *Id.* § 36-2-315.

77. *Id.* § 36-2-312.

78. *Jones v. Abriani*, 350 N.E.2d 635, 644-45 (Ind. App. 1976).

79. *Eddington v. Dick*, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (City Ct. 1976).

80. *Jones v. Abriani*, 350 N.E.2d 635, 644-45 (Ind. App. 1976).

81. *Antonucci v. Stevens Dodge, Inc.*, 73 Misc. 2d 173, 176-77, 340 N.Y.S.2d 979, 983 (Civ. Ct. 1973).

82. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975).

83. S.C. CODE ANN. § 36-2-313 (1976).

84. *Id.* § 36-2-313(2).

85. *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978).

86. *Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976).

about.⁸⁷ Other courts have concluded that the U.C.C. modifies the reliance requirement by creating a rebuttable presumption that affirmations of the seller become part of the basis of the bargain.⁸⁸ A third group of courts have concluded that the U.C.C. does not require reliance; instead, the seller is required to perform those obligations that a reasonable person would conclude the seller had undertaken, regardless of the buyer's reliance.⁸⁹

Courts should reject the reliance requirement and adopt the third test. This interpretation tends to be supported by the drafting history of the U.C.C. and is more consistent with the realities of contract formation in modern society. Under the Uniform Sales Act, the predecessor to the U.C.C., the buyer had to establish reliance in order to recover for breach of express warranty.⁹⁰ Although the intent of the drafters of the Code is far from clear, elimination of this requirement in the U.C.C. supports the third test.⁹¹ Further, the reliance test rests on an antiquated conception of contract formation — contracts result from face-to-face dealings between buyers and sellers in which the words and conduct of sellers influence decisions by buyers. While many contracts are formed this way, in a mass communication society, contract formation is often much more subtle. A variety of factors that are difficult to pinpoint in an individual case influence the decisions of buyers. The third test corresponds to this reality.

2. *Implied Warranties of Merchantability.* — If the seller is a merchant with respect to goods of the kind sold, the contract contains an implied warranty that the goods will be merchantable.⁹² The concept of merchantability (or the related concept in tort law, defectiveness) poses many difficult questions in personal

87. *E.g.*, *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972).

88. *E.g.*, *Sessa v. Riegle*, 427 F. Supp. 760, 766-68 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978).

89. *See, e.g.*, *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (Civ. App. 1975); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); *Autzen v. John C. Taylor Lumber Sales, Inc.*, 280 Or. 783, 572 P.2d 1322 (1977).

90. UNIFORM SALES ACT § 12.

91. S.C. CODE ANN. § 36-2-313 (1976) (Official Comment 3). *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 277-82 (1972) (history of the "reliance" requirement and its status under the Code).

92. S.C. CODE ANN. § 36-2-314 (1976). *See id.* § 36-2-104(1) (meaning of "merchant"); *McHugh v. Carlton*, 369 F. Supp. 1271 (D.S.C. 1974) (service station operator who sold recaps on request held a merchant); *Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So. 2d 92 (1976) (bank that resold boat after repossession not a merchant).

injury cases because the level of safety that a product must meet is a complex question that involves analysis of economic factors and buyer expectations.⁹³ In economic loss cases the concept is much less difficult to apply. Consumer products have clear functions. If the goods do not serve the function, they are unmerchantable. However, there are some questions about the application of the implied warranty of merchantability to used goods and non-sale transactions.

The application of the implied warranty of merchantability to used goods is unclear. While some courts have held that the warranty does not apply,⁹⁴ this result seems incorrect. The drafters of the U.C.C. did not distinguish between new and used goods.⁹⁵ Further, this approach seems inconsistent with probable expectations of buyers and sellers of used goods. A reasonable buyer probably assumes that used goods are in good condition unless told otherwise; a reasonable seller probably believes that it has some obligation as to the quality of used goods unless it informs the buyer otherwise.

Still, it is undoubtedly true that neither buyers nor sellers expect used goods to be of the same quality as new products. To reflect the difference in expectations between new and used goods, courts should distinguish between basic operating parts and other aspects of the goods, such as appearance or accessories. The warranty of merchantability should apply to the former but not the latter. This standard makes an appropriate distinction between new and used goods and seems to conform to reasonable expectations. Thus, in a used automobile, the engine should be subject to the warranty, but not the radio.

An interesting question is whether used goods are not merchantable if the seller fails to disclose some relevant fact about the goods, regardless of their condition. For example, suppose a used automobile has been used for racing purposes but the seller

93. J. WHITE & R. SUMMERS, *supra* note 91, at 289-95; Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 808-24 (1976).

94. *E.g.*, *Trax, Inc. v. Tidmore*, 331 So. 2d 275 (Ala. 1976) (intimating that implied warranty of merchantability does not exist in sale of used vehicle); *Valley Datsun v. Martinez*, 578 S.W.2d 485 (Tex. Civ. App. 1979).

95. Most courts have held that the implied warranty of merchantability does apply to used goods. *See generally* *Roupp v. Acor*, 253 Pa. Super. Ct. 46, 384 A.2d 968 (1978); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976); Editor's Note, 19 U.C.C. REP. SERV. 92 (1976).

does not inform the buyer of this. To be merchantable, goods must pass without objection in the trade under the contract description.⁹⁶ Vehicles that have been used for racing or have been involved in accidents are not "normal" used cars. Undoubtedly a dealer or consumer would "object" to being sold such a car without disclosure of its history. Courts should conclude that a failure to disclose such information results in a breach of the warranty of merchantability.⁹⁷

An additional unsettled question is whether the implied warranty⁹⁸ of merchantability applies to nonsale transactions such as leases or the rendition of services.⁹⁹ If a lease is sufficiently like a sale, the implied warranty of merchantability contained in the U.C.C. applies.¹⁰⁰ Generally, a lease will be treated like a sale if the lessee has the option to purchase at the end of the lease term for a nominal consideration or if the lessee is contractually obligated to pay the equivalent of the purchase price through lease payments.¹⁰¹ If services are rendered incident to the sale of goods and if the predominate thrust of the transaction is a sale rather than the rendition of services, the implied warranty of the U.C.C. applies.¹⁰²

96. S.C. CODE ANN. § 36-2-314(2)(a) (1976).

97. Compare *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976) (implied warranty breached when sold as used car when in fact had been substantially modified for racing purposes) with *Johnson v. Fore River Motors, Inc.*, 4 U.C.C. REP. SERV. 696 (Mass. App. Div. 1967) (failure to disclose that car has been in accident does not constitute breach of warranty). Even if failure to disclose such information does not constitute a breach of warranty, it might constitute fraud. See text at notes 305-10 *infra*.

98. In either a lease or service transaction, it is clear that express warranties are enforceable as a matter of contract; the question is whether the implied warranty of merchantability applies to such transactions.

99. See Murry, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 *FORDHAM L. REV.* 447 (1971); Farnsworth, *Implied Warranties of Quality in Non-Sale Cases*, 57 *COLUM. L. REV.* 653 (1957).

100. *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974) (lease of equipment subject to implied warranty when lessee had option to purchase at end of term for nominal consideration).

101. *C.f.* S.C. CODE ANN. § 36-1-201(37) (1976) (standard for when lease will be treated as conditional sale). See generally Annot., 48 *A.L.R.3d* 668 (1973).

102. There are no South Carolina Supreme Court cases concerning whether a contract that involves both services as well as the sale of goods is subject to the U.C.C. The federal district court, however, has twice concluded that the test for determining whether such contracts are subject to the Code is whether their predominant thrust is the rendition of services or the sale of goods. *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.S.C. 1977); *Computer Servicecenters, Inc. v. Beacon Mfg. Co.*, 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971).

It is arguable, however, that an implied warranty of merchantability analagous to that in the U.C.C. applies to true leases and pure service transactions. The South Carolina Supreme Court has created common-law implied warranties on several occasions.¹⁰³ Further, it seems reasonable to do so in true leases and service transactions because the parties to such transactions probably expect that the goods or services will be of good quality. The implied warranty of merchantability reflects this expectation.

3. *Implied Warranties of Fitness for a Particular Purpose.*

—The implied warranty of fitness for a particular purpose is quite different from the implied warranty of merchantability, although the two are often confused. The warranty of fitness applies if the buyer has special needs, the seller has reason to know of these needs, and the buyer relies on the seller's skill and judgment in selecting a product to meet these requirements.¹⁰⁴ The seller is not required to be a merchant, nor is it necessary for the product to be defective. For example, suppose a consumer purchased an insecticide for use in her garden. If the insecticide was defective and damaged her plants, she could recover for breach of the implied warranty of merchantability, but not for breach of the warranty of fitness because she did not have special needs that were communicated to the seller. However, if the buyer told the seller that she needed an insecticide for azaleas and the seller selected an inappropriate chemical that damaged the plants, she could recover for breach of the warranty of fitness.

II. WHAT CONSTITUTES BREACH

A. *Written Warranties*

Determining whether a written warranty has been breached is complicated because the typical written warranty consists of both an express warranty of limited duration and an implied warranty.¹⁰⁵ Thus, analysis of both aspects of the written war-

103. *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976) (common-law implied warranty in sale of new home); *Colcock v. Goode*, 14 S.C.L. (3 McCord) 513 (1826) (common-law implied warranty in hire of slave for one year). See also S.C. CODE ANN. § 36-1-103 (1976) (to extent not displaced by U.C.C., common-law doctrine continues to apply).

104. S.C. CODE ANN. § 36-2-315 (1976); see *McHugh v. Carlton*, 369 F. Supp. 1271, 1275-78 (D.S.C. 1974) (distinction between the implied warranties of merchantability and fitness for a particular purpose).

105. See text accompanying note 13 *supra*.

ranty must be considered. In the discussion that follows goods are referred to as "in warranty" if the period of the express warranty portion of the written warranty has not expired. They are referred to as "out of warranty" if such period has expired, regardless of the existence of implied warranties. Such definitions correspond to common usage.¹⁰⁶

1. *Breach When Goods are "In Warranty."* — (a) *Full warranties.* — Breach of the typical full warranty requires the consumer to establish¹⁰⁷ two elements: (1) a product malfunction within the warranty period that is caused by defects in materials or workmanship;¹⁰⁸ and (2) failure by the warrantor to provide the consumer with a proper "remedy" as required by the Magnuson-Moss Act.¹⁰⁹

Proof that the product malfunction was caused by defects in materials or workmanship does not require expert testimony. The consumer satisfies this requirement by showing a malfunction that does not normally occur unless the product was defective.¹¹⁰ The warrantor is not responsible for a product malfunction that results from consumer fault, such as product misuse or failure to provide proper maintenance. The warrantor, however, has the burden of establishing that this was the cause of any product failure.¹¹¹

The second requirement that a consumer must establish in order to prove breach of a full warranty is failure of the warrantor to comply with its obligations to provide a remedy. In the event a product malfunction occurs that is caused by defects in materials or workmanship, the warrantor has several remedial options. It may repair or replace the product. With consent of the consumer it may provide a refund. Even without the consumer's consent it may provide a refund if it is unable to give a replace-

106. C. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 68 (1978).

107. The buyer has the burden of proving breach of warranty for goods that have been accepted. S.C. CODE ANN. § 36-2-607(4) (1976).

108. This assumes that the warranty obligates the manufacturer to remedy a malfunction that is caused by defects in materials or workmanship. This is the typical provision. See the automobile warranty in appendix B *infra*.

109. The Act defines a remedy to include refund, repair, or replacement. The Act, however, limits the right of the warrantor to offer a refund to certain circumstances. 15 U.S.C. § 2301(10) (1976). See also *id.* § 2304(a)(4) (warrantor's remedial obligations under a full warranty).

110. See text at notes 121-22 *infra*.

111. 15 U.S.C. § 2304(c) (1976).

ment and if repair is not commercially reasonable or cannot be made timely.¹¹² The choice among these options depends on an analysis of the economic consequences of each of the choices. If the warrantor elects to repair the product, it must do so within a reasonable number of attempts. Should the warrantor fail to make the repair within this time period, the consumer has the right to elect either a refund or a replacement.¹¹³

A major issue that will arise is what constitutes a reasonable number of attempts. While the Act gives the Federal Trade Commission the power to define what constitutes a reasonable number of attempts under a full written warranty, it has not done so.¹¹⁴ A reasonable standard for a court to apply is that a failure to repair after two attempts constitutes a breach of warranty entitling the consumer to pursue remedies for breach. Because of the complexity of many consumer products, it may be difficult to pinpoint the problem on the first attempt. The second attempt gives the warrantor the opportunity to remedy such problems. Further attempts should not be allowed because the consumer should not be put to excessive inconvenience and because a failure to make repairs in two attempts is some evidence that the consumer has purchased a "lemon."¹¹⁵

In applying this standard the courts should hold that an attempt occurs when the product is returned to the consumer with an indication that the problem has been corrected. Failure to return the product to the consumer within the time that is ordinary in the trade for repair should also constitute a breach.

(b) *Limited warranties.* — The requirements for proof of breach of a limited warranty are conceptually different from those for a full warranty, but practically speaking, the elements

112. The Federal Trade Commission has the authority to promulgate rules that would allow warrantors to deduct from the amount of any refund a reasonable amount for depreciation. 15 U.S.C. § 2301(12) (1976). The Commission initiated a rulemaking proceeding under this section but recently terminated the proceeding after determining that promulgation of a rule at this time would not be in the public interest. 43 Fed. Reg. 4054 (1978).

113. 15 U.S.C. § 2304(a)(4) (1976). See *Pratt v. Winnebago Indus., Inc.*, 463 F. Supp. 709 (W.D. Pa. 1979) (rescission not allowed under Magnuson-Moss Act because warrantor not given opportunity to repair).

114. 15 U.S.C. § 2304(a)(4) (1976).

