

# Then and Now: Reviving the Promise of the Magnuson-Moss Warranty Act

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## I. INTRODUCTION

In preparing teaching materials for an advanced contracts class, one of the authors retrieved a number of written warranties to use as examples. This process exposed many instances of overly long, complicated and unwieldy warranties, as well as those that violated the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (MMWA or Act).<sup>1</sup> In particular, many written warranties disclaimed the Uniform Commercial Code (UCC) implied warranties even though the MMWA prohibits such disclaimers. Additional research of cases involving MMWA claims indicated fewer consumer warranty actions than one would have expected. Further, that same research revealed that courts were substantially limiting the reach of the MMWA as applied to private causes of action.

A recent law review article by one of the authors focused specifically on this justiciability problem.<sup>2</sup> Specifically, the article focused on one of the MMWA's strategic purposes of providing a federal private cause of action for violations of written and implied warranties, criticizing the court cases that incorrectly limited that private cause of action.<sup>3</sup> In some instances, the courts that limited the private cause of action justified the limitation by contending that a consumer's access to a MMWA claim

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1. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)) [hereinafter Magnuson-Moss Act].

2. Janet W. Steverson, *The Unfulfilled Promise of the Magnuson-Moss Warranty Act*, 18 LEWIS & CLARK L. REV. 155 (2014).

3. *Id.*

must align with the Act's other purposes, specifically, the policing of misleading written warranties.<sup>4</sup> Although the authors believe that the courts are incorrect to focus on some of the MMWA's strategic purposes to the exclusion of others, the courts' focus raised the question of whether the MMWA had achieved the Act's other aims, even as private causes of action appeared to be neglected.

This question regarding the other purposes of the MMWA, the dearth of practical legal scholarship on the topic, and the discovery of many problematic written warranties spawned the research that led to this article. The research revealed that, in many ways, the MMWA is not achieving its goal of curtailing misleading warranties. First, one part of the research was an empirical analysis of contemporary written warranties to determine whether the authors' anecdotal information concerning problematic warranties was borne out across multiple products and product categories. This analysis demonstrated that many of the current warranties do, in fact, violate the MMWA. A second area of research involved assessing the effectiveness of both public enforcement through Federal Trade Commission (FTC) actions and private enforcement through consumer suits. This research demonstrated that there is a decided lack of enforcement of the MMWA provisions. Thus, MMWA violations are likely to continue to flourish to the detriment of the consumer. In order to breathe new life into the Act and provide better consumer warranty protection, this article proposes some changes in FTC policy and some changes in the MMWA to allow for greater enforcement of the Act's provisions. Part II of the article explains the MMWA's history and goals to illustrate the nature and necessity of the consumer protection that the MMWA hoped to provide. Part III outlines the problems in current warranties that the authors' empirical research revealed, while Part IV demonstrates the lack of enforcement of the MMWA. Finally, Part V posits a multi-faceted solution to the problems outlined in Parts III and IV.

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4. *See, e.g.,* *McNamara v. Nomeco Bldg. Specialties, Inc.*, 26 F. Supp. 2d 1168, 1174-75 (D. Minn. 1998) (explaining that because the purpose of the MMWA was to police against deceptive written warranty practices, there was no evidence that Congress intended to allow a federal cause of action for state implied warranties where the supplier had not given a written warranty).

## II. STATED AIMS OF THE MAGNUSON-MOSS WARRANTY— FEDERAL TRADE COMMISSION IMPROVEMENT ACT

In 1975, in response to concerns that consumers were being misled by specious warranties on consumer goods, Congress enacted the MMWA.<sup>5</sup> The primary impetus behind the MMWA was to allow buyers of consumer products to make informed choices as to which products to purchase by curtailing the use of misleading warranties by the sellers of consumer products.<sup>6</sup> In addition to this goal, however, the MMWA had other strategic aims that were vital to the protection of consumers from defective goods. This section will put the MMWA into its historical context to enable the reader to understand the current obstacles that limit the MMWA's ability to achieve its intended purposes. The section will then delineate the Act's strategic purposes, as one must know these strategic purposes in order to determine whether they have been achieved.

### A. *Context and History of the Magnuson-Moss Warranty—Federal Improvement Act*

The MMWA was enacted in 1975.<sup>7</sup> At that time, there was no federal regulation in the area of warranties; regulation was left to the states. At the state level, the UCC had been adopted by all except Louisiana, seemingly providing strong warranty protection to buyers through its implied warranties of merchantability and fitness for a particular purpose.<sup>8</sup> With the implied warranty of merchantability in particular, if a good was defective, a consumer had a breach of warranty action against any seller dealing in goods of the kind.<sup>9</sup> In the consumer good arena, however, manufacturers and retail sellers quickly learned

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5. Magnuson-Moss Act, 88 Stat. 2183 (codified at 15 U.S.C. §§ 2301–2312).

6. 120 CONG. REC. 40,711 (1974) (statement of Sen. Moss) (“By making warranties of consumer products clear and understandable through creating a uniform terminology of warranty coverage, consumers will for the first time have a clear and concise understanding of the terms of warranties of products they are considering purchasing.”); *see also* H.R. REP. NO. 93-1107, at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 1974 WL 11709 (stating a need to make warranties “more readily understood”); S. REP. NO. 93-151, at 6 (1973) (indicating the Act was intended to further a larger purpose of “promot[ing] consumer understanding” of written warranties).

7. Magnuson-Moss Act, 88 Stat. 2183 (codified at 15 U.S.C. §§ 2301–2312).

8. U.C.C. §§ 2-314–15 (2012).

9. U.C.C. § 2-314 (in every contract of sale with a merchant in goods of that kind, there is an implied warranty that the goods shall be merchantable—i.e., that the goods would, *inter alia*, “pass without objection in the trade . . . [and be] fit for the ordinary purposes for which such goods are used”).

that they could bypass the UCC warranties by providing complicated written warranties that seemed to promise much, but actually provided little, and that, at the same time, disclaimed the UCC implied warranties.<sup>10</sup>

In the late 1950s and the early 1960s, the consumer's limited access to a remedy for defective products, coupled with the booming market for automobiles<sup>11</sup> and the burgeoning availability of consumer goods such as radios, televisions, and various household appliances,<sup>12</sup> led to a rising tide of complaints concerning motor vehicles,<sup>13</sup> household appliances,<sup>14</sup> and other consumer products.<sup>15</sup> In particular, the FTC was receiving increasing complaints about manufacturers and their warranties. The first major source of many of the complaints came from the owners of motor vehicles who began to inundate the FTC beginning in the late 1950s.<sup>16</sup> These complaints indicated that manufacturers or dealers were not living up to the terms of their warranties, that the automobiles "were unsafe, poorly designed, [and] noisy,"<sup>17</sup> and that neither the manufacturers nor the dealers cured the defects.<sup>18</sup>

The second major source of complaints emanated from owners of major appliances. In a study of warranties for major appliances, President Johnson's 1968 task force<sup>19</sup> reported that (1) manufacturers had

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10. H.R. REP. NO. 93-1107, at 24 (1974), *reprinted in* 1974 U.S.C.A.N. 7702, 1974 WL 11709 (in many cases, the warranties provided very little warranty protection while at the same time taking away the implied warranties of merchantability and fitness).

11. *Id.* at 22 ("In 1896 the year marking the beginning of the American motor vehicle industry, thirteen cars of the same design were produced by an organized company. In 1971, 75 years later over 8.5 million passenger cars were produced in the United States [sic].").

12. *Id.* at 22-23 (providing details concerning the vast sums of money spent by consumers on common home appliances).

13. *Id.* at 25 ("Beginning in the late 1950's a rising tide of complaints was received by Members and committees of the Congress, the Federal Trade Commission, and other officials and agencies of the Federal Government from irate owners of motor vehicles . . .").

14. *See id.* at 27 (stating that "[m]anufacturers, servicing dealers, and independent service companies [of major appliances] are aware that consumer dissatisfaction with the manner of performance under warranties is quite prevalent").

15. *See* 120 CONG. REC. 31,315 (1974) (statement of Rep. Staggers) ("The litany of complaints flooding Washington is a long one: cars that break down, appliances that would not work, TV sets and toys that pose safety hazards. What is more, many claim sellers are indifferent to complaints."); 115 CONG. REC. 31,484 (1969) (Senator Magnuson, in introducing S. 3074, stated that "Senate Commerce Committee correspondence files testify to the high level of consumer frustration generated by unreliable products guaranteed in name, but not in fact").

16. H.R. REP. NO. 93-1107, at 25 ("During this period as many letters were received by the FTC on this subject as on any other since the Commission was established in 1914.").