115. See Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354, 358 (1970) (arguing for one attempt but stating that the seller should certainly be permitted to make further attempts within the scope of his single attempt right, provided the overall attempt is concluded within a reasonable time).

are identical. The typical limited warranty, like the typical full warranty, obligates the warrantor to repair the product if a malfunction occurs within the warranty period because of defects in materials or workmanship. Unlike the full warranty, the Magnuson-Moss Act does not provide standards concerning the remedial obligations of the warrantor in the event a product malfunction occurs. Typically, the warranty provides that the warrantor will repair the product. This raises the question of when the warrantor breaches this repair obligation. Under the U.C.C. a consumer has the right to pursue remedies for breach of warranty when a limited remedy fails of its "essential purpose."¹¹⁶ Most courts have decided that this occurs when the warrantor fails to make repairs after a reasonable number of attempts.¹¹⁷ Thus, the result of this analysis is that the standard for breach of both full and limited warranties is the same: failure to repair the product after a reasonable number of attempts when the malfunction resulted from defects in materials or workmanship. This is not to say, however, that the warranties are the same. Remedies for breach of full and limited warranties differ. For breach of a full warranty the consumer is entitled to a refund or replacement of the product.¹¹⁸ A consumer may have narrower rights for breach of a limited warranty.¹¹⁹

2. *Breach When Goods are "Out of Warranty."* — If the goods are "out of warranty" the consumer's only option to obtain legal relief is to claim that an implied warranty was breached. To prove breach of the implied warranty of merchantability, the consumer must show that the goods were defective at the time of sale. Most courts have allowed consumers to prove this through circumstantial evidence. Expert testimony has not been required. The general view seems to be that the consumer proves a prima facie case if he establishes a product malfunction that does not normally occur unless the product was defective, and if he rebuts other equally plausible explanations.¹²⁰ Two cases illustrate the principle. In *Sauers v. Tibbs*,¹²¹ the plaintiff sued for breach of warranty in connection with the sale of a mobile home, claiming

116. S.C. CODE ANN. § 36-2-719(2) (1976).

117. See note 57 *supra*.

118. 15 U.S.C. § 2304(a)(4) (1976).

119. See text at notes 133-42 *infra*.

120. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

121. 48 Ill. App. 3d 805, 363 N.E.2d 444 (1977).

that the home was infested with beetles. Defendant argued that the beetles infested the home after the date of sale because of poor housekeeping. The court concluded, however, that the plaintiff had established breach of warranty when it showed that the gestation period of beetles made it likely that they had infested the home at the time of sale. By contrast, in *Kriedler v. Pontiac Division of General Motors Corporation*¹²² the court ordered a directed verdict for the defendant in a case in which the plaintiff sued for breach of warranty when the engine in his car burned up. Defendant proved that the plaintiff had taken the car to a service station for repair and that the fire could have resulted from improper repair. Plaintiff was unable to offer rebutting testimony.

Under a full warranty the warrantor may not limit the duration of implied warranties.¹²³ Thus, even if the goods are "out of warranty," the consumer may still bring suit for breach of implied warranty until the expiration of the statute of limitations. In South Carolina, which has a nonuniform amendment to the U.C.C.'s statute of limitations section, suit may be brought at any time within six years after the breach is or should have been discovered.¹²⁴

A limited warrantor, however, may limit the duration of implied warranties to the duration of an express warranty of reason-

122. 514 S.W.2d 174 (Tex. Civ. App. 1974).

123. 15 U.S.C. § 2304(a)(2) (1976).

124. S.C. CODE ANN. § 36-2-725(1),(2) (1976). The uniform version of the section is as follows:

Statute of Limitations in Contracts for Sale

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

able duration, provided such limitation is conscionable, set forth in clear and unmistakable language and prominently displayed on the face of the warranty.¹²⁵ The Act apparently envisions the following type of situation. Stereo manufacturer offers a limited written warranty against defects in materials and workmanship for a period of two years. The manufacturer may limit the duration of the implied warranty to as little as two years if this period of time is reasonable and if the limitation is properly displayed.

The provision that allows limited warrantors to limit the duration of implied warranties creates a conceptual problem because implied warranties actually do not have a duration. An implied warranty is an obligation as to the quality of goods at the time of sale. There are two possible interpretations that could be offered to deal with this problem.¹²⁶

First, the section could be interpreted as giving the warrantor the right to limit the period of time in which suit must be brought for breach of the implied warranty. Such an interpretation should be rejected because it would compel consumers who discovered warranty problems near the end of the warranty period to file lawsuits to protect their rights under implied warranties. This is inconsistent with the provision of the Magnuson-Moss Act that requires the warrantor to have a reasonable opportunity to cure defects before a suit is brought,¹²⁷ as well as the policy of the Act to promote settlement of warranty claims rather than litigation.¹²⁸ Further, this interpretation of the Act would render such limitations ineffective in South Carolina. The Magnuson-Moss Act preserves rights and remedies that consumers have under state law.¹²⁹ The South Carolina version of the U.C.C. prevents a warrantor from shortening the statute of limitations for breach of warranty by contract.¹³⁰

The second interpretation is that the section gives the limited warrantor the right to define the period of time in which it

125. 15 U.S.C. § 2308(b) (1976).

126. For another analysis of this problem see C. RERTZ, *supra* note 106, at 67-71.

127. 15 U.S.C. § 2310(e). (1976).

128. *See id.* § 2310(a)(1).

129. *Id.* § 2311(b)(1); Letter from Rachel Miller, attorney, Federal Trade Commission Division of Special Statutes, to Philip T. Lacy, Ass't Professor of Law, University of South Carolina School of Law (Sept. 13, 1977).

130. S.C. CODE ANN. § 36-2-725(1) (1976). The uniform version provides: "By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."

is reasonable for a consumer to discover any breach of implied warranty. The result of this interpretation would be to bar remedies for breach of warranty by a buyer who did not discover the breach within the period of the limited warranty. The preclusion of remedies would result because under the U.C.C. a buyer must notify the warrantor of a breach within a reasonable time after discovery or be barred from any remedy.¹³¹ For example, suppose a stereo manufacturer gives a written warranty which has a two-year warranty against defects along with a three-year limitation on the duration of implied warranties. If a defect occurs during the third year and the consumer notifies the warrantor, the consumer would be allowed to bring suit for breach of the implied warranty. The suit could be brought within six years from the date of discovery. If the defect did not occur until the fourth year, the consumer could not sue for breach of the implied warranty because the consumer failed to discover the defect within the three-year period.

One might object that this interpretation is unfair to consumers because it might prevent a consumer from suing for breach of an implied warranty even though the defect was not discovered until after the period expired. This objection is unsound. Consumers are protected against unreasonably short limitation periods because the Act provides that a limitation on the duration of implied warranties is enforceable only if the limitation of time is reasonable.¹³² Presumably this means that if statistical evidence shows that few defects appear within the period of time that the warrantor has given, the limitation of the implied warranty would be unreasonable.

Assuming the period of time is reasonable, the consumer has no right to complain because the consumer received a product that worked well for a reasonable time. In such a situation the malfunction is often due to wear and tear rather than defectiveness at the time of sale. The function of the limitation on duration clause is to prevent having to decide which is the case. Thus, the interpretation that is offered fosters a reasonable purpose of warranties, namely avoiding the expense of making difficult determinations as to the cause of product failures when the product has been used for a period of time.

131. S.C. CODE ANN. § 36-2-607(3)(a) (1976).

132. 15 U.S.C. § 2308(b) (1976).

B. *Warranties that are not Subject to the Magnuson-Moss Act*

If a warranty is not governed by the Magnuson-Moss Act, breach depends on the terms of the warranty. For express warranties, little can be said because they follow no particular pattern. In most instances, the determination of breach should not be difficult. For example, a lawyer should have little problem deciding if an oral warranty to refund money when the product is returned within seven days has been breached. The standard for breach of implied warranties has already been discussed above in connection with breach of written warranties that are "out of warranty."

III. REMEDIES FOR BREACH OF WARRANTY

A. *Remedy for Breach of Full Written Warranties that are "In Warranty"*

The Magnuson-Moss Act creates a cause of action on behalf of a consumer "who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract."¹³³ Suit may be brought for "damages and other legal and equitable relief . . ."¹³⁴ In connection with such a suit, if the consumer prevails, he is generally entitled to recovery of attorney's fees.¹³⁵ The Act provides that both federal and state courts have jurisdiction over such actions, but because of the monetary limitations on federal-court jurisdiction, most economic loss cases for violation of the Magnuson-Moss Act must be brought in state court.¹³⁶

If goods are "in warranty" under a full warranty, the consumer's basic remedy for breach is clear. The Act provides that a full warrantor must provide the consumer a right to a refund or replacement if repair is not made after a reasonable number

133. 15 U.S.C. § 2310(d)(1) (1976).

134. *Id.*

135. *Id.* at (d)(2).

136. No claim may be brought in federal court unless the amount in controversy exceeds \$50,000. *Id.* § 2310(d)(3)(B); *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978) (dismissing claim for breach of warranty seeking \$9,638 actual and \$50,000 punitive damages for failure to meet jurisdictional requirement). By contrast, many personal-injury cases may now be brought in federal court regardless of diversity of citizenship.

of attempts.¹³⁷ This is "an obligation under this chapter." A court could order the warrantor to comply with this obligation and could award attorney's fees to the consumer. However, two additional issues require analysis. May the remedy be asserted against a third party, such as the dealer or a financing entity, as well as against the warrantor? May the consumer recover incidental or consequential damages in addition to the basic remedy? These issues are discussed below.¹³⁸

B. Remedies for Breach of Limited Warranties, Express Warranties and Implied Warranties

The Magnuson-Moss Act provides that a consumer may recover under the Act for breach of a limited warranty, implied warranty, or service contract. Breach of an oral express warranty is not covered by the Act.¹³⁹ Attorneys should bring other actions for breach of warranty under the Act because it provides for recovery of attorney's fees. The Act entitles a consumer who has been damaged by breach of any such warranty to recover damages and other legal and equitable relief.¹⁴⁰ The Act, however, does not provide guidance concerning what these remedies are. The Uniform Commercial Code contains detailed provisions for remedies for buyers in the event of breach of warranty.¹⁴¹ A reasonable approach is for courts to use these remedies as the basis for relief under the Magnuson-Moss Act.¹⁴²

1. *Rejection or Revocation of Acceptance.* — The most important remedy available to a consumer for breach of warranty under the U.C.C. is cancellation of the contract and recovery of so much of the purchase price as has been paid.¹⁴³ To be entitled to this remedy the consumer must either have rejected the goods or revoked acceptance.¹⁴⁴ A consumer has the right to reject the

137. 15 U.S.C. § 2304(a)(4) (1976).

138. See Part III. *E. infra* (remedies against third parties), and Part III. *C. infra* (incidental and consequential damages).

139. H.R. Rep. No. 1107, 93d Cong., 2d Sess., 26 reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7758 (rejection of Senate version that would have allowed actions for breach of oral express warranties).

140. 15 U.S.C. § 2310(d)(1) (1976).

141. The U.C.C.'s remedy provisions may be found in S.C. CODE ANN. § 36-2-601 to -725 (1976).

142. See *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978).

143. See S.C. CODE ANN. § 36-2-711(1) (1976).

144. *Id.*

goods at anytime before "acceptance."¹⁴⁵ Acceptance occurs when the consumer does any act inconsistent with the seller's ownership or fails to discover a defect after a reasonable opportunity to inspect.¹⁴⁶ Because most cases for breach of written warranties concern goods that consumers have used for a period of time, it is likely that courts will conclude that the period of time for rejection has passed.¹⁴⁷ Such a position is sound because the consumer may still cancel the contract by complying with the requirements for revocation of acceptance. These requirements have been established to protect the seller when goods have been used by consumers for a period of time.¹⁴⁸

To revoke acceptance a buyer must satisfy five requirements.¹⁴⁹ First, if the goods do not conform to the contract, the seller must be given a reasonable opportunity to cure any nonconformity.¹⁵⁰ If the warrantor has an opportunity to repair any defects but fails to do so within a reasonable time, the seller's right of cure is satisfied and the buyer may revoke.¹⁵¹ Second, the buyer may revoke acceptance only if the nonconformity substantially impairs the value of the goods to him.¹⁵² The significance of the nonconformity is appraised from the buyer's point of view.¹⁵³

145. A buyer is entitled to reject "nonconforming" goods (e.g., goods that do not comply with warranties) at anytime before "acceptance." *Id.* § 36-2-607(2).

146. S.C. CODE ANN. § 36-2-606(1) (1976); *Stamm v. Wilder Travel Trailers, Inc.*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976).

147. *But see Jones v. Abriani*, 350 N.E.2d 635 (Ind. App. 1976) (rejection allowed despite continued occupancy).

148. S.C. CODE ANN. § 36-2-608 (1976). From a tactical point of view it might be advisable for the attorney to style letters and pleadings in terms of rejection or revocation alternatively because loss of the right of rejection has adverse consequences. For example, the burden of proving breach is on the buyer if the goods have been accepted, otherwise it is on the seller. *Id.* § 36-2-607(4).

149. S.C. CODE ANN. § 36-2-608 (1976).

150. A literal reading of the U.C.C. does not support the proposition that a seller always has the right to cure defective goods. S.C. CODE ANN. § 36-2-508 (1976) gives a right of cure only if the tender of nonconforming goods was made before the time for performance expired or when the buyer rejected a nonconforming tender that the seller had reasonable grounds to believe would be acceptable to the buyer, with or without money allowance. Nothing in *id.* § 36-2-608, which defines the right of revocation, requires the buyer to give the seller an opportunity to cure before revoking acceptance. Nevertheless, courts have either assumed or implied that the U.C.C. gives the seller a general right to cure all defective products. In any event, in an action under the Magnuson-Moss Act, the seller does have a reasonable opportunity to cure the defect. 15 U.S.C. § 2310(e) (1976).

151. *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, 290, 224 So. 2d 638, 644 (1969) (automobile returned for repair on thirty occasions; buyer deprived of possession for forty to fifty days); *Jorgensen v. Pressnall*, 274 Or. 285, 291, 545 P.2d 1382, 1385 (1976).

152. S.C. CODE ANN. § 36-2-608(1) (1976).

153. *Jorgensen v. Pressnall*, 274 Or. 285, 289-90, 545 P.2d 1382, 1384-85 (1976); *Ber-*

Thus, the mere fact that the cost of repair is small relative to the purchase price is not determinative.¹⁵⁴ Instead, the question is whether the nonconformity substantially interfered with the use that the buyer intended for the goods.¹⁵⁵ Third, the buyer must either have accepted the goods without discovery of the nonconformity because the defect was latent or must have accepted the goods based on the seller's assurances that the defects did not exist or would be cured.¹⁵⁶ For new goods covered by written warranties, this requirement should not be a problem because buyers rarely accept a new product that is defective without some promise of prompt repair.

Fourth, revocation must occur within a reasonable time after the buyer discovers or should have discovered any defect and before any substantial change in condition of the goods that is not caused by their own defects.¹⁵⁷ A question that arises frequently is whether continued use of the goods prevents revocation. Courts generally hold that if the buyer continues to use the goods based on the seller's repeated assurances that the defects will be cured, revocation is still allowed. If the buyer uses the goods with knowledge of the defects and not in reliance on the seller's promise to cure, revocation is barred.¹⁵⁸

genstock v. Lemay's G.M.C., Inc., 372 A.2d 69 (R.I. 1977).

154. *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 359, 292 N.E.2d 168, 176 (1972).

155. *Compare Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976) (minor defect in trailer did not substantially impair value) and *Reece v. Yeager Ford Sales, Inc.*, 155 W. Va. 461, 184 S.E.2d 727 (1971) (inexpensive repairs, no evidence that repair would inconvenience plaintiff) with *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444 (1977) (mobile homes infested with beetles and extermination proved unsuccessful) and *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977) (succession of minor defects sufficient impairment of value to warrant revocation).

156. S.C. CODE ANN. § 36-2-608(1)(a), (b) (1976).

157. *Id.* § 36-2-608(2). *E.g.*, *Ebner v. Haverty Furniture Co.*, 128 S.C. 151, 122 S.E. 578 (1924) (rescission of contract for purchase of furniture not allowed when furniture destroyed by fire before buyer learned that furniture not mahogany). If damage to the goods is caused by the defect, for example, a car fire that is started by a defective battery, revocation is still possible.

158. *Compare Stroh v. American Recreation & Mobile Home Corp.*, 35 Colo. App. 196, 530 P.2d 989 (1975) (revocation allowed one year after purchase because of seller's repeated assurances) and *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976) (revocation allowed fourteen months after purchase because of continuous negotiation and repair attempts during period) with *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964) (revocation not allowed when buyer continued to drive truck until it blew up despite knowledge that transmission not functioning properly) and *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974) (revocation not allowed

Fifth, revocation is not effective unless the buyer notifies the seller.¹⁵⁹ While in commercial cases the courts have strictly construed the notification requirement, in consumer cases the courts seem to be more lenient.¹⁶⁰ Thus, one court concluded that “[a]ny conduct clearly manifesting the buyer’s desire to get his money back is a sufficient notice to revoke.”¹⁶¹ Obviously, however, a formal written notification is desirable. The appendix contains a notice of revocation of acceptance that attorneys could use.

One question that arises is to whom notice must be sent — the dealer, the manufacturer who made the written warranty, the financier, or all three? Of course, if a consumer retains a lawyer promptly, it is prudent for the lawyer to send the notice to all persons against whom claims might be asserted. If the issue arises in litigation, however, courts should hold that notice to the dealer is sufficient notice to revoke acceptance. Several reasons support this conclusion. First, the consumer naturally expects that the dealer is the party who provides relief. Second, notice to the dealer would seem to satisfy the purposes of the notice requirement, namely to provide an opportunity to investigate the claim and make repairs. Third, the U.C.C. provides that notice must be sent to the “seller,”¹⁶² and the dealer is the seller.¹⁶³ Finally,

when automobile driven for two years and 18,000 miles; damages limited to difference in value).

The rule is based on the consideration of fairness to the seller. If revocation occurs, the seller must take the product back and dispose of it. The longer the use, the more difficult this becomes. See 35 Colo. App. at 202, 530 P.2d at 993. Even though continued use will not necessarily prevent revocation, the seller may have a right to offset the value of the use against damages due for revocation. *Id.*

159. S.C. CODE ANN. § 36-3-608(2) (1976). The purpose of this requirement is to allow the warrantor an opportunity to test for defects, preserve evidence and minimize loss.

160. Compare *Lynx, Inc. v. Ordnance Prods. Inc.*, 273 Md. 1, 327 A.2d 502 (1974) and *Desilets Granite Co. v. Stone Equalizer Corp.*, 133 Vt. 372, 340 A.2d 65 (1975) with *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972) (numerous complaints and cessation of payments constitute sufficient notice). *Performance Motors* overruled lower court decisions that applied a stricter rule. See also *Southeastern Steel Co. v. Burton Block and Concrete Co.*, ____ S.C. ____, 258 S.E.2d 888 (1979) (written notice of rejection required in commercial case).

While formal written notice is obviously preferable, notice may consist of an act such as institution of a lawsuit or leaving the vehicle at the seller’s place of business. *Fenton v. Contemporary Dev. Inc.*, 12 Wash. App. 345, 529 P.2d 883 (1974) (refusal to allow additional repair efforts after repeated failures, institution of suit constitutes notice).

161. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 49, 554 P.2d 349, 357 (1976).

162. S.C. CODE ANN. § 36-2-608(2) (1976).

163. *Id.* § 36-2-103(d) (1976).

notice to the dealer is not unfair to manufacturers and financing entities. Such concerns have contractual relationships with dealers. They can require dealers to forward notices to them.

2. *Revocation of Acceptance Against Manufacturers.* — Some courts have held that a consumer is not entitled to revoke acceptance against a manufacturer who makes a warranty when goods are sold through retailers because there is no contractual relationship between the manufacturer and the consumer. Such courts reason that the consumer purchased the goods from the retailer and should be required to pursue remedies against it. In essence, these courts create a barrier of privity of contract to revocation of acceptance.¹⁶⁴

These decisions should not be followed for three reasons. First, case law in South Carolina has rejected lack of privity as a defense in a breach of warranty action.¹⁶⁵ Second, such a rule serves no useful purpose in the context of consumer product warranties. Presumably, the reason for the rule is to force a buyer to bring his complaint to the attention of his immediate seller. An action for revocation of acceptance under the Magnuson-Moss Act, however, cannot be brought until the warrantor has been given a reasonable opportunity to cure any defect.¹⁶⁶ This requires the buyer to present the goods to the authorized representative of the warrantor (who is often the seller) for repair. Finally, in those instances where dealers are insolvent, the rule precludes revocation of acceptance against anyone.

3. *Direct Damages for Breach of Warranty.* — Even if a consumer is not entitled to cancel the contract, he may recover damages for breach of warranty.¹⁶⁷ The measure of damages is the difference between the value of the collateral as warranted and its actual value.¹⁶⁸ Expert testimony is not necessary to prove the difference in value because “[m]ost jurors, as average men, are well informed about automobiles. They were capable of evaluat-

164. *Voytovich v. Bangor Punta Operations, Inc.*, 494 F.2d 1208 (6th Cir. 1974).
Contra, Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977).

165. *Gasque v. Eagle Machine Co.*, 270 S.C. 499, 243 S.E.2d 831 (1978) (privity of contract not a bar to action for breach of implied warranty seeking recovery of lost profits); *Spartanburg Hotel Corp. v. Smith*, 231 S.C. 1, 97 S.E.2d 199 (1957) (lack of privity does not bar action by remote purchaser against manufacturer under express-warranty theory).

166. 15 U.S.C. § 2310(e) (1976).

167. S.C. CODE ANN. § 36-2-714 (1976).

168. *Id.* § 36-2-714(2). See *Long v. Quality Mobile Home Brokers, Inc.*, 271 S.C. 482, 248 S.E.2d 311 (1978) (value as warranted does not include finance charges).

ing the evidence bearing on value”¹⁶⁹ Proof of purchase price is sufficient evidence of the value of the goods if they had been as warranted.¹⁷⁰ Proof of resale price is sufficient evidence of the value as accepted.¹⁷¹ Proof of a reasonable repair cost should also be sufficient evidence of the difference in value.¹⁷²

*C. Incidental and Consequential Damages
for Breach of Warranty*

1. *In General.* — The Code allows the buyer to recover incidental and consequential damages as well as direct economic loss.¹⁷³ Incidental damages are expenses incurred in connection with the breach, such as the expense of towing a disabled vehicle to a repair shop.¹⁷⁴ Consequential damages are those that flow from the breach, such as loss of use of a vehicle.¹⁷⁵ Consequential damages must be reasonably within the contemplation of the parties and the buyer has a duty of mitigation.¹⁷⁶ While the buyer’s right to recover most consequential damages should be fairly clear, it is uncertain whether a buyer may recover damages for inconvenience, annoyance, aggravation, or mental distress.¹⁷⁷ The fear seems to be that such damages are too speculative, but in light of the general trend in tort law to allow recovery for mental distress, this argument does not seem convincing.¹⁷⁸ Although courts have generally denied recovery of attorney’s fees as

169. *Durant v. Palmetto Chevrolet Co.*, 241 S.C. 508, 515, 129 S.E.2d 323, 326 (1963).

170. *Draffin v. Chrysler Motors Corp.*, 252 S.C. 348, 166 S.E.2d 305 (1969).

171. *Durant v. Palmetto Chevrolet Co.*, 241 S.C. 508, 515, 129 S.E.2d 323, 326 (1963).

172. *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 383 (E.D. Mich. 1977); *Davis-Pickett Chevrolet, Inc. v. Collier*, 106 Ga. App. 660, 662 n.1, 127 S.E.2d 923, 925 n.1 (1962); *Jones v. Abriani*, 350 N.E.2d 635, 647 (Ind. App. 1976). *But see* *Foremost Mobile Homes Mfg. Corp. v. Steele*, 506 S.W.2d 646, 649 (Tex. Civ. App. 1974).

173. S.C. CODE ANN. § 36-2-715 (1976).

174. *See id.* § 36-2-715(1).

175. *See id.* § 36-2-715(2); *Bob Anderson Pontiac, Inc. v. Davidson*, 155 Ind. App. 395, 293 N.E.2d 232 (1973); *Long v. Quality Mobile Home Brokers, Inc.*, 271 S.C. 482, 248 S.E.2d 311 (1978) (discussing recovery of consequential damages and holding that finance charges are not a recoverable element).

176. S.C. CODE ANN. § 36-2-715(2)(a) (1976) (“which could not reasonably be prevented by cover or otherwise”).

177. *Compare* *Allen v. Edwards*, 217 So. 2d 284 (Miss. 1969) (not recoverable) *with* *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 360 N.E.2d 818 (1977) (recoverable damage). *Cannon v. Pulliam Motor Co.*, 230 S.C. 131, 94 S.E.2d 397 (1956) intimates that such damages are not recoverable in South Carolina.

178. RESTATEMENT (SECOND) OF TORTS § 312 (1965) (intentional infliction of emotional distress).

a consequential damage,¹⁷⁹ this limitation is not particularly significant because of the right to recover fees under the Magnuson-Moss Act.¹⁸⁰ In South Carolina, unlike other states, punitive damages may be awarded in a breach of warranty case if the breach is accompanied by a fraudulent act.¹⁸¹

2. *Limitations on Recovery of Incidental and Consequential Damages for Breach of Written Warranties.* — Under the Magnuson-Moss Act a limited warranty may include a clause excluding liability for incidental damages. While clauses limiting remedies are subject to restrictions imposed by state law¹⁸² such clauses would be effective under the Code.¹⁸³ Under a full warranty, however, there are limitations on the validity of clauses that exclude incidental damages. A full warrantor is required to remedy any defect “without charge.”¹⁸⁴ Proposed regulations will provide content to this concept.¹⁸⁵ Further, if the consumer suffers incidental expenses because the warrantor fails to remedy the defect promptly or imposes unreasonable duties on the consumer, the consumer may recover such expenses in litigation.¹⁸⁶

The Magnuson-Moss Act allows both full and limited warranties to contain clauses that exclude liability for consequential damages.¹⁸⁷ In a full warranty, the exclusion is ineffective unless it appears conspicuously on the face of the warranty.¹⁸⁸ While the Act does not contain a similar requirement for limited warranties,

179. *E.g.*, United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956).

180. 15 U.S.C. § 2310(d) (1976).

181. See text at note 306 *infra*.

182. 15 U.S.C. § 2311(b)(1) (1976).

183. S.C. CODE ANN. § 36-2-719(1) (1976) provides for limitations on remedies to repair or replace the product, thus, by implication allowing the warrantor to exclude incidental damages. While *id.* § 36-2-719(3) provides that limitations on consequential damages are not valid if unconscionable, the restriction does not apply to incidental damages. No case has been found involving unconscionability of a clause limiting incidental damages.

184. 15 U.S.C. § 2304(a)(1),(d) (1976).

185. 42 Fed. Reg. 39,223 (1977) (to be codified in 16 C.F.R. § 705).

186. 15 U.S.C. § 2304(d) (1976). The requirement that the remedy be provided without charge does not generally require the warrantor to reimburse the consumer for “incidental expenses.” The meaning of this term is unclear, but the most reasonable interpretation is that it refers to consequential damages as defined in the U.C.C. See note 41 *supra*.

187. 15 U.S.C. § 2304(a)(3) (1976) (full warranties). While the Act does not expressly allow such a clause for limited warranties, it follows logically that limited warranties may contain such an exclusion because full warranties may do so.