17. *Id.*

18. *Id.*

19. In his February 6, 1968, message to the Congress, President Johnson established a Task

not lived up to their obligations; (2) consumers lacked the ability to compel manufacturers or retailers to perform their warranty obligations; (3) a number of warranties were deceptively captioned; (4) consumers did not understand the warranties due, in part, to the content and terminology of the warranty; (5) almost all major appliance warranties disclaimed any liability under the implied warranties of the UCC; and (6) the majority of major appliance warranties contained “exceptions and exclusions which are unfair to the purchaser and which are unnecessary from the standpoint of protecting the manufacturer from unjustified claims or excessive liability.”<sup>20</sup>

As a result of consumer complaints, consumer protection became an oft-revisited topic in Presidential speeches and communications.<sup>21</sup> Further, in response to the complaints, in a 1970 report on automobile warranties, the FTC proposed enacting a statutory obligation on manufacturers to provide defect-free automobiles and to honor their warranties.<sup>22</sup> Subsequently, Congress held committee hearings in 1970 and 1971 focusing on consumer product warranties.<sup>23</sup> The ultimate result of Congress’s work was Public Law 93-637, commonly referred to as the Magnuson-Moss Warranty Act, enacted on January 4, 1975.<sup>24</sup>

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Force on Appliance Warranties and Service that was comprised of the Special Assistant to the President for Consumer Affairs, the Chairman of the FTC, the Secretary of Commerce, and the Secretary of Labor. *Id.* at 24.

20. *Id.* at 28 (referring to the Task Force’s Feb. 6, 1968 report). The report was based on a study conducted by the FTC of “over 200 warranties used by 50 manufacturers of major appliances.” *Id.* at 27.

21. *See, e.g.*, President John F. Kennedy, Special Message to Congress on Protecting Consumer Interest (Mar. 15, 1962), available at <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028.aspx> (a message from President Kennedy was the first Presidential Message on consumer interests). *See also* H.R. REP. NO. 93-1107, at 24 (indicating that, since President Kennedy’s 1962 message, “six additional Presidential Messages on consumer matters ha[d] been submitted to the Congress”). Those six included President Johnson’s message on Feb. 6, 1968, creating a task force on appliance warranties and service, President Nixon’s message on Nov. 3, 1969, activating a task force to comment on the need for guarantee and warranty legislation in the household appliance industries and in other fields, and President Nixon’s message on Mar. 1, 1971, proposing a Fair Warranty Disclosure Act. *Id.* at 24–25.

22. CASPAR W. WEINBERGER ET AL., FED. TRADE COMM’N, REPORT ON AUTO. WARRANTIES 69 (1970).

23. *See* H.R. REP. NO. 93-1107, at 29 (stating that hearings were held by the Subcommittee on Commerce and Finance each day on September 29th through October 1<sup>st</sup> in 1970, and again each day of September 28<sup>th</sup> and 29<sup>th</sup>, and of October 12th through 15th in 1971).

24. Magnuson-Moss Act, Pub. L. No. 93-637, 88 Stat. 2183, 2183 (1975) (Codified at 15 U.S.C. §§ 2301–2312 (2012)).

*B. The Act's Strategic Purposes*

Throughout the Act's circuitous route through the House and Senate, the House and Senate committees discussed both the goals and the implementation of the legislation.<sup>25</sup> The main goals were as follows: to promote greater consumer understanding of warranties;<sup>26</sup> to "[e]nsure consumers certain basic protections when they purchase consumer products which have written warranties";<sup>27</sup> to "improve the position of the consumer in the marketplace by making the Federal agency responsible for his economic well being (the F.T.C.) more effective";<sup>28</sup> and to allow the consumer "to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation."<sup>29</sup> The MMWA itself mirrors some of these aims and adds others when it states that it is an Act "[t]o provide minimum disclosure standards for written consumer product warranties; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes."<sup>30</sup>

It is important to understand, however, that the Act was designed to address deficiencies in the state warranty protection legislation that existed at the time.<sup>31</sup> It "was not designed to completely supplant the state law of warranties and sales but, instead, to provide a basic level of honesty and reliability to the entire transaction."<sup>32</sup> Through an analysis of the Act and its legislative history, this section will elaborate on the four basic purposes that Congress hoped to serve via the MMWA. In particular, the section will focus on the legislative reports on the 1973

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25. See, e.g., *id.*; S. REP. NO. 93-151 (1973) (Senate Commerce Committee); H.R. REP. NO. 93-1107 (House Committee on Interstate and Foreign Commerce).

26. S. REP. NO. 93-151, at 6-7; H.R. REP. NO. 93-1107, at 29.

27. S. REP. NO. 93-151, at 7.

28. *Id.* at 2.

29. *Id.* (The report indicated that "this bill aims to increase the ability of the consumer to make more informed product choices and to enable him to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation"). The report also stated that in order to ensure warrantor performance, there was a need to monetarily penalize a warrantor for non-performance and award that penalty to the consumer. *Id.* at 7.

30. Magnuson-Moss Act, Pub. L. No. 93-637, 88 Stat. 2183, 2183 (1975) (codified at 15 U.S.C. §§ 2301-2312 (2012)).

31. CAROLYN L. CARTER ET AL., CONSUMER WARRANTY LAW 35 n.2 (4th ed. 2010) (citing *Skelton v. Gen. Motors Corp.*, 500 F. Supp. 1181, 1190 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981)).

32. *Id.*

Senate bill that eventually became the MMWA, S. 356,<sup>33</sup> and the 1974 House bill that contributed to the MMWA, H.R. 7917.<sup>34</sup>

### 1. Promote Consumer Understanding

The first strategic purpose as identified in the legislative history and embodied in the Act relates to creating an informed consumer. As the Senate Report stated, the MMWA was intended to pursue a larger purpose of “promot[ing] consumer understanding” of written warranties.<sup>35</sup> The House Report mirrored this intent in stating a need to make warranties “more readily understood.”<sup>36</sup> In fulfilling this goal, the bill hoped to enable the consumer “to make more informed product choices.”<sup>37</sup>

The Act utilized two mechanisms to promote greater consumer understanding. The first was “to provide minimum disclosure standards for written consumer product warranties.”<sup>38</sup> In particular, the Act required simplicity in the labeling of warranties;<sup>39</sup> through clarification of product labeling, the Senate Report indicated that the bill satisfied the need to identify for the consumer which products are fully warranted.<sup>40</sup> It was hoped that clarifying the rules of the warranty game would enable consumers to differentiate between more or less reliable products.<sup>41</sup> This ability to differentiate would, in turn, lead consumers to purchase the more reliable products and produce economic rewards for the suppliers of such products.<sup>42</sup> The House Report stated a similar, albeit more specific, purpose of “prohibiting the proliferation of classes of warranties on consumer products and requiring that such warranties be either a full or limited warranty with the requirements of a full warranty clearly stated.”<sup>43</sup>

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33. S. 356, 93rd Cong. (1973).

34. H.R. 7917, 93rd Cong. (1973).

35. S. REP. NO. 93-151, at 6 (1973).

36. H.R. REP. NO. 93-1107, at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 1974 WL 11709.

37. S. REP. NO. 93-151, at 2.

38. Magnuson-Moss Act, Pub. L. No. 93-637, 88 Stat. 2183, 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)).

39. Magnuson-Moss Act § 102(A).

40. S. REP. NO. 93-151, at 8.

41. *Id.*

42. *Id.*

43. H.R. REP. NO. 93-1107, at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 1974 WL 11709.

In addition to its labeling requirements, the Act sought to promote consumer understanding by requiring greater clarity in the language used to describe the warranty.<sup>44</sup> The bill's supporters felt that clearer language was needed because in many cases, the warranties offered by suppliers failed to communicate to the consumer what the supplier was offering.<sup>45</sup> Further, the House Report indicated that President Nixon, in a message to Congress on March 1, 1971, stated that "[g]uarantees and warranties are often found to be unclear or deceptive."<sup>46</sup>

## 2. Provide Basic Consumer Protections

The second strategic purpose, as stated in the Senate Report, was to "[e]nsure consumers certain basic protections when they purchase consumer products which have written warranties."<sup>47</sup> The Act intended to achieve this purpose by "defin[ing the] minimum federal content standards for such warranties."<sup>48</sup> In particular, the Act was to create standards for warranties that the supplier designated as "full."<sup>49</sup> In addition to ensuring basic protections through standardization of full written warranties, both the Senate Report and the House Report concluded that these basic protections could be achieved by prohibiting a supplier from disclaiming the implied warranties when giving a written warranty.<sup>50</sup> As the House Report stated:

in many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper [on which the warranty was written] operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.<sup>51</sup>

By establishing minimum standards in addition to the labeling requirements, the Act intended to address these concerns.

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44. S. REP. NO. 93-151, at 7 (the Act sought to improve consumer understanding by "clearly and conspicuously disclosing the terms and conditions of the warranty and by telling the consumer what to do if his guaranteed product becomes defective or malfunctions").

45. *Id.*

46. H.R. REP. NO. 93-1107, at 25.

47. S. REP. NO. 93-151, at 7.

48. Magnuson-Moss Act, Pub. L. No. 93-637, 88 Stat. 2183, 2183 (1975) (codified at 15 U.S.C. §§ 2301-2312 (2012)).

49. S. REP. NO. 93-151, at 8.

50. *Id.* at 7; H.R. REP. NO. 93-1107, at 29 (stating a need for "safeguards against the disclaimer or modification of the implied warranties of merchantability and fitness on consumer products where a written warranty is given with respect thereto").