188. *Id.*

the U.C.C. provides that a limited remedy is ineffective if it is unconscionable.¹⁸⁹ Courts should declare that "hidden" limitations on recovery of consequential damages are unconscionable. Provisions excluding consequential damages are also subject to restrictions imposed by state law.¹⁹⁰ Clauses limiting consequential economic damages are generally effective under the Code.¹⁹¹

The major problem that arises in connection with clauses that exclude incidental or consequential damage is not their effectiveness in general but rather their validity if the warrantor fails to comply with its obligations under the warranty. While some courts have held that such limitations are effective even if the warrantor fails to honor its warranty obligations, a better approach is to consider the warranty and the restrictions as a package.¹⁹² In a sense the warranty represents a fair bargain between the consumer and the warrantor. The warrantor agrees to promptly repair any defects while the consumer gives up claims for consequential and incidental damages in return for prompt repair. When the warrantor fails to act promptly, the bargain collapses. The consumer should be entitled to recover those damages that he incurs because of the collapse of the agreement.

D. Buyers' Security Interests and Rights of Setoff

The U.C.C. provides buyers with two rights that are of great practical significance in enforcing claims for breach of warranty. A buyer who rightfully rejects or revokes acceptance has a security interest in the goods for any amounts paid to the seller as well as expenses incurred.¹⁹³ Further, a buyer may deduct damages for breach of warranty against any amounts still owed on the contract.¹⁹⁴

These rights are of practical significance to the buyer in two ways. The buyer need not tender goods to the seller in order to reject or revoke acceptance. Possession by the buyer is a proper

189. S.C. CODE ANN. § 36-2-719(3) (1976).

190. 15 U.S.C. § 2311(b)(1) (1976).

191. S.C. CODE ANN. § 36-2-719(3) (1976) ("but limitation of damages where the loss is commercial is not" prima facie unreasonable); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 483 (Ky. App. 1978).

192. *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D. Del. 1973); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 430-33, 265 N.W.2d 513, 525-26 (1978) (citing principal authorities).

193. S.C. CODE ANN. § 36-2-711(3) (1976).

194. *Id.* § 36-2-717.

way for him to enforce his security interest.¹⁹⁵ Second, these rights provide the buyer with defenses in the event the seller or a financing entity brings suit against the buyer seeking possession of the collateral. The buyer can argue that the plaintiff has no right to the goods because its failure to pay on the contract was not a default but a permissible deduction of damages. Further, the buyer can argue that the plaintiff has no right to possession of the goods because the buyer's security interest provides it with a superior right. Discussion of defenses to claim and delivery actions are discussed below.¹⁹⁶

*E. Availability of Remedies for Breach of
Warranty Against Dealers and Financing Agencies*

1. *The Role of Dealers and Financing Entities.* — The system that distributes consumer goods involves numerous parties: component-part suppliers, manufacturers, wholesalers, dealers, and financing entities.¹⁹⁷ One of the major problems in connection with remedies for breach of warranty is determining the party against whom remedies may be asserted. Revocation of acceptance against manufacturers was discussed previously.¹⁹⁸ This section focuses on the issue of whether remedies for breach of warranty may be asserted against dealers and financing agencies. To analyze this issue correctly, however, requires an understanding of the role played by dealers and financing agencies in the sale of consumer products.

New consumer products are normally marketed under written consumer-product warranties issued by the manufacturer of the goods. Typically, the goods are sold through retailers who "pass through" the manufacturer's warranty, for example, when a retailer sells a packaged product that contains the warranty. Dealers may, but usually do not, make warranties of their own. Consumer product warranties instruct the consumer what to do in the event of breach. Some warranties provide for repair work through authorized representatives of the manufacturer, while others require the consumer to return the product to the manufacturer for repair. Such representatives are often, but not al-

195. *Id.* § 36-2-711(3) ("and may hold such goods").

196. *See* section III. *E. infra.*

197. *See* C. RERRZ, *supra* note 106, at 115-38 (description of distribution system).

198. *See* text at note 164-66 *supra.*

ways, the dealers from whom the goods were purchased. In the event repair work is done by dealers, contracts between manufacturers and dealers provide for compensation to the dealers. Used goods may or may not be sold under written warranty, but probably most are sold with an attempted disclaimer of all warranties by the dealer.

Banks, credit unions, and other financing entities are involved in financing the purchase of both new and used consumer products. Financing of purchases of consumer products typically takes one of three forms: assignment by seller, direct secured loan, or unsecured credit-card purchase. In the assignment transaction the dealer retains a purchase-money security interest in the goods and subsequently assigns the contract to a financing entity. In the loan transaction the consumer negotiates a loan directly with some financing entity. The financier pays the seller and takes a purchase-money security interest in the goods. If the dealer arranges for the financing with the lender, the second transaction is functionally identical to the first. Finally, some purchases take place through credit cards, such as Visa or Master Charge, that have been issued by some lending institution.¹⁹⁹

2. *Remedies Against Dealers.* — If the dealer makes either a written or implied warranty to the consumer and the warranty is breached, the consumer has the right to assert remedies against the dealer. The problem is determining when a dealer “makes” a warranty to the consumer. Several situations should be distinguished. If the dealer gives the consumer its own written warranty (as opposed to the manufacturer’s warranty), it clearly “makes” a warranty for the breach of which a consumer could pursue remedies. More difficult is the situation in which the dealer simply passes through the manufacturer’s warranty and makes no statement or provisions about its own warranty liability. In this situation the consumer normally will have remedies for breach of warranty against the dealer on either of two theories. The consumer can argue that the dealer adopted the manufacturer’s warranty as its own.²⁰⁰ In the alternative the consumer can argue that the

199. For a description of the transactions see Federal Trade Commission, Statement of Basis and Purpose for Rule on Preservation of Consumer Claims and Defenses, 40 Fed. Reg. 53,560 (1975).

200. 16 C.F.R. § 700.4 (1979). In *Cannon v. Pulliam Motor Co.*, 230 S.C. 131, 94 S.E.2d 397 (1956), the South Carolina Supreme Court held that a dealer adopted the manufacturer’s warranty when it inserted in the contract of sale a clause that stated there were no warranties other than those contained in the manufacturer’s written warranty.

dealer did not disclaim its implied warranty of merchantability and that a claim should be allowed for breach of this warranty.²⁰¹

The most troublesome case is one in which the dealer passes through the manufacturer's warranty and also expressly disclaims its own implied warranties. Whether the dealer should be held liable for breach of the manufacturer's warranty should depend on the dealer's actions.²⁰² If the dealer affirmatively assumes obligations under the warranty by words or by conduct, such as undertaking repair of the product, it should be held liable for breach of the warranty. On the other hand, if the dealer simply passes through a packaged product that contains a written warranty, it should not be held liable. Several reasons support this conclusion. First, if the dealer assumes obligations under the warranty, the consumer naturally expects that the dealer is responsible. Further, the dealer can protect itself against financial loss through its contract with the manufacturer. In addition, failure to hold the dealer liable in such a situation will destroy the effectiveness of the restrictions on the holder-in-due-course rules that are discussed in the next section. Such consequences should not be disregarded in interpreting the dealer's liability.

3. *Remedies Against Financing Entities.* — Historically, financing entities have attempted to avoid liability for breach of the contracts that they finance. Three devices — negotiable instruments, clauses that waive claims and defenses, and direct loans — were used to insulate financiers from liability.²⁰³ By taking a negotiable promissory note from the seller, a creditor could attempt to cut off the buyer's rights to assert claims and defenses.²⁰⁴ A holder in due course takes a negotiable instrument free of claims and defenses. If the seller had taken a consumer credit contract from the buyer rather than a promissory note, the first

See also *Richards v. Goerg Boat and Motors, Inc.*, 384 N.E.2d 1084 (Ind. App. 1979). Other courts have reached opposite results. *Courtesy Ford Sales, Inc. v. Farrior*, 53 Ala. App. 94, 298 So. 2d 26 (1974), cert. denied, 292 Ala. 718, 298 So. 2d 34 (1974); *Gilliam v. Indiana Nat'l Bank*, 337 So.2d 352 (Ala. Civ. App. 1976); *Bill McDavid Oldsmobile, Inc. v. Mulcahy*, 533 S.W.2d 160 (Tex. Civ. App. 1976).

201. If the dealer does nothing about its warranty liability, it will have made an implied warranty of merchantability. S.C. CODE ANN. § 36-2-314 (1976). For breach of this warranty the consumer would be able to seek remedies. *Id.* § 36-2-711, -714.

202. The courts are divided on this issue. See note 200 *supra*. See also 15 U.S.C. § 2310(f) (1976).

203. For a description of these devices see Federal Trade Commission, Statement of Basis and Purpose, *supra* note 199.

204. See S.C. CODE ANN. § 36-3-305 (1976).

method of cutting off claims and defenses would not succeed because the assignee of the contract could not be a holder in due course. This was because the contract was not a negotiable instrument in that it contained promises and conditions which destroyed its negotiability.²⁰⁵ To avoid liability in such transactions, assignees relied on clauses by which the buyer agreed to waive its right to assert claims and defenses against the assignee.²⁰⁶ Finally, the financing entity could avoid liability by making a loan directly to the buyer rather than by taking an assignment of the contract between buyer and seller. By preventing the lender from becoming a party to the sales contract, this method eliminated the contractual basis by which the consumer could assert claims and defenses against the financier.

In 1975 the Federal Trade Commission promulgated a trade regulation rule designed to eliminate these practices.²⁰⁷ The rule divides transactions into consumer-credit sales and purchase-money loans.²⁰⁸ Because credit card transactions are regulated by the Truth-in-Lending Act,²⁰⁹ they are exempt from the application of the rule.²¹⁰ The rule provides that, in a sale transaction, it is an unfair or deceptive practice for a seller to take a consumer-credit contract not containing a notice providing that any subsequent holder of the contract is subject to claims and defenses that the consumer may have against the seller.²¹¹ The rule regulates

205. See *id.* § 36-3-104(1)(b).

206. Such clauses were generally valid. See *id.* § 36-9-206.

207. 16 C.F.R. § 433 (1979). On September 21, 1979, the FTC voted to amend the rule. The amendments do not affect the substance of the rule but rather extend the rule's affirmative obligations to creditors as well as to sellers. Change in the wording of the notice required by the rule is also contemplated. The Commission will promulgate a revised rule in the near future. See 48 U.S.L.W. 2254 (1979).

208. 16 C.F.R. § 433.2(a),(b).

209. 15 U.S.C. § 1666i (1976). The official title of the Act is the Federal Consumer Credit Protection Act.

210. 16 C.F.R. § 433.1(c) (1979) (definition of creditor exempts credit card issuers). See also Federal Trade Commission, Statement of Basis and Purpose, *supra* note 199, at 53,516. See text at notes 221-24 *infra*.

211. 16 C.F.R. § 433.2(a) (1979). The notice is as follows:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The wording of this notice will be revised but its substance will remain the same. See note 207 *supra*.

loan transactions by providing that it is an unfair or deceptive practice for a seller to take the proceeds of a purchase-money loan if the documents reflecting the loan do not contain a notice that the lender is subject to claims and defenses that the buyer may have against the seller.²¹²

The application of the rule to loan transactions, however, is limited because the rule defines a purchase-money loan as one in which the seller either regularly refers customers to the lender or one in which the seller and lender are affiliated.²¹³ The reason for these restrictions is derived from the rationale for the rule. The rule was designed to make creditors responsible for the sales practices of sellers but only when the relationship between the seller and creditor was sufficiently regular to enable the creditor to shift the economic consequences of misconduct back to the seller.²¹⁴

The rule allows the consumer to assert claims and defenses that he has against the seller, either affirmatively or defensively, against the holder of the contract.²¹⁵ Thus, if the seller of a used car effectively disclaims all warranties, the consumer has no rights against the financing entity.²¹⁶ Affirmative recovery against the holder of the contract is limited to the amounts paid thereun-

212. *Id.* § 433.2(b). The notice is as follows:

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The wording of this notice will be revised but its substance will remain the same. *See* note 207 *supra*.

213. *Id.* § 433.1(d). The Commission has issued a Statement of Enforcement Policy that provides guidance on when these requirements are met. 41 Fed. Reg. 43,594 (1976).

214. Federal Trade Commission, Statement of Basis and Purpose, *supra* note 199, at 53, 524-25; Federal Trade Commission, Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,025 (1976).

215. Federal Trade Commission, Statement of Basis and Purpose, *supra* note 199, at 53,524. One commentator has argued that the Magnuson-Moss Act insulates financiers from liability because it provides that claims for breach of warranty may be made only against the person actually making the warranty. C. Rertz, *supra* note 106, at 123. *See* 15 U.S.C. § 2310(f). There is no evidence in the legislative history that the Congress intended such a result. Instead, the provision seems to have been aimed at protecting intermediaries in the distribution system from liability. Further, such a large inroad into the limitations on the holder-in-due-course doctrine should not be adopted unless compelled by clear intent of Congress. Such is not the case here.

• 216. Federal Trade Commission, Guidelines, *supra* note 214, at 20,024.

der.²¹⁷ This means that in a direct loan, the consumer could not recover from the lender any amounts paid to the seller as a down-payment, nor could the consumer recover from either an assignee or a lender consequential damages or attorney's fees.²¹⁸ Of course, if the seller can be joined in such an action, the consumer can obtain complete relief by asserting claims against both, but there may be instances in which the seller is either out of business or not subject to suit.