51. H.R. REP. NO. 93-1107, at 24.



### 3. Make the FTC More Effective

The Act's third strategic purpose was to "improve the position of the consumer in the marketplace by making the Federal agency responsible for his economic well being (the F.T.C.) more effective."<sup>52</sup> Thus, the Act was designed "to amend the Federal Trade Commission Act in order to improve [the FTC's] consumer protection activities."<sup>53</sup> Such amendment was needed because, although the 1938 Wheeler-Lea Act<sup>54</sup> granted the FTC the power to police "unfair or deceptive acts or practices in or affecting commerce,"<sup>55</sup> Congress did not expand the FTC's enforcement powers.<sup>56</sup> Rather, except for the partial expansion of powers in the area of food, drug, and cosmetic advertising, the cease-and-desist order was the only tool available to the FTC for enforcement of § 5(a)(1) of the Federal Trade Commission Act.<sup>57</sup> Even at the time of the enactment of the Wheeler-Lea Act, the cease-and-desist order was felt to be fairly anemic because a potential violator would only be deterred from such action if he knew that, at some time in the future, he could be "held accountable by a criminal or civil penalty action."<sup>58</sup> Further, in each subsequent decade, commentators decried the FTC's inability to adequately enforce this section of the Federal Trade Commission Act.<sup>59</sup>

### 4. Provide Consumer Redress

Finally, the MMWA's fourth strategic purpose was to enable the consumer "to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation."<sup>60</sup> The House Report mirrored this goal in stating a need to provide consumers with "reasonable and effective remedies" when a warrantor has breached its warranty on a consumer product.<sup>61</sup>

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52. S. REP. NO. 93-151, at 2.

53. Magnuson-Moss Act, 88 Stat. at 2183 (codified at 15 U.S.C. §§ 2301-2312).

54. Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45 (2012 & Supp. I 2014)).

55. 15 U.S.C. § 45(a)(2).

56. S. REP. NO. 93-151, at 9.

57. *Id.*

58. *Id.* (quoting the House Committee reporting the Wheeler-Lea Act).

59. *Id.*

60. *Id.* at 2 (stating that in order to ensure warrantor performance, there was a need to monetarily penalize a warrantor for non-performance and award that penalty to the consumer).

61. H.R. REP. NO. 93-1107, at 29 (1974), *reprinted in* 1974 U.S.C.A.N. 7702, 1974 WL 11709.

This fourth purpose stems from Congress's concern with suppliers who put defective products into the stream of commerce. Such suppliers are to be held accountable through private warranty actions, both written and implied. In addition to providing for private redress, Congress hoped that allowing for warranty enforcement in the courts would encourage suppliers to develop workable informal dispute settlement procedures for the "expeditious settlement of consumer complaints."<sup>62</sup>

Congress's fourth strategic purpose is manifested in § 110(d)(1) of the MMWA,<sup>63</sup> whereby "[t]he Magnuson-Moss Act created a federal remedy for breach of written and implied warranties falling within the statute."<sup>64</sup> Thus, § 110(d)(1) is one of the most important provisions of the MMWA for a consumer who has been harmed by a defective consumer product. It allows any consumer—defined as the purchaser or transferee of a consumer product<sup>65</sup>—to sue a broad class of persons "for damages and other legal and equitable relief" caused by a defective consumer product.<sup>66</sup> Specifically, the Act authorizes four independent causes of action: failure to comply with (or breach of) any obligation

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62. S. REP. NO. 93-151, at 8.

63. Magnuson-Moss Act, Pub. L. No. 93-637, § 110(d)(1), 88 Stat. 2183, 2191 (1975) (codified at 15 U.S.C. § 2310(d)(1) (2012)).

64. *Hylar v. Garner*, 548 N.W.2d 864, 874 (Iowa 1996) (citing *Alberti v. Gen. Motors Corp.*, 600 F. Supp. 1026, 1027 (D.D.C. 1985)). This point has been expressed by several other courts. *See, e.g., Milicevic v. Fletcher Jones Imps., Ltd.*, 402 F.3d 912, 918 (9th Cir. 2005) (quoting *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1325 (11th Cir. 2001)) (stating that the MMWA provides "a federal remedy for breach of written and implied warranties"); *Rentas v. DaimlerChrysler Corp.*, 936 So. 2d 747, 750 (Fla. Dist. Ct. App. 2006) (holding that the MMWA "provide[s] an independent federal cause of action for breach of warranty"); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1026 (Miss. 1982) (stating that the MMWA "creates a new federal cause of action for the breach of warranties"); *see also* S. REP. NO. 93-151, at 2-3 (1973) ("If a supplier fails to honor his warranty or service contract promises, the consumer can avail himself of certain specified remedies . . . . [I]f the consumer is not satisfied with the results obtained in any informal dispute settlement proceeding, the consumer can pursue his legal remedies in a court of competent jurisdiction . . . ."); Christopher Smith, *Private Rights of Action Under the Magnuson-Moss Warranty Act*, in *WARRANTIES IN THE SALE OF BUSINESS EQUIPMENT AND CONSUMER PRODUCTS* 1985, 225 (Barkley Clark & Christopher Smith eds., 1985) (Magnuson-Moss creates four separate federal causes of action: breach of written warranty, implied warranty, service contract, or Magnuson-Moss provisions). A few courts have found that the MMWA only applies to written warranties. *See, e.g., Thomas v. Micro Ctr. Inc.*, 875 N.E.2d 108, 112 (Ohio Ct. App. 2007) ("It follows that with no written warranty . . . appellant could not, as a matter of law, prevail on any Magnuson-Moss warranty claim . . ."). However, the clear language of 15 U.S.C. § 2310 demonstrates that these courts are in error. 15 U.S.C. § 2310 (2012).

65. 15 U.S.C. § 2301(3). In addition to the buyer and the transferee of a consumer product, the MMWA also defines a consumer as "any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)." *Id.*

66. Magnuson-Moss Act § 110(d)(1) (codified at 15 U.S.C. § 2310(d)(1)).

under the MMWA, a written warranty, an implied warranty,<sup>67</sup> and a service contract.<sup>68</sup> The requirements for creating written warranties and service contracts are found in the provisions of the MMWA,<sup>69</sup> but the requirements for creating an implied warranty are found in state law.<sup>70</sup> Only a consumer can bring these actions; however, the actions may be brought against three types of entities: suppliers, warrantors, and service contractors.<sup>71</sup>

Coupled with the federal causes of action is the provision for attorneys' fees that provides the means by which such suits may be brought.<sup>72</sup> Together, the four federal causes of action and the availability of attorneys' fees cast a net wide enough to monetarily penalize all suppliers of defective products. Specifically, § 2310(d)(2) allows a finally-prevailing consumer to receive reasonable costs and expenses, including attorneys' fees.<sup>73</sup> As the Senate Report explained, the attorneys' fees provision is a key component to the Act's goal of forcing suppliers to live up to the promises made in the warranty.<sup>74</sup> The Senate Report contended that warrantors who did not perform as promised needed to suffer direct economic detriment in order to have a strong enough incentive to perform.<sup>75</sup> However, the damages sought in many breach of warranty cases would be relatively small because the price of the consumer product is not high. If one couples this fact with the often-expensive nature of litigation,<sup>76</sup> it is easy to see how the majority of consumers would elect not to pursue a breach of warranty case.<sup>77</sup> The

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67. See *Chase v. Kawasaki Motors Corp., U.S.A.*, 140 F. Supp. 2d 1280, 1291 (M.D. Ala. 2001) ("[S]ection 2310(d) essentially provides a federal cause of action for breach of an implied warranty which arises under state law."); *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1522 (D.D.C. 1986) (the MMWA creates a private cause of action for the "failure of a warrantor or supplier to comply with the Act or with the obligations under a written warranty, implied warranty, or service contract").

68. S. REP. NO. 93-151, at 2-3.

69. See 15 U.S.C. §§ 2301(6), (8) (defining written warranty and service contract).

70. 15 U.S.C. § 2301(7) (an implied warranty means one arising under state law).

71. Magnuson-Moss Act § 110(d)(1) (codified at 15 U.S.C. § 2310(d)(1)).

72. Magnuson-Moss Act § 110(d)(2) (codified at 15 U.S.C. § 2310(d)(2)).

73. 15 U.S.C. § 2310(d)(2).

74. S. REP. NO. 93-151, at 24 (1973) ("Th[e] attorneys' fees] provision would make economically feasible the pursuit of remedies by consumers in State and Federal courts. It should be noted that an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery. This requirement is designed to make the pursuit of consumer rights involving inexpensive consumer products economically feasible.").

75. *Id.* at 7.

76. *Id.*

77. Mace E. Gunter, Note, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1512-13 (2000) (citing Jean R.

attorneys' fees provision sought to encourage consumers to pursue private redress.