The South Carolina Consumer Protection Code also gives a consumer the right to assert claims and defenses against assignees or lenders.²¹⁹ These rights, however, are narrower than those given by the FTC rule. In particular, the South Carolina provisions effectively preclude affirmative recovery by limiting liability to the amount owing on the contract at the time notice is given. Thus, if the contract contains the FTC notice, it, rather than the Consumer Protection Code, will govern the liability of the assignee or lender.²²⁰

The right of a consumer to assert claims and defenses against the issuer of a credit card is governed by the Federal Consumer Credit Protection Act (usually called the Truth-in-Lending Act).²²¹ While South Carolina has a similar provision,²²² the federal act will always apply because it provides for the same measure of recovery and has less stringent notification requirements.

An issuer of credit cards is liable for claims and defenses if: (1) the consumer has made a good faith effort to obtain satisfaction from the seller; (2) the amount of the initial transaction

217. 16 C.F.R. § 433.2 (1976) (notice provides that affirmative recovery is limited to the amounts paid under the contract).

218. See Federal Trade Commission, Guidelines, *supra* note 214, at 20,023.

219. S.C. CODE ANN. § 37-2-404 (Cum. Supp. 1978) (assignees), § 37-3-410 (Cum. Supp. 1978) (lenders).

220. If the contract fails to include the FTC notice, the liability of an assignee or lender is somewhat unclear. It could be argued that the operation of the FTC notice is dependent on its inclusion in the contract. Thus, if the notice is not included a buyer could assert rights against a financing entity only to the extent allowed under the South Carolina Consumer Protection Code. See Federal Trade Commission, Statement of Enforcement Policy, *supra* note 213; Note, *The FTC's Holder-in-Due-Course Rule: An Ineffective Means of Achieving Optimality in the Consumer Credit Market*, 25 U.C.L.A.L. REV. 821, 854 (1978). On the other hand, it seems strange that a person can be relieved of liability through an unfair or deceptive trade practice. Further, financing entities are clearly on notice as to the existence of the FTC rule. It seems more sensible to construe the notice as an implied term of contracts governed by the rule.

221. 15 U.S.C. § 1666i (1976).

222. S.C. CODE ANN. § 37-3-411 (Cum. Supp. 1978).

exceeds fifty dollars; and, (3) the place where the initial transaction took place was in the same state as the consumer's mailing address or was located within one-hundred miles of that address. If the issuer of the card is affiliated with the seller, the second and third limitations do not apply.²²³ The amount of recovery against the issuer may not exceed the amount owing at the time the card holder first notifies the issuer.²²⁴

F. Breach of Warranty as a Defense in Claim and Delivery Actions

If a consumer purchases goods on credit and suffers a breach of warranty, a natural thing for the consumer to do is to stop paying the creditor. If the matter remains unresolved most creditors will bring suit on the debt. If the creditor has a security interest, it will also seek possession of the collateral. The proceeding to obtain immediate possession of secured collateral in South Carolina is the claim and delivery action.²²⁵

The claim and delivery action requires four steps. First, the plaintiff must file an affidavit which alleges: (1) that the plaintiff is entitled to the property either because of ownership or special property; (2) that the property is wrongfully detained by the defendant; (3) the cause of the detention; (4) that the property has not been seized subject to tax levy or attachment; and (5) the actual value of the property.²²⁶ Attached to the affidavit must be a notice of right to a pre seizure hearing.²²⁷ The plaintiff must deliver a sufficient bond to the sheriff.²²⁸

Second, the sheriff must serve the affidavit and notice of right to a pre seizure hearing on the defendant.²²⁹

The purpose of the pre seizure hearing is to protect the defendant's use and possession of property from arbitrary encroachment, and to prevent unfair or mistaken deprivations of property. If the judge shall, after conducting the hearing, find that the plaintiff's claim for immediate possession is probably

223. 15 U.S.C. § 1666i(a) (1976).

224. *Id.* § 1666i(b).

225. Claim and delivery actions may be brought in either circuit or magistrate's court. The following discussion assumes that the case is brought in circuit court. *See* S.C. CODE ANN. §§ 15-69-10 to -210 (1976); *id.* §§ 22-3-1310 to -1480 (1976).

226. *Id.* § 15-69-30.

227. *Id.* § 15-69-40.

228. *Id.* § 15-69-50.

229. *Id.*

valid and the defendant has no overriding right to continue in possession of the property, then the judge may allow the claim for immediate possession and endorse the affidavit accordingly.²³⁰

Third, if a preseizure hearing is not required or if the court determines that the plaintiff is entitled to immediate possession, the court instructs the sheriff to obtain possession of the property.²³¹ Fourth, the defendant may retain possession of the property either by defeating the plaintiff's right at the preseizure hearing or by posting a bond in double the value of property.²³²

The statute is vague as to the defenses which may be raised by a defendant to defeat a claim of immediate possession. Some judges take the position that the only way that the defendant may maintain possession is by posting bond.²³³ The rationale for this view is that the plaintiff must post bond to obtain the property, so if the defendant wants possession he must do the same. This view is not supported by statute or policy. The statute clearly provides that the defendant may retain possession *either* by posting a bond or by showing that the plaintiff does not have a right of immediate possession.²³⁴ Further, one purpose of the statute is to provide debtors a meaningful opportunity to contest the claims of creditors.²³⁵ This interpretation of the statute deprives indigent debtors of this right because indigents are unable to meet the bonding requirement.

Assuming that courts will allow defendants to raise some defenses at the claim and delivery hearing, two issues require analysis. What types of claims may the defendant raise? How should a judge decide who is entitled to immediate possession?

230. *Id.* § 15-69-70.

231. *Id.* § 15-69-80. The section contemplates that the defendant may have waived the right to a preseizure hearing by a provision in the contract. Although the section provides that the waiver must be made voluntarily, intelligently, and knowingly, it further provides that the plaintiff may demonstrate this to the court by affidavit. The constitutional validity of such a provision is questionable. See *Swarb v. Lennox*, 405 U.S. 191 (1972).

232. S.C. CODE ANN. § 15-69-140 (1976).

233. Speech by Nathan M. Crystal, Judicial Continuing Legal Education Seminar Sponsored by the South Carolina Bar Ass'n in Columbia, S.C. (Jan. 20, 1979) (statements by judges in audience).

234. S.C. CODE ANN. §§ 15-69-70, -140 (1976).

235. The prejudgment hearing provisions of the statute were enacted after the Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972) that held judicial procedures for taking a debtor's property without notice and hearing violated due process.

Any defense that contests the validity of the plaintiff's security interest should be assertable at the hearing. This is because the plaintiff's right to immediate possession is dependent on the plaintiff having a "special property."²³⁶ Similarly, the defendant should be allowed to raise any defense to the validity of the debt or default because the plaintiff's right to possession is dependent on a showing of wrongful detention by the defendant.²³⁷ If the defendant is not in default, the detention is not wrongful.

Less clear is the issue of whether a counterclaim for damages may be raised by the defendant to defeat a claim of immediate possession. Under the U.C.C. and the Consumer Protection Code, claims for damages for breach of warranty or Truth-in-Lending violations may be used to reduce the amount of any debt owed.²³⁸ Based on this doctrine of setoff, the defendant should be allowed to assert such counterclaims at the claim and delivery hearing.

The second question that judges must answer is who is entitled to immediate possession when defenses or counterclaims are raised. If a debtor raises a defense or counterclaim for damages at a claim and delivery hearing, the judge should receive a proffer from the defense concerning the grounds of the defense or counterclaim. A formal evidentiary hearing should not be held, however, because the claim and delivery hearing is intended to be preliminary and not to substitute for a full trial on the merits. The judge should then make a determination concerning the probable validity of the claims and defenses. Such a determination is for the purpose of the hearing only and should not be binding if the matter goes to trial.

If the judge determines that a defense to the debt or security interest is probably valid, the claim for immediate possession should be denied because the plaintiff has no right to the goods unless the detention is wrongful. If the judge determines that a counterclaim is probably valid, he should compare the amount of

236. S.C. CODE ANN. § 15-69-30(1) (1976). If the plaintiff cannot produce a written security agreement its claim for immediate possession should be denied because it does not have an enforceable security interest in the collateral. *Id.* § 36-9-203.

237. *Id.* § 15-69-30(2). For example, if the plaintiff failed to send the defendant a notice of right to cure, as required by the Consumer Protection Code, the plaintiff should be denied immediate possession because the plaintiff has no legal right to enforce its security interest until 20 days after the notice has been sent. *Id.* § 37-5-111(1) (Cum. Supp. 1978).

238. S.C. CODE ANN. § 36-2-717 (1976) (setoff of damages for breach of warranty); *id.* § 37-5-205 (setoff of damages for violation of Truth-in-Lending Act).

the counterclaim with the amount owed the plaintiff. When the counterclaim is large relative to the amount owed, immediate possession should be denied because the defendant's equity should constitute an overriding right to possession.²³⁹ For example, if a bank is suing for repossession of a used vehicle and the defendant has a probably valid claim to revoke acceptance for breach of warranty, the court should deny the plaintiff immediate possession. On the other hand, when the plaintiff's claim is large relative to the counterclaim, immediate possession should be granted. For example, suppose the plaintiff sues to repossess a mobile home worth \$20,000. Immediate possession should be granted if the defendant raises a Truth-in-Lending counterclaim for \$1000.

G. Class Actions²⁴⁰

1. *Class Actions in Federal Court.* — Prior to the passage of the Magnuson-Moss Act, consumer class actions for breach of warranty could not, as a practical matter, be brought in federal court. Because federal law did not provide a cause of action for breach of warranty, the jurisdiction for any such class action must have been founded on diversity of citizenship. No action based on diverse citizenship could be brought unless the amount in controversy exceeded \$10,000.²⁴¹ In *Snyder v. Harris*,²⁴² the Supreme Court held that, in a class action under 23(b)(3) of the Federal Rules of Civil Procedure founded on diversity of citizenship, individual claims, each of which was less than \$10,000, could not be aggregated to reach the jurisdictional amount. Subsequently, the Supreme Court held in *Zahn v. International Paper Co.*,²⁴³ that a class action in which the claim of the named plaintiffs exceeded \$10,000 could not be brought on behalf of

239. *Id.* § 15-69-70.

240. This section is limited to a discussion of the question of whether a class action for breach of warranty may be maintained legally. Even if such a class action is legally proper, an attorney has delicate ethical questions that must be considered before deciding to undertake such an action. Is a class action in the best interest of the client? Is the lawyer competent to handle a class action? What are the attorney's ethical responsibilities to class members in the event a class action is certified? How far may an attorney go in attempting to obtain a sufficient number of named plaintiffs to meet the Magnuson-Moss Act requirements? For a discussion of these questions, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319 (1976).

241. 28 U.S.C. § 1332 (1976).

242. 394 U.S. 332 (1969).

243. 414 U.S. 291 (1973).

unnamed plaintiffs whose claims were less than that amount. Because most consumer claims for breach of warranty, other than claims for personal injury or property damage, do not approach the jurisdictional amount, these decisions effectively precluded the use of federal courts.

The Magnuson-Moss Act creates a cause of action for breach of warranty that may be brought in either federal or state court and provides that no action may be brought in federal court if (1) the amount in controversy for any individual claim is less than twenty-five dollars; (2) the amount in controversy for all claims involved in the suit is less than \$50,000; or (3) the number of named plaintiffs is less than 100. Because of these provisions, *Snyder* will no longer prevent class actions in federal court for products that cost more than twenty-five dollars, but there are still significant hurdles to such actions. The requirement of 100 named plaintiffs will often be difficult to overcome. More troublesome, however, is the absence of any provision in the Act to deal with the notice problem in class actions.

Federal Rule of Civil Procedure 23(c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In *Eisen v. Carlisle & Jacquelin*,²⁴⁴ the Supreme Court held that the rule barred any class action that dispensed with notice. Further, the Court held that the district court was unauthorized in imposing almost ninety percent of the notice costs in the case on the defendant after a pretrial hearing at which the court determined that the plaintiff had established a substantial likelihood of prevailing on the merits. If notice is required and if the plaintiff must bear the costs, consumer class actions are precluded as a practical matter.

The legislative history of the Magnuson-Moss Act indicates that Congress was concerned with the notice problem.²⁴⁵ While the House report states that the notice requirement should not be invoked to preclude class actions, the Act is silent on the question, and in light of the lack of receptivity which the federal courts have shown to consumer class actions, one cannot be san-

244. 417 U.S. 156 (1974).

245. H.R. Rep. No. 1107, 93d Cong., 2d Sess. 42, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7724.

guine about the prospects.

One commentator has argued that the requirements of Rule 23, including the notice requirement, do not generally apply to class actions brought under the Magnuson-Moss Act.²⁴⁶ There are two difficulties with this approach. First, the Act and legislative history are not clear on whether Congress intended to dispense with these requirements. In the absence of a clear expression of intent, one would assume that Magnuson-Moss class actions would be treated like other class actions and be governed by the rule. Second, notice to class members may be constitutionally required.²⁴⁷

2. *Class Actions in State Court.* — If a consumer class action cannot be brought in federal court, a class action in state court could be considered. It is arguable that the Magnuson-Moss Act authorizes consumer class actions for breach of warranty in state court even if such actions could not have been brought previously; however, the better interpretation of the Act is that the availability of a class action in state court will continue to be determined by state law.²⁴⁸ The South Carolina Code provides: “When the question is one of a common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.”²⁴⁹ While the

246. C. Rerrz, *supra* note 106, at 99-101.

247. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974).

248. Arguably, the Magnuson-Moss Act authorizes class actions to be brought in state court if they do not meet the jurisdictional requirements for class actions in federal court. The legislative history may support this interpretation. The Senate bill provided that “[n]othing in this subsection shall be construed to change in any way the jurisdictional or venue requirements of any State.” S. 356, 93d Cong., 2d Sess. § 110(b) (1974). The Senate report states that the purpose of this language was

to preserve the status quo as to the eligibility under State law for participation in class actions Because Federal rights would be enforced in State courts, some might argue that limitations that certain States impose on participation in class action litigation, would not be valid. The above mentioned language preserves such limitations

S. Rep. No. 151, 93d Cong., 1st Sess. 23 (1973). Because the version of the Act that was passed did not contain this language, one could argue that the deletion was intended to authorize class actions in state court. This is supported by general statements in the legislative history of the House bill, which in large measure became the enacted version, that the remedy provisions were designed to give consumers greater protection and should be construed liberally.