### III. TEXTUAL PROBLEMS IN CURRENT WRITTEN WARRANTIES

The initial research the authors conducted indicated that the MMWA might not be achieving some of the above-delineated strategic purposes. To determine whether their concerns were well-founded, the authors did an empirical analysis of contemporary warranties by replicating a 1978 FTC study. This replicated study revealed that the MMWA was no longer achieving two of its strategic purposes: promoting consumer understanding of written warranties and ensuring consumers certain basic protections when they purchase consumer products which have written warranties. This section explains the methodology and conclusions of the first FTC study and the authors' replicated study. In doing so, it reveals where the MMWA is falling short of its goals.

#### A. *The Earlier FTC Study*

Following passage of the Act, reviews of the legislation and its impact were widespread, including critical reviews only a few years after its enactment.<sup>78</sup> These critics posited that warranties were providing less protection and were simultaneously becoming more complex and legalistic under the Act's requirements.<sup>79</sup> Much of the data for these assertions came from a single survey conducted by the National Association of Service Managers (NASM).<sup>80</sup> In this survey, nearly 2,000 questionnaires were distributed to NASM members and prospective members—and 132 were returned (approximately a 6.6% return rate).<sup>81</sup>

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Sternlight, *Gateway Widens Door to Imposing Unfair Binding Arbitration on Consumers*, 71 FLA. B. J. 8, 12 (1997) ("For consumers with small warranty claims, the expense of attorneys' fees makes bringing a claim impracticable.").

78. A sampling of reviews includes: Robert C. DeNicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 FORDHAM L. REV. 273 (1975); Jonathan A. Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C. L. REV. 835 (1977). Critical reviews include Caroline E. Mayer, *Why So Many Laws Turn Out to be Lemons*, U.S. NEWS & WORLD REP., May 22, 1978, at 26; *Warranty Protection Shrinking Under Magnuson-Moss: NASM*, 1978 APPLIANCE SERV. NEWS 1 (1978).

79. See, e.g., *Warranty Protection Shrinking Under Magnuson-Moss: NASM*, *supra* note 78, at 13.

80. *Id.*

81. JACQUELINE SCHMITT ET AL., BUREAU OF CONSUMER PROT., IMPACT REPORT ON THE MAGNUSON-MOSS WARRANTY ACT: A COMPARISON OF 40 MAJOR CONSUMER PRODUCT

Of these 132, only 83 were deemed by NASM to be applicable to the protections of the MMWA.<sup>82</sup> However, these responses were entirely self-reported and assessed;<sup>83</sup> copies of the warranties were not reviewed, and as a result, the data set was, at best, a self-selected, rough approximation.

In response to the NASM's conclusions, the Bureau of Consumer Protection within the FTC conducted a more thorough study of warranty documents, culminating in a report issued in 1980.<sup>84</sup> In this study, the staff selected forty warranties across four categories of major consumer purchases: household appliances, mobile homes/RVs, automobiles, and home entertainment.<sup>85</sup> For each, they compared the warranty characteristics prior to passage of the Act (1974) and a few years following implementation (1977–78).<sup>86</sup> The Bureau examined the warranties using five measures of warranty content: designations; coverage; readability; length of text; and frequency of certain limitations, exclusions, and disclaimers.<sup>87</sup> In brief, the Bureau found that warranty coverage had increased, warranties had become longer though slightly more readable, and limitations on buyers' rights in warranties had decreased.<sup>88</sup> After nearly thirty-five years of living with the MMWA, the authors set out to replicate the analysis with contemporary warranties to look for differences. More detailed information regarding the Bureau's findings and the authors' findings is contained in the subsections below.

#### *B. The Follow-up Study: Methodology*

In replicating the Bureau's Impact Report, it is important to note that our analysis contains the same limitations that the original Impact Report contained. First, the analysis is purely textual: to keep the analysis free from bias, both the Bureau and this article's authors used only the language of the warranties.<sup>89</sup> Consequently, even if a warranty's

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WARRANTIES FROM BEFORE AND AFTER THE ACT 9 (1980) [hereinafter IMPACT REPORT].

82. *Id.*

83. *See id.* at 10 (stating that the survey only reflected the "perceptions" of the manufacturers who responded to the survey and not to the actual warranties offered by those manufacturers).

84. *Id.*

85. *Id.* at 31.

86. *Id.* at 11.

87. *Id.* at 1.

88. *See id.* at i.

89. *Id.* at 2.

language indicates broad coverage, one cannot assume that the consumer is actually receiving the coverage provided. Second, the warranties used were not necessarily representative of the most frequently-purchased products in the studied product categories, nor were they representative of all consumer products. Finally, as in the Impact Report, this analysis does not control for the “changing technologies, marketing strategies, consumer demand,” and other variables that lead to changes in warranty offerings.<sup>90</sup> Thus, one cannot necessarily attribute the changes that have occurred in the warranties to the MMWA or the FTC.<sup>91</sup> Nevertheless, the Impact Report and the replicated analysis can provide a snapshot of warranty offerings and whether the warranties are in compliance with the MMWA.

Using the 1980 Commission Report as a template, the methodology for this analysis was very similar. First, model-year 2012 warranties were selected from forty different manufacturers, paralleling the originally-chosen manufacturers as much as possible. Next, those warranties were gathered from the manufacturers or their resellers. Finally, numerical calculation and analysis was performed on the warranties themselves.

### 1. Selecting the Warranties

The first step in warranty analysis is determining which warranties to analyze. In order to maintain as much longitudinality with the FTC analysis of 1977–78 warranties, the same companies’ warranties were used wherever possible. Because of the intervening decades, however, this was not always possible due to corporate mergers, bankruptcies, or other changes. Again, for long-term analysis, the authors kept the same mix of nineteen household appliance warranties, thirteen mobile home/RV warranties, four automobile warranties, and four home entertainment warranties.<sup>92</sup>

The automobile category had the highest percentage of consistent manufacturers from 1977 to 2012. Of the four originally chosen by the Commission (American Motors, Chrysler, Ford, and General Motors), only American Motors was no longer available. Based on market share

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90. *Id.* at 2–3.

91. *Id.* at 3.

92. *Id.* at 31. For a crosswalk table of the manufacturers used in the original report and their analogs in the current analysis, see the appendix to this Article.

and pervasiveness, Honda was selected as a replacement for American Motors.

Home entertainment is the category with perhaps the greatest change since 1977—not only in terms of the manufacturers sampled, but also the definition of home entertainment itself. Of the manufacturers sampled by the Commission (JVC, KLH, Magnavox, and Zenith), only JVC remains as a stand-alone brand similar in form to what it was in the 1970s. To replace the three other manufacturers, the authors used a 2012 conception of home entertainment and added Apple, Samsung, and Vizio. Each of these manufacturers produces devices similar in purpose to KLH, Magnavox, and Zenith, and each represent significant market share in the American consumer market.<sup>93</sup>

Household appliances is another category where both the technology *and* the companies have seen major change in the last thirty-five years. Of the original nineteen manufacturers (Admiral, Amana, Carrier, Emerson, Fedders, Friedrich, Frigidaire, General Electric, Gibson, Hardwick, Hoover, Kelvinator, Maytag, McGraw-Edison, Modern Maid, Roper, Tappan, Westinghouse, and Whirlpool), ten remain as stand-alone manufacturers in the same market niche. For most of the remaining nine warranties, then, substitutions were made based on product line. For instance, Roper was an independent manufacturer of refrigerators; in its place, Sub-Zero (a current manufacturer of refrigerators) was substituted. In two cases, substitutions were made to broaden the category of household appliances to include computing devices; in those cases, HP and Dell were used in place of appliance makers Gibson and Admiral, which are no longer independent manufacturers.

Finally, the mobile home/RV category had undergone the most change between 1974 and 2012 with only five of the thirteen manufacturers remaining unchanged. Two had merged into other listed manufacturers, and six were no longer operating in the mobile home/RV business. To replace the eight warranties, manufacturers were selected in both the mobile/manufactured home and RV industries, in the same proportions as the old manufacturers. Thus, Excel Homes, Clayton Homes, Fleetwood, Keystone, Tiffin Motorhomes, Gulf Stream Coach, and Jayco were added to the current list. For additional details about

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93. See Tom Morrod, *Vizio Retakes Lead in U.S. LCD TV Market; Samsung Maintains Overall TV Dominance*, NEXTINNOVATOR, (July 12, 2012), <http://nextinnovator.com/index.php?articleID=32132&sectionID=269>; *U.S. Consumer Electronics Sales Reach \$144 Billion in 2011*, NPD GROUP, [https://www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120213/](https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120213/) (last visited Dec. 20, 2014).

which manufacturers replaced those that had merged or left the business, see the Appendix to this article.

## 2. Gathering the Warranties

Once the manufacturers were selected, the next step was contacting the manufacturers or their resellers to get copies of the warranty. The MMWA provides that “[t]he [Federal Trade] Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.”<sup>94</sup> The Commission enacted rules in 1975 (amended in 1987) that require sellers to display the written warranty in close proximity to the product or to furnish it upon request and place attention-getting signs advising the consumer it is available.<sup>95</sup> In theory, then, it should be trivial to enter a manufacturer or dealer sales location, contact them in writing, or visit them on the Internet and get a warranty. In practice, the experience varied widely from simple to maddeningly unsuccessful.