On the other hand, the conference report did not mention the language; the omission may have resulted from a general adoption of the House bill rather than an intentional design to reverse the provisions of the Senate bill.

249. S.C. CODE ANN. § 15-5-50 (1976).

language of the section seems broad enough to authorize a consumer class action for breach of warranty, the South Carolina courts probably would not entertain such an action.²⁵⁰

The Supreme Court of South Carolina has followed the "community of interest" theory of class actions.²⁵¹ Under this theory a class action cannot be brought unless the plaintiffs are united in their legal right. The existence of common legal or factual questions is not sufficient. For example, shareholders of a corporation may bring a derivative action as a class against directors because each member of the class is united in a single right that the corporation has against the directors.²⁵² Similarly, an action for an injunction against the enforceability of a statute on the ground that the statute is unconstitutional may be maintained as a class action.²⁵³ Likewise, if the class asserts a single right against a common fund, a class action may be maintained.²⁵⁴

Courts in other jurisdictions have extended the class action to consumer claims on the theory that common questions of law or fact establish a sufficient community of interest.²⁵⁵ Indeed, this is the approach of the Federal Rules of Civil Procedure.²⁵⁶ The Supreme Court of South Carolina, however, has uniformly rejected attempts to extend class actions to such cases.²⁵⁷

250. See Note, *State Class Actions*, 27 S.C.L. REV. 87, 91-115, 170-73 (1975).

251. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319, 1329-72 (1976).

252. *Hernlen v. Vandiver*, 145 S.C. 412, 437, 143 S.E. 222, 230 (1928); *Black v. Simpson*, 94 S.C. 312, 77 S.E. 1023 (1913). Because of criticism of the theory, other states have passed statutes that authorize class actions despite the absence of a community of interest. CAL. CIV. CODE § 1781 (West 1973); N.Y. CIV. PRAC. LAW §§ 901-09 (Consol. 1976); WIS. STAT. ANN. § 426.110 (West 1974).

253. *Evans v. Creech*, 187 S.C. 371, 197 S.E. 365 (1938) (class action by voters barred by *res judicata* effect of prior action brought by other voters).

254. *Powell v. Gary*, 200 S.C. 154, 20 S.E.2d 391 (1942) (fund of insurance company in hands of receiver).

255. *Hoover v. May Dep't Stores Co.*, 62 Ill. App. 3d 106, 378 N.E.2d 762 (1978).

256. FED. R. CIV. P. 23.

257. In *Earle v. Webb*, 182 S.C. 174, 188 S.E. 798 (1936), mortgagors of a building and loan association attempted to bring a petition to intervene as a class in a liquidation proceeding. They alleged that they and other members of the class had overpaid interest to the association. The court gave many reasons for its decision, including cost and expenses of going through the records of the association to determine whether such claimants existed, but ultimately the decision rested on the court's view that each claimant had a separate legal right. Quoting from *Bannister v. Bull*, 16 S.C. 220 (1881), the court held

[t]hey may be said, in one sense, to have a common interest, but, according to our decided cases, they are not as against a stranger, *united in interest* in the sense of this section of the Code. They have interests in the same property while

IV. DEFENSES TO WARRANTY ACTIONS

A. *Written Warranties*

1. *Right to Cure.* — The Magnuson-Moss Act provides that no cause of action may be brought under the Act until the warrantor is given a reasonable opportunity to cure any defects.²⁵⁸ Since most breach of warranty cases will be brought under the Act because of the availability of recovery of attorney's fees,²⁵⁹ this standard of cure rather than the cure provisions of the U.C.C.²⁶⁰ will normally govern. The major question that a court will face in applying this provision is determining whether a buyer has the right to demand a replacement product or refund of the purchase price rather than being required to submit the product for repair. Under the U.C.C., courts have distinguished between major and minor defects. If the defect was minor, for example an adjustment of picture quality on a television set, the warrantor had the right to cure. However, if the defect was major, for example a defective transmission, the buyer was entitled to a new product or refund on the theory that the buyer's confidence in the product had been shaken.²⁶¹

it remains undivided, but such interests are distinct. Each has a right to the extent of his share.

Id. at 186 (emphasis in original). Similarly, in *Wilder v. South Carolina State Highway Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955), an automobile owner brought a class action against the highway department seeking recovery of postage charges that he alleged were not authorized by statute. The court held that plaintiff could not maintain the action individually. It went on to say that it had "no hesitancy" in holding that the action could not have been maintained as a class action. *Id.* at 457, 90 S.E.2d at 639. There was not a common legal right but rather numerous legal claims. The recent case of *Benjamin v. South Carolina Nat'l Bank*, 269 S.C. 250, 237 S.E.2d 72 (1977), follows this approach. There the supreme court affirmed the sustaining of a demurrer to a class action brought to recover vested benefits under a pension plan that had been declared invalid. The court stated that each member had a separate legal claim for his portion of the fund.

In *Trowell v. Blue Cross, Civ. Action No. 69-4078, Order Approving Settlement*, (Ct. C. Pleas Richland County, S.C., December 21, 1978), a class action in the Court of Common Pleas of Richland County, plaintiff claimed that defendant had retained monies that it was required to pay under the terms of its policies when part of the medical expenses had been paid by Medicare. *Trowell* seems to be a significant expansion of the common-fund theory because the subscribers had separate legal rights to amounts under their policies. However, the case has been settled, so no ruling on the validity of the class action will be forthcoming from the Supreme Court of South Carolina.

258. 15 U.S.C. § 2310(e) (1976).

259. *Id.* § 2310(d)(2).

260. S.C. CODE ANN. § 36-2-508 (1976).

261. *Compare Wilson v. Scampoli*, 228 A.2d 848 (D.C. App. 1967) with *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977).

The distinction between major and minor defects should not be adopted by courts in applying the Magnuson-Moss Act. First, as a matter of statutory construction, the Act impliedly rejects the claim that a buyer has a right to a new product when the defect is major. Even a warrantor who elects to make a full warranty is only required to replace the product or refund the purchase price if it cannot make the repair after a reasonable number of attempts.²⁶² Second, the result is not justified as a matter of policy because it increases the costs associated with honoring warranties. Consumers will naturally want a replacement product rather than repair. This will generate disputes between warrantors and consumers. A line of cases distinguishing major from minor defects will develop. Litigation expenses will necessarily increase. A better approach is to allow the warrantor an opportunity to cure all defects, no matter how major. If the warrantor cannot do so after a reasonable number of attempts, the buyer should be able to exercise whatever legal rights he has.

2. *Lack of Privity.* — The problem of lack of privity arises when a consumer or some other person affected by a consumer product brings a lawsuit against the warrantor when there is no contractual relationship between the parties. Vertical privity refers to the relationship between plaintiff and the parties in the chain of distribution other than the retail seller.²⁶³ Horizontal privity refers to the relationship between the plaintiff and the retail seller. In South Carolina, lack of privity, whether horizontal or vertical, is not a defense to an action for breach of warranty by a consumer regardless of whether the action is under the Magnuson-Moss Act or the U.C.C. South Carolina's version of the U.C.C. abolishes lack of horizontal privity as a defense to actions brought by consumers.²⁶⁴ A recent supreme court case held that the statute abolished the defense of lack of vertical privity as well.²⁶⁵ If the action is brought under the Magnuson-Moss Act, a court would be bound to follow these rules.²⁶⁶

3. *Failure to Provide Notice of Breach.* — The U.C.C. re-

262. 15 U.S.C. § 2304(a)(4) (1976).

263. J. WHITE & R. SUMMERS, *supra* note 91, at 327.

264. S.C. CODE ANN. § 36-2-318 (1976) provides: "A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty. A seller may not exclude or limit the operation of this section."

265. *Gasque v. Eagle Machine Co.*, 270 S.C. 499, 243 S.E.2d 831 (1978).

266. 15 U.S.C. § 2311(b)(1) (1976).

quires a buyer who discovers a defect to notify the seller or be barred from any remedy under the Code.²⁶⁷ Formal notice requirements should not be imposed. Courts should hold that the notice requirement is complied with if the buyer reasonably informs the seller he has experienced a defect and demands relief.²⁶⁸

4. *Statute of Limitations.* — The South Carolina version of the Code provides that actions for breach of contract of sale, including breach of warranty, must be brought within six years after the cause of action accrues.²⁶⁹ The principal problem that is likely to occur with this provision is its effect on clauses that limit the duration of implied warranties, an issue that was discussed above.²⁷⁰

B. Other Warranties

Many of the same defenses that can be raised in an action for breach of a written warranty also apply to an action for breach of warranties that arise only under the U.C.C. However, there is one defense that applies to warranties under the U.C.C. but not to written warranties, the defense of disclaimer of warranties.²⁷¹

1. *Disclaimers of Express Warranties.* — Dealers who wish to disclaim all warranty liability are often concerned about liability for oral representations made by salesmen, for example, a statement that a used automobile was a one-owner vehicle. To avoid this liability dealers often include clauses in the sales contract (usually called “merger clauses”) that state that the contract constitutes the entire agreement of the parties and there are no representations or warranties other than those contained in the document.²⁷² To what extent is the seller bound by oral representations made by salesmen, despite the existence of the merger clause? Two factual situations should be distinguished.

If the oral representations are rescinded prior to the signing of the contract, the seller is not bound by them because they do not constitute part of the basis of the bargain.²⁷³ For example, if

267. S.C. CODE ANN. § 36-2-607(3)(a) (1976).

268. See text at notes 159-61 *supra*.

269. S.C. CODE ANN. § 36-2-725 (1976).

270. See text at notes 125-32 *supra*.

271. If a warrantor makes a written warranty, any disclaimer of implied warranties is ineffective. 15 U.S.C. § 2308(a) (1976).

272. See J. WHITE & R. SUMMERS, *supra* note 91, at 356 (1972) (example of merger clause).

273. S.C. CODE ANN. § 36-2-313(1) (1976). See also *id.* § 36-1-201(3) (“ ‘Agreement’

the salesman informed his manager of the representation before the contract was signed, the manager could instruct the salesman to tell the customer that the salesman was mistaken in his assertion that it was a one-owner vehicle.²⁷⁴

The more difficult situation is one in which the seller relies solely on the merger clause to deny liability for statements made by salesmen. Courts should not deny the buyer the right to present evidence of oral statements simply because of the existence of such a clause. Instead, courts should examine the negotiations leading to the execution of the contract. If the court finds that the contract was intended by both parties to be a final statement of their rights and duties, evidence of oral statements should not be received. Absent this finding, the court should admit the evidence.²⁷⁵ In consumer settings such an intent is much less likely than in commercial settings.

2. *Disclaimers of Implied Warranties.* — The implied warranty of merchantability may be disclaimed or excluded in three ways. First, the warranty may be disclaimed by language which: (1) includes the word merchantability; (2) is specific; and (3) in the case of a written disclaimer, is conspicuous.²⁷⁶ The South Carolina version varies from the uniform version of the Code in that it requires disclaimers to be specific.²⁷⁷ The meaning of this

means the bargain of the parties in fact . . . ”).

274. R. NORDSTROM, *LAW OF SALES* 214 (1970).

275. *Compare* *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973) (contract not intended as final expression of intent) *with* *Jordan v. Doonan Truck & Equipment, Inc.*, 220 Kan. 431, 552 P.2d 881 (1976) (contract as final expression of intent). *See also* R. NORDSTROM, *supra* note 274, at 215. This approach is clearly contemplated by the uniform version of the U.C.C. Section 2-316(1) provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

U.C.C. § 2-316(1) (1962 version). Section 2-202 bars the admission of parol evidence if the written agreement is intended by the parties as a final expression of their agreement.

Although South Carolina has a nonuniform version of § 2-316(1), the same approach should be followed. S.C. CODE ANN. § 36-2-316(1) states: “If the agreement creates an express warranty words disclaiming it are inoperative.” Analysis of the “agreement” of the parties would require a court to determine if the written agreement was intended to be a final expression of the agreement of the parties. This is exactly the approach contemplated by uniform § 2-202. Further, a federal district court in South Carolina adopted this approach in a commercial case. *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974).

276. S.C. CODE ANN. § 36-2-316(2) (1976).

277. The uniform version of § 2-316(2),(3) provides:

requirement is obscure. One interpretation is that it requires the seller to inform the buyer of the provision.²⁷⁸ Another interpretation is that the use of the word "merchantability" is not sufficient. The disclaimer must contain more specific language that explains the effect of the disclaimer.

Courts should adopt the second interpretation for several reasons. The South Carolina reporter's comments to the U.C.C. seem to support this view.²⁷⁹ Further, the second interpretation expresses a sound policy. It is likely that many buyers do not understand the significance of the terms "merchantability" and "fitness for a particular purpose." The requirement of further explanation fosters the policy of avoiding surprise to the buyer. In addition, this interpretation of the specificity requirement is consistent with the proposed Federal Trade Commission Rule on used motor vehicles, which requires explanation concerning the impact of the disclaimer on the buyer.²⁸⁰

The first method of disclaiming warranties requires that the

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) 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; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

278. This interpretation finds some support in pre-Code case law. *E.g.*, *Durant v. Palmetto Chevrolet Co.*, 241 S.C. 508, 129 S.E.2d 323 (1963) (restriction in written warranty separated from sales contract ineffective unless specifically brought to buyer's attention).

279. The reporter discusses the conflicting policies of bringing disclaimers to the attention of buyers and contractual certainty. The first interpretation advances the former at the expense of the latter, while the second seems to be a balance of these policies. See S.C. CODE ANN. § 36-2-316 (1976) (S.C. Reporter's Comments, 5th paragraph).