The difficulty in obtaining warranty information tended to vary by product category. Easiest to obtain were automobile and home entertainment warranties. Each of the four home entertainment companies had their warranties on the manufacturer’s website, with the exception (at the time) of Apple; their warranty for specific products had to be obtained either by mail or at an Apple sales location. Automobile warranties were easily found on their manufacturer’s website or by visiting a helpful dealer.

Household appliances were slightly more involved, although only modestly so. Of the nineteen household appliance warranties, fifteen of them were available online. Three of the remaining four were easily obtained by visiting a reseller (Home Depot was particularly accommodating, dispatching a sales staffer to open one of the product’s boxes from the floor, remove the warranty, make photocopies of it, and then return the box to their stock). Only one necessitated correspondence: Dell, who ironically requested that copies of warranties be obtained by mailing the manufacturer via the United States Postal Service.

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94. Magnuson-Moss Act, Pub. L. No. 93-637, § 102(b)(1)(A), 88 Stat. 2183, 2186 (1975) (codified at 15 U.S.C. § 2302(b)(1)(A) (2012)).

95. 16 C.F.R. § 702.3(a) (2012).



Mobile Homes and RVs proved to be the most difficult to obtain. While nearly half of the manufacturers have their warranties on their website, the majority do not. Upon visiting dealers of both RVs and manufactured homes, multiple dealers turned away one author without a copy of the warranty, with the author being told that it was necessary to contact the manufacturer directly. In the case of Tiffin Motorhomes, Commodore, and Excel, warranties eventually were received after visiting multiple dealers in multiple states. Champion Homes never replied to any requests for warranties (via telephone, fax, or regular mail), and their resellers referred all inquiries back to the manufacturer. Ultimately, getting the warranty proved possible only through independently making contact with Champion owners, who searched their records and provided copies of their warranty.

### 3. Warranty Analysis and Quantification

Once obtained, each of the warranties was analyzed in a similar manner. First, the designation of the warranty was established—“full,” “limited,” or “other.” Then, detail about length of coverage and whether the warranty covered both parts and labor was gathered. Next, limitations and disclaimers were reviewed: whether the warranty limited coverage to the original owner, whether the warranty disclaimed implied warranties, and whether the warranty limited consequential damages. Finally, a series of “readability counts” were made, including the number of syllables, the number of words, and the number of sentences. From these readability counts, calculations could be made about the reading level and difficulty of the warranties.

#### *C. Results and Analysis*

Following the format of the original 1980 Commission Report, the results of the analysis focus on the designations of the warranties, the coverage provided, the readability of the written text, the length of the text, and any significant limitations or exclusions.<sup>96</sup> Because the metrics of analysis, categories of warranty—and in many cases, the manufacturers—are the same between this analysis and that of the Commission, a comparison is drawn wherever possible.

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96. IMPACT REPORT, *supra* note 81, at 13–25.

## 1. Designations

Prior to the passage of the MMWA, there were no federal consumer labeling requirements or federal standards for warranties.<sup>97</sup> The Act established standardized designations of “full” and “limited,” requiring manufacturers to assign one or both of these labels to a warranty.<sup>98</sup> A supplier must meet the minimum coverage requirements of § 104 of the MMWA before it can label the warranty as full.<sup>99</sup> The first requirement for full warranties was that they must, “for the time period specified,” give consumers “full remedies.”<sup>100</sup> In this case, a full remedy means giving the consumer a replacement of the product or a refund “if the warrantor has been given a ‘reasonable’ number of attempts to repair the product and the repairs have not been successful,” remedying defects without charge, and remedying defects without charging for transportation or travel.<sup>101</sup> Further, a full warranty may not disclaim the state law implied warranties;<sup>102</sup> limit the duration of implied warranties;<sup>103</sup> require a registration card to prove date of purchase;<sup>104</sup> or “impose any unreasonable duty as a condition of warranty coverage.”<sup>105</sup> While a warranty that is designated as limited need not comply with the § 104 requirements outlined above, a supplier who gives a limited warranty may not disclaim the state law implied warranties.<sup>106</sup>

In the “designations” measure of warranty content, the Bureau measured the changes in warranty designation from “full” to “limited.”<sup>107</sup> The Bureau found that after the Act’s enactment, most warranty designations had either stayed the same or changed from limited to full.<sup>108</sup> Specifically, using the Act’s standards, prior to the enactment of the MMWA, most of the warranties offered were limited (only six of the forty qualified as full).<sup>109</sup> In 1977–78, warranty coverage had increased

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97. *Id.* at 13.

98. Magnuson-Moss Act § 103(a) (codified at 15 U.S.C. § 2303(a)).

99. Magnuson-Moss Act § 103(a)(1) (codified at 15 U.S.C. § 2303(a)(1)).

100. IMPACT REPORT, *supra* note 81, at 13.

101. *Id.*; *see also* Magnuson-Moss Act § 104(a)(1)–(4) (codified at 15 U.S.C. § 2304(a)(1)–(4)).

102. Magnuson-Moss Act §§ 104(a)(2), 108(a) (codified at 15 U.S.C. §§ 2304(a)(2), 2308(a)).

103. *Id.*

104. Magnuson-Moss Act § 104(b)(1) (codified at 15 U.S.C. § 2304(b)(1)).

105. IMPACT REPORT, *supra* note 81, at 13. *See also* Magnuson-Moss Act § 104(b)(1) (codified at 15 U.S.C. § 2304(b)(1)).

106. Magnuson-Moss Act § 108 (codified at 15 U.S.C. § 2308).

107. *See* IMPACT REPORT, *supra* note 81, at 1, 3.

108. *Id.* at 14.

109. *Id.*

because seventeen of the forty warranties qualified as full, with *only two companies* switching from a full warranty designation to a limited warranty designation.<sup>110</sup>

The authors' replicated study demonstrates that not only have full warranty designations dropped below the 1977–78 level, but they have also dropped below the 1974, pre-MMWA, level. Specifically, in the replicated study, only five warranties were designated as full, while thirty-seven were designated as limited. One warranty document carried no designation at all. Note that these numbers exceed the forty warranties because three of the five full warranties carried both a limited and a full designation.

	1977–78 Warranties		2012 Warranties	
<b>Full</b>	17	42.5%	5	12.5%
<b>Limited</b>	23	57.5%	37	92.5%
<b>No Designation</b>	0	0.0%	1	2.5%

Table 1. Full and Limited Designations, 1977–78 vs. 2012.

	Full		Limited		No Designation	
<b>Household Appliances</b>	4	21.1%	18	94.7%	0	0.0%
<b>Mobile Home/RV</b>	1	7.7%	11	84.6%	1	7.7%
<b>Automobiles</b>	0	0.0%	4	100.0%	0	0.0%
<b>Home Entertainment</b>	0	0.0%	4	100.0%	0	0.0%

Table 2. Full and Limited Designations by Industry, 2012.

Because the original Commission Report did not break down the designation data by industry, it is impossible to disaggregate that data longitudinally. The Report does note that fourteen of the nineteen household appliance warranties were full in 1977–78; only four are

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110. *Id.*

today.<sup>111</sup> Across all of the industry categories, there are few full warranties remaining.

## 2. Coverage

The question of warranty coverage encompasses the duration of the warranty, the scope of the warranty (i.e., what parts are covered), and the remedies available under the warranty (i.e., what the warrantor will do if a product is defective—e.g., provide parts only or parts and labor).<sup>112</sup> The Bureau found, in general, that coverage in 1977–78 was at or above 1974 levels.<sup>113</sup> Specifically, fourteen warranties showed an increase in coverage, fifteen showed no change, five showed both an increase in one or more aspects of coverage and a decrease in another aspect or aspects, and six showed a decrease in coverage.<sup>114</sup>

Unfortunately, the original Commission Report reduced the analysis of warranty coverage to a binary question: did the warranty increase coverage or decrease coverage since passage of the Act?<sup>115</sup> Because the underlying detail was excluded, it is impossible to compare this area across the decades. In the authors' analysis, two coverage questions were asked: what is the length of the warranty, and does it cover both parts and labor? In reviewing the results, a third question emerged: is the length "tiered," providing reduced warranted benefits over time? The authors found that most of the 2012 warranties had fairly good coverage. Specific details regarding coverage follow.

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111. *Id.* at 16.

112. *Id.* at 16–17.

113. *Id.*

114. *Id.* at 17–18.

115. *See id.* at 16–17. Note that in the original report, warranties could both increase and decrease coverage if, for instance, an RV maker used to warrant parts-only for the entire RV and subsequently began warranting parts and labor, but only for the chassis. In the original report, these were counted both as having increased and having decreased. *Id.*

	Average Length (in months)	Tiered Warranty?	
		Yes	No
Household Appliances	33	7 36.8%	12 63.2%
Mobile Home/RV	34	5 38.5%	8 61.5%
Automobiles	36	4 100.0%	0 0.0%
Home Entertainment	12	0 0.0%	4 100.0%

Table 3. Warranty Length and Tiering by Industry, 2012.