280. See 41 Fed. Reg. 1089 (1976) (to be codified in 16 C.F.R. § 455).

disclaimer be conspicuous as well as specific. The Code defines conspicuous as follows:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.²⁸¹

The section is unclear. Does it mean that all clauses are to be judged by the reasonable-person standard set forth in the first sentence, with the examples merely showing facts which tend to make a clause conspicuous? Or, do the second and third sentences provide "safe havens" of conspicuousness that override the first sentence? For example, envision a written contract with the signature line on the front page which states at the bottom that it is subject to the terms and conditions on the reverse side. On the reverse side, a provision in large type disclaims all warranties. Is the disclaimer conspicuous?

Most courts seem to apply the reasonable person standard.²⁸² Further, the reasonable person test is supported by the official comment, which states: "This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it."²⁸³

A second method of disclaiming implied warranties is by specific language that in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.²⁸⁴ Under the uniform version of the Code, language such as "as is" or "with all defects" is sufficient to disclaim all implied warranties, but the sufficiency of this language in South Carolina is uncertain. The drafters of the South Carolina version deleted the language from the uniform version that specifically sanctioned the use of such disclaimers.²⁸⁵

281. S.C. CODE ANN. § 36-1-201(10) (1976).

282. *E.g.*, *Houck v. DeBonis*, 38 Md. App. 85, 98-99, 379 A.2d 765, 772-73 (1977); *Williams v. College Dodge, Inc.*, 11 U.C.C. REP. SERV. 958 (Mich. Dist. Ct. 1972).

283. S.C. CODE ANN. § 36-1-201 (1976) (Official Comment 10).

284. *Id.* § 36-2-316(3)(a) (1976).

285. See note 277 *supra* for the uniform version.

Surely the change was not made to economize language. It might be argued that it defies common sense to hold that an "as is" disclaimer is ineffective because the term is widely used and understood. However, many people may think that "as is" makes them responsible for obvious defects, such as appearance, but not for latent defects. The FTC's proposed rule on used motor vehicles, discussed in the next section, requires an explanation in addition to the use of "as is." Because of these reasons, South Carolina courts should conclude that an "as is" disclaimer is not sufficient to disclaim implied warranties in South Carolina, but that additional explanatory language is necessary. The language contained in the proposed FTC rule should be sufficient.²⁸⁶

A third method by which warranties may be excluded is by examination. If the buyer fully examines the goods, there are no implied warranties as to defects that ought to have been discovered by an examination.²⁸⁷

3. *Warranties on Used Motor Vehicles.* — The Magnuson-Moss Act requires the Federal Trade Commission to initiate a rule-making proceeding dealing with warranty practices in the used motor vehicle sales industry.²⁸⁸ The Commission has issued for comment a proposed rule which requires dealers to reveal certain information by means of a disclosure statement that must be attached to the right rear window of any used motor vehicle that is offered for sale. In addition, under the proposed rule, if a used motor vehicle is offered for sale without a warranty and the seller attempts to disclaim any implied warranty, the contract must contain the following language:

AS IS

THIS USED MOTOR VEHICLE IS SOLD AS IS *WITHOUT ANY WARRANTY, EITHER EXPRESSED 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.*²⁸⁹

If the proposed rule is adopted, failure to make either of these disclosures, or the making of any oral or written statement that

286. For the text of the proposed rule see 41 Fed. Reg. 1089 (1976).

287. S.C. CODE ANN. § 36-2-316(3)(b) (1976).

288. 15 U.S.C. § 2309(b) (1976).

289. 41 Fed. Reg. 1089, 1090 (1976) (to be codified in 16 C.F.R. § 455).

tends to detract from or mitigate them, will constitute an unfair or deceptive act or practice under section 5 of the Federal Trade Commission Act.²⁹⁰ If a person engages in an unfair or deceptive practice, the Federal Trade Commission has a variety of remedial options including suing for consumer redress²⁹¹ and recovery of civil penalties.²⁹² A consumer in South Carolina would also have a private cause of action for recovery of actual damages against a dealer who violated the rule. If the violation is willful, treble damages may be recovered.²⁹³

V. OTHER THEORIES OF LIABILITY

Breach of warranty is the basic theory of liability that would be relied on by a consumer to recover economic loss. A lawyer should consider other theories that could be asserted in connection with a breach of warranty theory or that may provide alternative theories if warranty theory is unavailable, for example, when the seller effectively disclaims all warranties in the sale of a used vehicle.

A. *Strict Liability in Tort*

In 1974 the South Carolina legislature enacted section 402A of the Restatement (Second) of Torts, which is often referred to as "strict liability in tort."²⁹⁴ A tactical reason for attempting to use a strict-liability theory to recover economic loss is that disclaimers of liability are legally ineffective to bar recovery based on such a theory.²⁹⁵ This tactical advantage may be more apparent than real. As discussed above, clauses that attempt to disclaim or limit liability for breach of warranty are often invalid

290. *Id.*

291. 15 U.S.C. § 57b(a)(1) (1976).

292. *Id.* § 45(m)(1)(A).

293. S.C. CODE ANN. § 39-5-140 (1976).

294. *See* S.C. CODE ANN. § 15-73-10 (1976).

295. The statute provides that the comments to section 402A of the RESTATEMENT (SECOND) OF TORTS are incorporated by reference and constitute the legislative intent of the chapter. S.C. CODE ANN. § 15-73-30 (1976). The comments to the Restatement provide that the "consumer's cause of action . . . is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands." RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m* (1965). *E.g.*, *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976) (rejecting recovery of economic loss under strict-liability theory because inconsistent with right to disclaim liability granted by U.C.C.).

because improperly drafted.²⁹⁶ Further, attorney's fees are not recoverable in a strict-liability action.²⁹⁷ The following discussion, however, assumes that bringing an action for recovery of economic loss under a strict-liability theory makes tactical sense.

Whether strict liability theory may be used to recover damages for economic loss has divided the courts of other jurisdictions.²⁹⁸ The issue is unsettled in South Carolina. While a federal district court held that such damages were not recoverable under a strict-liability theory,²⁹⁹ a recent supreme court case casts doubt on the issue.³⁰⁰

Recovery of economic loss under a strict-liability theory should not be allowed in South Carolina because recovery of such damages is inconsistent with the legislative intent embodied in the strict-liability statute and is not wise as a matter of public policy.³⁰¹ South Carolina is one of the few states in which liability

296. See text at notes 274-287 *supra*.

297. But see 15 U.S.C. § 2310(d) (1976).

298. See *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 285 n.10 (Alaska 1976) (collecting cases and concluding that majority view rejects liability). If property damages rather than economic damages are suffered recovery under strict liability is allowed. *Cloud v. Kit Mfg. Co.*, 563 P.2d 248 (Alaska 1977) (upholding claim under strict-liability theory to recover damage to mobile home resulting from fire; *Morrow* distinguished). While the distinction between economic loss and property damage is fuzzy, "sudden and calamitous damage will almost always result in direct property damage," while "deterioration, internal breakage and depreciation will be considered economic loss." *Id.* at 251.

299. *Cooley v. Salopian Indus., Ltd.*, 383 F. Supp. 1114, 1118-19 (D.S.C. 1974).

300. In *Gasque v. Eagle Machine Co.*, 270 S.C. 499, 243 S.E.2d 831 (1978) the supreme court held that "property" under § 2-318 of the U.C.C. included lost profit, a form of economic loss. Because the strict-liability statute makes a seller liable for damages to property, the court might construe that statute as allowing recovery of economic loss. On the other hand, the strict-liability statute deals with "unreasonably dangerous" products and speaks in terms of "physical harm."

301. The two reasons usually given to support the conclusion that recovery of damages for economic loss should not be allowed under strict liability seem unconvincing. First, strict liability developed to protect consumers against severe personal injury and property damage losses; when the loss is economic the reasons for imposing strict liability are not as compelling. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965). But, for many consumers economic loss can be disastrous. The purchase of a car or mobile home is one of the most significant investments that a consumer may make during his life. A distinction based on the assertion that such a claim is not compelling does not seem sound.

Second, imposing strict liability is inconsistent with the provisions of the U.C.C. that allow a seller to disclaim warranties. *Morrow v. New Moon Homes*, 548 P.2d 279, 285-86 (Alaska 1976). The Code provides, however, that disclaimers are prima facie unconscionable when personal injuries are suffered. S.C. CODE ANN. § 36-2-719(3) (1976). Allowing recovery for economic loss in strict liability is tantamount to extending the unconscionability doctrine to this type of damage. Although the effect of this is that disclaimers are

was adopted by legislation rather than by court decision. As a result, courts here are bound by the legislative intent in enacting that statute. The legislature has expressed the intent that the statute is to be interpreted in accordance with the comments to section 402A of the Restatement (Second) of Torts.³⁰² These comments clearly indicate that the purpose of section 402A was to provide recovery for physical damage to person or property rather than for economic loss.³⁰³ Moreover, as a matter of public policy, allowing recovery of economic loss would be undesirable. Economic analysis tends to show that the benefits to consumers from such a rule are outweighed by the costs.³⁰⁴

ineffective in all consumer cases, this does not render the provisions of the U.C.C. superfluous. Such clauses would still be valid in commercial transactions.

302. S.C. CODE ANN. § 15-73-30 (1976).

303. RESTATEMENT (SECOND) OF TORTS § 402A, Comments *c, d* (1965).

304. One of the major developments in legal theory in the last fifteen years has been the application of economic theory to a wide variety of legal problems, including judicial decisionmaking. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). Economic analysis concludes that judges should render decisions that promote social efficiency. *Id.* at 10. In general, efficiency is achieved if contractual provisions are enforced by courts. *Id.* at 10-12. Courts should interfere with contractual provisions only when there is some evidence that market transactions are not working to maximize consumer welfare. The prime examples of such market failure are fraud and monopoly. *Id.* at 399-404 (concept of market failure); *id.* at 87 (fraud); *id.* at 201-05 (monopoly).

While many consumers might not understand the terms of their warranties, this misunderstanding is probably attributable more to their unwillingness to make the investment of time necessary to decipher the warranty than to fraud by the manufacturer. Further, the disclosure requirements of the Magnuson-Moss Act make an even weaker case that the typical written warranty is fraudulent.

Although many industries are highly concentrated, this alone is not evidence that manufacturers are exercising monopoly power. An industry might be highly concentrated because efficiency dictates that firms reach a certain size. *Id.* at 251-52. Even an industry with few members might be highly competitive depending on whether the members acted in concert or not.

While written warranties tend to be uniform, this is probably explained more by the fact that the typical written warranty is an efficient method of minimizing the mix of cost involved in dealing with product defects than on the basis of the exercise of monopoly power.

A manufacturer that is adopting a warranty policy must evaluate repair and investigation costs. Repair costs could, of course, be eliminated by not giving any warranty. But consumers demand some warranty protection and are willing to pay for it. On the other hand, it would be undesirable for a manufacturer to establish an unlimited return policy. This would not give consumers any incentive to maintain their products and would leave manufacturers with used goods, which are often difficult to dispose of. Investigation costs are involved because, with complex products, it is often difficult to determine whether damage occurs because of product defect, consumer fault, or accident, such as road hazard. Manufacturers face costs in determining the cause of a product failure. They also face the possible cost of loss of consumer good will if they are strict in denying warranty claims.

The typical manufacturer's limited warranty has three parts: (1) a narrowly drawn

B. Common-Law Fraud

The cause of action for fraud has nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge by defendant of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted on; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.³⁰⁵

It is important for an attorney to understand the scope of common-law fraud in South Carolina as well as the related concept, breach of contract accompanied by a fraudulent act. Some examples should help. Suppose a purchaser buys a car after the dealer represents that it has been reconditioned. In fact, repair work was not done and the dealer knew it. The purchaser has a cause of action for common-law fraud. Suppose on the other hand that a purchaser buys a used car and the dealer gives a thirty-day warranty. A problem develops within the warranty period but the dealer refuses to honor the warranty. The buyer has a cause of action for breach of contract but not for fraud; punitive damages may not be recovered. If the dealer received the car and claimed to honor the warranty when in fact not doing so, the

express warranty, which defines the parts warranted and establishes a standard with which the parts must comply; (2) a limitation of the duration of implied warranties to the duration of the express warranty or some other reasonable period; and (3) a clause that modifies the buyer's remedies in the event of breach, generally by limiting the buyer's rights to repair or replacement of the product, and that excludes liability for consequential damages. Eddy, *Effects of the Magnuson-Moss Act upon Consumer Product Warranties*, 55 N.C.L. REV. 835, 841 (1977). Under such a warranty, so long as the consumer complies with the terms of the warranty, such as maintenance requirements, the manufacturer is obligated to repair any product defect that occurs within the warranty period. Thus, the warranty seems to be an efficient response to the cost situation that the manufacturer faces. It responds to the consumer's demand for warranty protection yet limits and defines the manufacturer's obligation, thus reducing investigation and repair costs.

Exactly what manufacturers would do in response to imposition of strict liability for defective products that cause only loss of bargain is uncertain. If the limited warranty is truly an efficient solution, one would expect manufacturers to adopt it as a working policy for dealing with consumer complaints of defectiveness. For example, a company might decree in its policy manuals that it would repair any product that was returned with a defect within 12 months or 12,000 miles but not after that period. Even if manufacturers did this, efficiency might not result. Consumers would have a greater incentive to litigate because of strict liability. This litigation would increase warranty costs. Manufacturers would have to respond with increased prices or, perhaps, some change in their warranty policy.