	Parts	Parts & Labor
Household Appliances	2 10.5%	17 89.5%
Mobile Home/RV	1 7.7%	12 92.3%
Automobiles	0 0.0%	4 100.0%
Home Entertainment	0 0.0%	4 100.0%

Table 4. Coverage of Parts-Only vs. Parts &amp; Labor by Industry, 2012.

As one might suspect, the length of the warranty generally corresponds to the price of the item being warranted—more-expensive items like cars and homes carry longer warranties than less-expensive items like music players and televisions. The large-ticket items (household appliances, mobile home/RV, and automobiles) had an average of three-years duration, while the home entertainment products had an average of one-year duration. Additionally, there are very few warranties in the sample that cover only parts; parts-and-labor coverage is nearly ubiquitous (92.5%). However, over half of the warranties carried the complexity of tiered coverage. These warranties generally classified the coverage chronologically, offering most coverage immediately after purchase and lesser coverage in the months following the sale. This tiering not only adds length to the warranty texts, but also increases its complexity for consumers.

### 3. Readability

As previously indicated, one of the MMWA's strategic purposes was to improve consumer understanding of warranties.<sup>116</sup> Toward that end, the Act requires that a written warranty "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty."<sup>117</sup> Thus, the Bureau and the authors analyzed the readability of the warranties, the "ease with which consumers can read a written text."<sup>118</sup> The Bureau assessed readability by applying the Flesch Reading Ease formula to arrive at a score for each warranty.<sup>119</sup> This scoring formula has been in use since the 1940s, and continues to be in wide use today.<sup>120</sup> In this scale, the higher the number, the easier the text is to read—a score of 90–100 is considered "very easy," while a score below 30 is considered "very difficult."<sup>121</sup> Several states have implemented statutes requiring insurance policies to have a Flesch Reading Ease score of 40 or 45, or greater, to ensure a minimum of readability.<sup>122</sup> The readability analysis performed on 2012 warranties was the same as that done in 1980, so comparison across the decades is possible.

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116. See *supra* notes 35–36 and accompanying text.

117. Magnuson-Moss Act, Pub. L. No. 93-637, § 102(a), 88 Stat. 2183, 2185 (1975) (codified at 15 U.S.C. § 2302(a) (2012)).

118. IMPACT REPORT, *supra* note 81, at 18.

119. *Id.*

120. See generally Rudolf Flesch, *A New Readability Yardstick*, 32 J. APPLIED PSYCHOL. 221 (1948) (detailing formula).

121. IMPACT REPORT, *supra* note 81, at 18.

122. See, e.g., ARK. CODE ANN. § 23-80-206(a)(1) (West 2012); CONN. GEN. STAT. ANN. § 38a-297(a) (West 2012); DEL. CODE. ANN. tit. 18, § 2741(a) (West 2006); FLA. STAT. ANN. § 627.4145(1) (West 2011).

	1974	1977-78	2012
<b>Household Appliances</b>	36	44	31
<b>Mobile Home/RV</b>	20	29	30
<b>Automobiles</b>	32	40	36
<b>Home Entertainment</b>	42	38	29
<b>All Categories</b>	31	38	31

Table 5. Warranty Readability by Industry, 1974 to 2012.  
Higher numbers are more readable.

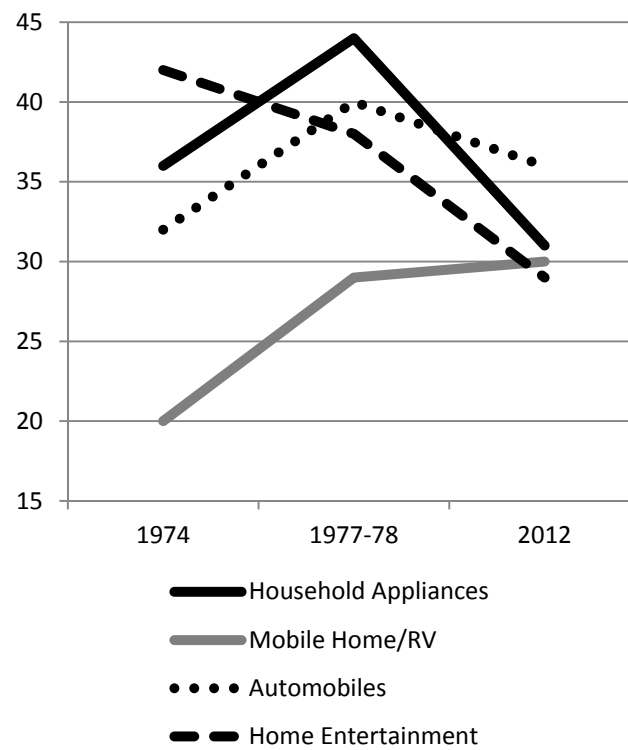


Table 6. Warranty Readability by Industry, 1974 to 2012.  
Higher numbers are more readable.

The Bureau found that the 1977–78 warranties were slightly more readable than the 1974 warranties; however, “most [of the] warranties analyzed [fell] into the category of ‘difficult’ reading, far short of the statute’s standard of ‘simple and readily understood.’”<sup>123</sup> The replicated study found that the average readability level of the warranties has returned to pre-Act levels. However, that aggregation does not tell the whole story. In fact, the variability in warranty readability has also been reduced dramatically over the decades: while the range of Reading Ease scores in 1974 was 22 points (from 20 to 42), the range in 2012 was only 7 points (from 29 to 36).<sup>124</sup> Note that if we exclude Mobile Homes and RVs from the analysis, the average Reading Ease score goes from 36 in 1974 to 43 in 1977–78, to 31 in 2012—a remarkable decline.

Also applicable is a related reading ease formula that uses the same inputs as the Flesch score, converting it into a U.S. grade level. This approach, the Flesch-Kincaid Grade Level formula, nets a number that equates to the number of years of education generally required to understand the text.<sup>125</sup> Applying it to the 2012 warranties, the average Grade Level was as follows: 13.8 for automobiles; 15.6 for home entertainment; 14.7 for household appliances; and 15.0 for mobile homes/RVs. The lowest warranty had a grade level of 10.5, while the highest had a grade level of 19.8, effectively requiring a post-graduate degree to understand.

#### 4. Length of Warranty

As previously indicated, one of Congress’s goals in enacting the MMWA was to enable consumers to differentiate between more or less reliable products.<sup>126</sup> This ability to differentiate would, in turn, lead consumers to purchase the more reliable products and produce economic rewards for the suppliers of such products.<sup>127</sup> In order for the consumer to differentiate, however, the consumer needs to read the warranty. Thus, the Bureau measured the textual length of a warranty because it presumed that this length would influence whether a consumer is likely

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123. IMPACT REPORT, *supra* note 81, at i.

124. *Id.* at 20, tbl. 3.

125. J. PETER KINCAID ET AL., NAVAL TECHNICAL TRAINING COMMAND, DERIVATION OF NEW READABILITY FORMULAS FOR NAVY ENLISTED PERSONNEL ii (1975).

126. *See supra* notes 40–42 and accompanying text; *see also* IMPACT REPORT, *supra* note 81, at 21 (stating that one of Congress’s goals “was to encourage consumers to read and use warranties when shopping for products”).

127. *See supra* note 42 and accompanying text.



to read the warranty completely.<sup>128</sup> The Bureau noted, however, that “longer warranties may also indicate that crucial information left out of earlier warranties was added after the Act and the FTC Rule went into effect.”<sup>129</sup> Further, “[l]onger warranties may also be less ambiguous and make it easier for consumers and servicers to agree upon their meaning when a defect needs repair.”<sup>130</sup>

The Bureau measured length by counting words;<sup>131</sup> this study does as well. While the original report omitted word counts for each individual warranty, it did provide information averaged by product category.<sup>132</sup> Thus, we can compare across years. The Bureau found that warranties in 1977–78 had increased in length over their 1974 counterparts.<sup>133</sup> Further, it found that the Act was partly to blame for the increase because the FTC’s “disclosures required under Rule Sections 701.3(a)(7), (8) and (9) added an average of 44 words, accounting for 71% of the average length increase noted in 1977–78 warranties”<sup>134</sup> and the “step-by-step explanation for warranty service under Section 701.3(a)(5) of the FTC Rule.”<sup>135</sup> However, part of the increase in length also resulted from the language added due to the increased popularity of the exclusion of consequential damages.<sup>136</sup>

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128. IMPACT REPORT, *supra* note 81, at 21.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 22.

133. *See id.* (“Findings show that 33 (83%) of the 40 current warranties increased in length over their 1974 counterparts, while only 7 (17%) decreased.”).

134. *Id.*

135. *Id.*

136. *Id.*

	1974	1977–78	2012
<b>Household Appliances</b>	305	450	1004
<b>Mobile Home/RV</b>	339	489	2676
<b>Automobiles</b>	292	312	2159
<b>Home Entertainment</b>	351	511	1033
<b>All Categories</b>	319	455	1666

Table 7. Average Word Count of Warranties by Industry, 1974 to 2012.

In 2012, as the table above details, the trend is unmistakable: warranties are *several times* longer than they were in 1977–78. The amount of growth ranged from approximately double the length to six times the length; on average, the warranties were over three-and-a-half times as long. Thus, even accounting for the laudable effect of providing crucial information, the increased length is problematic in that consumers are much less likely to read these longer warranties.

##### 5. Significant Limitations, Exclusions, and Disclaimers

The initial Commission Report examining the warranty differences before and after the Act focused on three warranty provisions explicitly addressed in the MMWA: limitation of the warranty to the original owner, disclaimer of implied warranties, and disclaimer of consequential damages.<sup>137</sup> In the 2012 warranty analysis, the same characteristics were examined, while other, more anecdotal characteristics were also noted.

First, the Bureau examined the restriction of warranty protection to the original owner. This was done first because the Act does not allow a supplier who gives a full warranty to restrict the warranty to the original purchaser.<sup>138</sup> In addition, however, even in the case of a limited

137. *Id.* at 23.

138. Magnuson-Moss Act, Pub. L. No. 93-637, § 104(b)(4), 88 Stat. 2183, 2188 (1975) (codified at 15 U.S.C. § 2304(b)(4) (2012)) (“The duties under subsection (a) [of this section] extend from the warrantor to each person who is a consumer with respect to the consumer product.”). Section 101(3) defines “consumer” as including a person to whom the product was transferred.

warranty, the Bureau felt that a limitation to the original purchaser was problematic because it allowed the supplier to escape warranty liability if the consumer product was sold and it prevented the subsequent purchaser from having any assurance of product quality.<sup>139</sup> In 2012, second purchasers of the products studied are more likely to enjoy warranty coverage than they would have in 1974, but less likely than they would have in 1977–78. Specifically, the Bureau found that, in 1974, 43% of the warranties contained a limitation to the original purchaser.<sup>140</sup> In contrast, in 1977–78, only 23% of the warranties had such a limitation.<sup>141</sup> In 2012, this proportion increased to approximately 35%. Further, three additional 2012 warranties shorten coverage for subsequent owners, and two allow for subsequent ownership coverage only if the transfer is approved in writing by the manufacturer and, in one case, a \$250 fee is paid.

	1974	1977–78	2012
<b>Household Appliances</b>	7 36.8%	2 10.5%	5 26.3%
<b>Mobile Home/RV</b>	7 53.8%	5 38.5%	6 46.2%
<b>Automobiles</b>	0 0.0%	0 0.0%	0 0.0%
<b>Home Entertainment</b>	3 75.0%	2 50.0%	3 75.0%
<b>All Categories</b>	17 42.5%	9 22.5%	14 35.0%

Table 8. Warranties Limited to Original Owner by Industry, 1974 to 2012.

The second area of examination is the disclaimer of implied warranties. As previously explained, Congress believed that, in order to ensure basic warranty protection for consumers, the Act needed to prohibit a supplier from disclaiming the state law implied warranties

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Magnuson-Moss Act § 101(3) (codified at 15 U.S.C. § 2301(3)).

139. See IMPACT REPORT, *supra* note 81, at 23.

140. *Id.*

141. *Id.*

when that supplier gave a written warranty.<sup>142</sup> Thus, § 108(a) provides that:

[n]o supplier may disclaim . . . any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.<sup>143</sup>

This prohibition applies to both full and limited warranties.<sup>144</sup> Further, any such disclaimer made in violation of the MMWA is ineffective for purposes of the MMWA and state law.<sup>145</sup> In 1974, 55% of the pre-Act warranties carried disclaimers of the implied warranties, while only 5% (two warranties) had this language in 1977–78.<sup>146</sup> The 2012 warranty analysis shows that the disclaimer of implied warranty is returning to consumer warranties, despite its prohibition by the MMWA: 32.5% of the warranties included the language.<sup>147</sup> Most of these were in the mobile home/RV (46% of warranties carried the disclaimer) and household appliance (31% carried the disclaimer) industries.

	1974	1977–78	2012
<b>Disclaimed Implied Warranty</b>	22 55.0%	2 5.0%	13 32.5%

Table 9. Warranties Disclaiming Implied Warranties, 1974 to 2012.

Finally, the Commission examined the exclusion of consequential damages, which are allowable under the MMWA if they are clearly and

142. S. REP. NO. 93-151, at 7 (1973); H.R. REP. NO. 93-1107, at 29 (1974), *reprinted in* 1974 U.S.C.A.N. 7702, 1974 WL 11709 (stating a need for “safeguards against the disclaimer or modification of the implied warranties of merchantability and fitness on consumer products where a written warranty is given with respect thereto”).

143. Magnuson-Moss Act § 108(a) (codified at 15 U.S.C. § 2308(a)).

144. *Id.*

145. Magnuson-Moss Act § 108(c) (codified at 15 U.S.C. § 2308(c)).

146. IMPACT REPORT, *supra* note 81, at 24.

147. To compound the problem, there are some courts that fail to recognize that a disclaimer of an implied warranty is ineffective if a written warranty or service contract is given. *See, e.g.,* Zanger v. Gulf Stream Coach, Inc., No. 05-CV-72300-DT, 2005 WL 3163392, at \*7 (E.D. Mich. Nov. 28, 2005) (allowing disclaimer of implied warranties even when a written warranty was given); Prousi v. Cruisers Div. of KCS Int’l, Inc., 975 F. Supp. 768, 774 (E.D. Pa. 1997) (same), *vacated*, No. Civ.A. 95-6652, 1999 WL 551359 (E.D. Pa. June 30, 1999).

conspicuously disclosed in the warranty.<sup>148</sup> The replicated study indicates that the rise in the exclusion of consequential damages that began after the Act's enactment has continued. Thus, most warranties significantly reduce the damages that a consumer can recover.<sup>149</sup> From 1974 to 1977–78, the Commission noted an increase in the exclusion of consequential damages, from 45% to nearly 73%, with the greatest increase occurring in the household appliance group.<sup>150</sup> In 2012, the proportion was higher: almost all warranties, 95%, disclaimed consequential damages.

	1974	1977–78	2012
<b>Excluded Consequential Damages</b>	18 45.0%	29 72.5%	38 95.0%

Table 10. Warranties Excluding Consequential Damages, 1974 to 2012.

Beyond these quantifiable characteristics, some of the 2012 warranties also carried additional notable attributes. One of the home entertainment warranties, for example, requires the consumer to pay for shipping the item one-way back to the manufacturer. One of the mobile home/RV companies provides a short warranty—unless the consumer agrees to binding arbitration and no lawsuits, in which case the length is extended. Two other mobile home/RV manufacturers require the consumer to pay a fee for any warranty claim, and also force arbitration with no avenue for appeal.

## 6. Analytical Summary

Based on comparing the results from 1977–78 and 2012, it is clear

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148. IMPACT REPORT, *supra* note 81, at 25. Although the statutory language that requires conspicuous notation of the consequential damages limitation only applies to full warranties, *see* Magnuson-Moss Act § 104(a)(3) (codified at 15 U.S.C. § 2304(a)(3)), the MMWA regulations extend the requirement to limited warranties where the consumer product costs more than \$15. *See* 16 C.F.R. § 701.3(a)(8) (2012) (“Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than \$15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information: . . . [a]ny exclusions of or limitations on relief such as incidental or consequential damages . . .”).

149. It should be noted that the reduction is mainly relevant to the recovery of property damage caused by defective products because U.C.C. § 2-719(3) provides that a limitation on the recovery of personal injury damages for defective consumer products is *per se* unconscionable. U.C.C. § 2-719(3) (2013).

150. IMPACT REPORT, *supra* note 81, at 25.

that warranties have become significantly less consumer-friendly over that period. From a readability and consumer understanding standpoint, the differences are staggering: warranties are nearly three-times longer on average, and most require some college education to understand. This comes at a time when 42.7% of Americans aged twenty-five and over have never attended college.<sup>151</sup> Further, the protections afforded by consumer warranties have also shrunk. Fewer warranties are designated as full, and the vast majority exclude consequential damages. A third of consumer warranties disclaim implied warranties—a disclaimer that is unlawful under the MMWA!<sup>152</sup> More warranties today limit their coverage to the original owner of the product, and many offer tiered coverage, reducing protections over the life of the warranty.

While in some cases, consumer warranty protections are not as inadequate as they were before the passage of the Act, the trend is moving in that direction. In terms of readability, however, the situation is actually worse than in 1975: warranties are longer and generally more difficult to parse than at the time of the MMWA's enactment.

#### IV. LACK OF ENFORCEMENT OF THE MMWA PROVISIONS

As the above evidence demonstrates, many suppliers are violating the MMWA. The FTC is not, however, actively pursuing these violators. Further, consumer suits are not discouraging violators. Thus, in addition to failing to achieve its first purpose of promoting consumer understanding and its second purpose of providing consumers with basic protection, the MMWA also is failing to achieve its third purpose of making the FTC more effective so that it can improve the position of the consumer in the marketplace, as well as its fourth purpose of enabling the consumer to pursue his own remedies against a MMWA violator.