305. *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974). See *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641 (1978) (proximate injury not established merely by showing vehicle not a one-owner car as represented by seller).

buyer would have a cause of action for actual and punitive damages based on the theory of breach of contract accompanied by a fraudulent act.³⁰⁶

Common-law fraud offers two advantages over other theories of liability. First, punitive damages may be recovered. Second, liability may be based on the failure to disclose information; the South Carolina Supreme Court has held that a vendor has a duty to disclose material information accessible to the seller when the seller knows that such information is not readily available to the buyer.³⁰⁷ However, there may be problems with a fraud theory. Whether the proof must be clear and convincing or by a preponderance of the evidence is unclear.³⁰⁸ A mere breach of contract, for example, a failure to honor a warranty, is not actionable under a fraud theory.³⁰⁹ Further, one cannot be heard to complain of fraud when the buyer could have discovered the truth by exercise of reasonable prudence, for example, by reading the contract between the parties.³¹⁰

C. *Liability for Violation of the Federal Odometer Law*

The Motor Vehicle Information and Cost Savings Act³¹¹ prohibits tampering and other deceptive practices in connection with odometers³¹² and requires transferors of motor vehicles to make certain disclosures at the time of sale.³¹³ Any person who violates any provision of the Act with intent to defraud is liable for treble actual damages or \$1500, whichever is greater, plus costs and attorney's fees.³¹⁴ The action may be brought in any federal district court without regard to amount in controversy or in any state court of competent jurisdiction within two years of the date when liability arises.³¹⁵

306. *Dunsil v. E.M. Jones Chevrolet Co.*, 268 S.C. 291, 233 S.E.2d 101 (1977) (dissenting opinion of Chief Justice Lewis discusses issues).

307. *Lawson v. Citizens & Southern Nat'l Bank*, 259 S.C. 477, 193 S.E.2d 124 (1972).

308. *See Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 227 S.E.2d 189 (1976) (clear and convincing evidence required but may be satisfied by preponderance of evidence).

309. *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641 (1978), *Morrison v. Chrysler Corp.*, 270 F. Supp. 107 (D.S.C. 1967) (breach of warranty not actionable under fraud theory).

310. *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641 (1978).

311. 15 U.S.C. § 1981 (1976).

312. *Id.* §§ 1983 to 1987.

313. *Id.* § 1988.

314. *Id.* § 1989(a). *See Kirkland v. Cooper*, 438 F. Supp. 808 (D.S.C. 1977).

315. *Id.* § 1989(b). Liability arises when the violation is discovered. *Levine v. MacNeil*, 428 F. Supp. 675 (D. Mass. 1977).

To recover under the Act the plaintiff must establish violation of a requirement of the Act with intent to defraud.³¹⁶ A mere violation of the Act without some evidence of intent to defraud is not sufficient to establish liability. Thus, dealers are not liable merely for failing to provide an accurate disclosure statement³¹⁷ or for failing to discover tampering with an odometer.³¹⁸ If a violation is coupled with some evidence of fraud, however, a prima facie case of liability is established. For example, a dealer who gave a disclosure statement that stated that the odometer reading was accurate violated the act when the dealer should have known that the reading was incorrect.³¹⁹

Because privity of contract is not necessary to maintain an action under the Act, a purchaser may bring suit against any transferor in the chain of title through which the car reached her.³²⁰ Courts are divided on the question of whether transferors are severally liable or jointly and severally liable for the statutory penalty.³²¹ Courts should construe the Act to hold transferors severally liable. Prior to Congress' amendment of the remedy provisions of the Act in 1976, a district court held transferors severally liable.³²² The failure to overrule this decision is some evidence that Congress tacitly approved of it. Further, because used cars often pass through hands of numerous transferors, joint liability would seriously weaken the regulatory purpose of the Act.

While the Act is unclear on whether liability extends to agents and employees of transferors, courts should decide that it does.³²³ The language of the statute supports this conclusion. Al-

316. 15 U.S.C. § 1989 (1976).

317. *Mayes v. Warren Hollen Motors*, 410 F. Supp. 768 (S.D. Ohio 1975); *Shepherd v. Eagle Lincoln Mercury, Inc.*, 536 S.W.2d 92 (Tex. Civ. App. 1976).

318. *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053 (E.D. La. 1976).

319. *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978); *Delay v. Hearn Ford*, 373 F. Supp. 791 (D.S.C. 1974).

320. *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65, 68 (E.D. Wis. 1976).

321. *Compare Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D.W. Va. 1975) (severally liable) *with Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *aff'd*, 578 F.2d 721 (8th Cir. 1978).

322. *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D.W. Va. 1975).

323. On this issue *compare Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D.W. Va. 1975) (liability imposed on employee) *with Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *aff'd*, 578 F.2d 721 (8th Cir. 1978) (president of transferor not liable) *and Romans v. Swets Motors, Inc.*, 428 F. Supp. 106 (E.D. Wis. 1977) (corporate manager not liable) *and Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975) (sales agent not liable).

though the disclosure provisions only apply to transferors,³²⁴ the remedy section extends to "any person."³²⁵ Further, imposing liability on an employee who tampers with an odometer or sells a car knowing that the odometer reading is incorrect is not unfair. Employees are only liable if they act with intent to defraud.

D. Liability Under the South Carolina Unfair Trade Practices Act

Under South Carolina law "unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."³²⁶ The Act provides that any person who suffers an "ascertainable loss of money or property" as a result of such act or practice may recover actual damages, plus attorney's fees. If the violation is willful, treble actual damages are allowed.³²⁷ Because of the provisions for recovery of attorney's fees and treble damages, the Act offers obvious advantages over other theories of warranty liability.

In applying this Act courts will face two major issues. What warranty practices constitute unfair or deceptive conduct? When has a consumer suffered "actual damages" within the meaning of the Act? In construing the Act, South Carolina courts are to be guided by the interpretations that the federal courts and the Federal Trade Commission have given to the Federal Trade Commission Act.³²⁸ These decisions should provide some standards for determining when a warranty practice is "unfair or deceptive." A mere breach of warranty should not violate the Act because such a breach can occur without fault under circumstances that do not involve unfairness or deception. However, repeated failure to honor a warranty or a pattern or practice of selling shoddy goods should violate the Act.³²⁹

Establishment of actual damages may be difficult. For example, if a warrantor fails to comply with the disclosure requirements of the Magnuson-Moss Act, it engages in an unfair or deceptive practice.³³⁰ Yet, it may be difficult for a consumer to show

324. 15 U.S.C. § 1988 (1976).

325. 15 U.S.C. § 1989 (1976).

326. S.C. CODE ANN. § 39-5-20(a) (1976). *See also id.* § 56-15-30 (Deceptive Trade Practices Act for motor vehicles).

327. *Id.* § 39-5-140(a). *See also id.* § 56-15-110 (Unfair Trade Practices Act for motor vehicles providing for recovery of double actual damages).

328. S.C. CODE ANN. § 39-5-20(b) (1976).

329. *Ford Motor Co. v. Mayes*, 24 U.C.C. REP. SERV. 1057, 1066 (Ky. App. 1978).

330. 15 U.S.C. § 2310(b) (1976).

that actual damage flows from this conduct. Because the Unfair Trade Practices Act was intended as a consumer protection measure, it should be liberally construed. Any tangible harm that flows from a practice should be compensated. Thus, a consumer should be able to recover for annoyance or inconvenience as well as for out of the pocket expenses.³³¹

VI. CONCLUSION

The passage of the Magnuson-Moss Act has substantially increased the complexity of warranty law. Two new types of warranties, full and limited warranties, have been created. The Act imposes various substantive and disclosure obligations on warrantors. Further, it creates a new cause of action for breach of written and implied warranties. Despite the increase in complexity, the Act offers the prospect of improvement in the warranty system through increased information and more available remedies for consumers. It is unlikely, however, that the Act represents the culmination of consumer demand for warranty reform. Instead, it probably represents a step in an evolving process of reform of the warranty system in this country. Even now, Congress is considering amendments to the Magnuson-Moss Act.³³²

331. *Cf. Razor v. Retail Credit Co.*, 87 Wash. 2d 516, 554 P.2d 1041 (1976) (action for actual damages under Fair Credit Reporting Act, 15 U.S.C. § 1681 (1976)).

332. H.R. 1005, 96th Cong., 1st Sess. (1979).

APPENDIX A

NOTICE OF REJECTION/REVOCATION

Dear _____:

I am an attorney representing _____. On _____ Mrs. _____ purchased a new 1979 _____ automobile from you. Shortly after the purchase, Mrs. _____ encountered several mechanical problems, including _____ (details). She returned the vehicle to you for repair on three occasions. (Include details). Each time she was assured that the vehicle had been repaired. Each time the same problems reappeared within a few days.

This letter is to inform you that Mrs. _____ hereby exercises her legal right to cancel the contract. (S.C. Code Ann. § 36-2-711(1)). Please inform me how Mrs. _____ may obtain a refund of her purchase price and cancellation of the security agreement and note that she signed. Until we hear from you, Mrs. _____ is exercising her legal right to retain possession of the vehicle as security for the debt (S.C. Code Ann. § 36-2-711(3)).

Please direct all communication regarding this matter to me rather than my client. I look forward to hearing from you in the near future.

Sincerely,

NOTE: Appropriately worded letters should also be sent to the manufacturer and financing entities involved in the transaction.

APPENDIX B

TYPICAL AUTOMOBILE WARRANTY: NARROW EXPRESS WARRANTY—LIMITATION ON IMPLIED WARRANTIES—LIMITATION ON REMEDIES

ITEMS NOT COVERED

DAMAGE DUE TO ACCIDENTS, MISUSE OR ALTERATIONS
This warranty does not cover damage to the vehicle resulting from accidents, misuse, or alterations to the vehicle.

DAMAGE FROM ENVIRONMENT
This warranty does not cover damage to the vehicle resulting from environmental factors such as lightning, road hazard, etc.

DAMAGE DUE TO LACK OF MAINTENANCE
This warranty does not cover damage to the vehicle resulting from lack of maintenance as described in the Owner's Guide.

TIRES
This warranty does not cover damage to tires. Tires are not covered by this warranty. Tires should be repaired or replaced by the tire manufacturer under a separate warranty supplied with your car. Any Ford or Lincoln tires not covered by this warranty are listed in the Owner's Guide for U.S. dealers.

EXPENSE
This warranty does not cover the cost of labor, parts, and shipping work, windshield repair, and other items not listed in the Owner's Guide for U.S. dealers.

BATTERIES
This warranty does not cover Eveready batteries. Eveready batteries are covered by a separate warranty supplied with your car. Any Eveready batteries not covered by this warranty are listed in the Owner's Guide for U.S. dealers.

CORROSION, EMISSIONS, AND NOISE
This warranty does not cover corrosion, emissions, or noise. Corrosion, emissions, and noise are covered by a separate warranty supplied with your car. Any corrosion, emissions, or noise not covered by this warranty are listed in the Owner's Guide for U.S. dealers.

EVEREADY BATTERIES
This warranty does not cover Eveready batteries. Eveready batteries are covered by a separate warranty supplied with your car. Any Eveready batteries not covered by this warranty are listed in the Owner's Guide for U.S. dealers.

VEHICLE WARRANTY

Express Warranty Portion

LIMITED WARRANTY 12 MONTHS—12,000 MILES ON NEW 1980 FORD PASSENGER CARS & LIGHT TRUCKS

RADIO, ANTENNA, AND CLOCK
This warranty covers the radio, antenna, and clock for 12 months (limited mileage).

SEASONAL EQUIPMENT
This warranty covers seasonal equipment for 12 months (limited mileage).

BATTERY
This warranty covers the battery for 12 months (limited mileage).

CORROSION, EMISSIONS, AND NOISE
This warranty covers corrosion, emissions, and noise for 12 months (limited mileage).

VEHICLE WARRANTY

ITEMS COVERED

NO CHARGE
This warranty covers the cost of labor, parts, and shipping work. No charge will be made for no charge, including Ford or Lincoln Service Centers, authorized dealers, or other service facilities. A reasonable amount will be added after taking the car to the dealer.

ADJUSTMENTS
This warranty covers adjustments to the engine, transmission, suspension, steering, and brakes. The term "adjustments" refers to the repair of a defect or the replacement of a part. For instance, if a part is defective, it will be replaced with a new part. If a part is adjusted, it will be corrected without charge. Any amount will be added after taking the car to the dealer.

WARRANTY BEGINS
The warranty period begins on the date of the vehicle's first delivery or sale to the first owner or purchaser.

TRAVEL OR EMERGENCY
If you are traveling, have moved a long distance, or need emergency repairs, contact your nearest Ford or Lincoln Service Center. A vehicle repair or adjustment will be made for you at the nearest Ford or Lincoln Service Center.

WHICHEVER COMES FIRST
This warranty covers 12 months or 12,000 miles, whichever comes first.

DEFECTS
This warranty covers defects in the vehicle that the Seller or Dealer will repair, replace, or adjust any parts, accessories, or equipment. Defects are defined as those found to be defective in materials or workmanship and not caused by Ford.

VEHICLE WARRANTY

Limitation on Remedies in Event of Breach

Neither Ford Motor Company nor the Selling Dealer shall be liable for loss of time, inconvenience, commercial loss or consequential damage.

Some states do not allow limitations on how long an implied warranty will last or the extent of the remedy. If the limitation of time or extent of the remedy in this section of the warranty is not permitted by your state, the limitation of time or extent of the remedy in this section of the warranty shall not apply to you.

1980 Limited Warranty

A FACTS BOOKLET

WHAT TO DO IF THERE IS A QUESTION REGARDING WARRANTY

The satisfaction and goodwill of owners are of primary concern to Ford and Lincoln Mercury dealers. We want to make sure that your warranty problem is not handed to your satisfaction. The following steps are suggested:

- 1 Discuss the problem with your Ford or Lincoln Mercury dealership management.
- 2 Contact the Ford Motor Company District Office closest to you as listed in the Owner's Guide.

Please Retain This Booklet in Your Vehicle

Ford Motor Company
Lincoln Mercury
Mercury

Make Address:
Ford Parts and Service Division
P.O. Box 1602
Dearborn, Michigan 48170

Ford Parts and Service Division