##### *A. Generally*

In attempting to achieve the third strategic purpose, Title II of the MMWA granted the Commission the power to “seek either a preliminary or permanent injunction against parties committing acts or practices which are unfair or deceptive to consumers”,<sup>153</sup> “assess civil penalties

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151. *Educational Attainment in the United States: 2012—Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (last visited Dec. 20, 2014).

152. Magnuson-Moss Act § 108(a) (codified at 15 U.S.C. § 2308(a)).

153. S. REP. NO. 93-151, at 3 (1973); *see also* 15 U.S.C. § 45(b) (2012).

(up to \$10,000 per violation) against those suppliers of consumer products who knowingly commit unfair or deceptive acts or practices in violation of Section 5(a) (1) [sic] of the Federal Trade Commission Act<sup>154</sup>; and “initiate civil actions in United States district court seeking reasonable and appropriate consumer redress” as a remedy for “consumer injury resulting from violations of the Federal Trade Commission Act.”<sup>155</sup> Although redress under this latter provision does not include exemplary or punitive damages, relief includes “recission [sic], reformation, refunding of money, return of property, or other appropriate relief for those injured by an unfair or deceptive act or practice.”<sup>156</sup> All of these powers granted to the FTC apply to violations of the MMWA because any violation of the MMWA is a violation of the Federal Trade Commission Act.<sup>157</sup>

In spite of this significant expansion of the FTC’s power, in recent years, the FTC has not utilized this power to prosecute the MMWA violations identified above in section III.C.5.<sup>158</sup> In the past, the FTC did use its expanded powers to hold MMWA violators accountable. In fact, between the years 1979 and 1999, the FTC issued at least twenty-three cease-and-desist orders against twenty-two different manufacturers for violations of the MMWA.<sup>159</sup> For example, in 1998, the FTC brought suit against Gateway 2000 for misleading warranty claims and disclaiming

154. S. REP. NO. 93-151, at 3; *see also* 15 U.S.C. § 45(m)(1)(A).

155. S. REP. NO. 93-151, at 3; *see also* 15 U.S.C. § 57b.

156. S. REP. NO. 93-151, at 3; *see also* 15 U.S.C. § 57b(b).

157. Magnuson-Moss Act § 110(b) (codified at 15 U.S.C. § 2310(b)) (“It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act . . . for any person to fail to comply with any requirement imposed on such person by this title (or a rule thereunder) or to violate any prohibition contained in this title (or a rule thereunder).”).

158. The FTC’s ongoing docket is available at: *Cases and Proceedings*, FEDERAL TRADE COMMISSION, <http://ftc.gov/os/adjpro/index.shtml> (last visited Dec. 20, 2014). Actions seem to drag on for years at a time, and generally end not with an adjudication *per se*, but rather a consent order.

159. *See, e.g., In re Tiger Direct, Inc.*, 128 F.T.C. 517 (1999); *In re Gateway 2000, Inc.*, 126 F.T.C. 888 (1998); *In re Rustevader Corp.*, 122 F.T.C. 359 (1996); *In re Macy’s N.E., Inc.*, 118 F.T.C. 643 (1994); *In re Sears, Roebuck & Co.*, 118 F.T.C. 655 (1993); *In re Montgomery Ward & Co.*, No. 932 3116, 1994 WL 287594 (Apr. 22, 1994); *In re Circuit City Stores, Inc.*, 115 F.T.C. 695 (1992); *In re The Good Guys, Inc.*, 115 F.T.C. 670 (1992); *In re Nobody Beats The Wiz, Inc.*, 114 F.T.C. 278 (1990); *In re Jeep Eagle Corp.*, 113 F.T.C. 792 (1990); *In re Craftmatic/Contour Org., Inc.*, 105 F.T.C. 366 (1985); *In re Peabody Barnes, Inc.*, 104 F.T.C. 503 (1983); *In re Centurion Int’l, Inc.*, 103 F.T.C. 84 (1984); *In re Worthington Ford of Alaska, Inc.*, 98 F.T.C. 895 (1981); *In re Montgomery Ward & Co.*, 97 F.T.C. 363 (1981), *vacated*, *Montgomery Ward & Co., Inc. v. Fed. Trade Comm’n*, 691 F.2d 1322 (9th Cir. 1982); *In re Bob Rice Ford, Inc.*, 96 F.T.C. 18 (1980); *In re Nolan’s R.V. Ctr., Inc.*, 95 F.T.C. 294 (1980); *In re George’s Radio and Television Co.*, 94 F.T.C. 1135 (1979); *In re Corvette’s, Inc.*, 94 F.T.C. 318 (1979); *In re Woodland Mobile Homes, Inc.*, 94 F.T.C. 290 (1979); *In re Arnaudville Indus., Inc.*, 93 F.T.C. 1061 (1979); *In re Madison Mobile-Modular Homes, Inc.*, 93 F.T.C. 1068 (1979); *In re Renault U.S.A., Inc.*, 93 F.T.C. 905 (1979).

the implied warranty.<sup>160</sup> In addition, a couple of decades earlier, around the time of the MMWA enactment, the FTC went after a mobile home manufacturer that had a mid-1970s warranty that the FTC deemed, in 1978, to be unlawful post-MMWA.<sup>161</sup> Consequently, the FTC issued a permanent injunction against using the warranty and ordered the manufacturer to communicate with the prior purchasers to tell them of the correct warranty terms.<sup>162</sup> The manufacturer sued, and the district court (later affirmed by the Fourth Circuit) ruled that both the permanent injunction and the compulsory notification were within the FTC's jurisdiction.<sup>163</sup>

In recent years, however, despite a fairly extensive docket, the FTC has not pursued a MMWA violation since the *Tiger Direct*<sup>164</sup> case in 1999—nearly fifteen years ago.<sup>165</sup> In addition, apart from a nearly \$300,000 fine imposed on Gateway, even when the FTC was pursuing MMWA violations, it did not exhort penalties from the violators.<sup>166</sup> Thus, compliance with the MMWA need not even be on corporate radar screens.

### B. Private Enforcement

In addition to a lack of enforcement by the FTC, consumers are not utilizing the private redress provisions of the MMWA to hold suppliers accountable for the violations of the Act. As outlined previously, § 2310(d) provides for a federal cause of action for a consumer who is

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160. *In re Gateway 2000, Inc.*, 126 F.T.C. 888 (1998). In a consent order, Gateway agreed to pay nearly \$300,000 to the FTC. *Id.* at 905. An excerpt from a FTC news release at the time provided: "A final order with Gateway 2000 requires the company to pay \$290,000 to settle FTC charges that Gateway made false and misleading statements in advertising its refund policy and misleading claims about its on-site warranty service. The Commission required that the money be paid to the U.S. Treasury because individual consumers who should have received a refund could not be identified." *Announced Actions for January 7, 1999*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/news-events/press-releases/1999/01/announced-actions-january-7-1999> (last visited Dec. 20, 2014).

161. *Fed. Trade Comm'n v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 53 (D. Md. 1981), *aff'd*, *Fed. Trade Comm'n v. Virginia Homes Mfg. Corp.*, 661 F.2d 920 (4th Cir. 1981).

162. *Id.* at 53, 59.

163. *Id.*

164. 128 F.T.C. 517 (1999).

165. *Id.* To reach this conclusion, the authors reviewed all of the 823 case entries on the FTC webpage from November 1999 through February 2014. See *Cases and Proceedings*, *supra* note 158. Further, the authors reviewed the 104 cases involving the MMWA found on the Westlaw Federal Antitrust & Trade Regulation—Federal Trade Commission Decisions database, and the 589 cases found on the Westlaw Federal Antitrust & Trade Regulation—Federal Cases database.

166. See *supra* note 158–59 and accompanying text. Only *Gateway* involved a penalty.



injured by a supplier, warrantor or service contractor's, *inter alia*, failure to comply with any MMWA obligation.<sup>167</sup> Recognizing that such consumer actions may involve small amounts, § 2310(d) also provides for the award of attorneys' fees and costs to a prevailing consumer.<sup>168</sup> However, the authors' research demonstrates that relatively few consumers are taking advantage of the MMWA private redress provisions.<sup>169</sup>

The first area of research that the authors conducted was to examine all of the reported and available unreported state MMWA claims and federal appeals court cases for the past ten years. The authors also examined the federal district court cases for 2013 and 2014. This research revealed that very few of the cases sued for a violation of a substantive MMWA provision. The research in this area was challenging because although a complaint might allege a violation of the MMWA, in many cases, what was actually being alleged was a breach of warranty under the MMWA. Further, not every case contained details as to the nature of the violation alleged. Thus, if the complaint alleged a violation of the MMWA and the authors found no mention of a breach of warranty under the MMWA, they treated the case as a violation of a substantive provision of the MMWA. Utilizing this method (which is likely to over-count substantive violations), the authors found that, of the approximately one hundred ninety-five reported state cases that mentioned a MMWA claim, only approximately fifty-three indicated suit for a violation of the MMWA, and in only two cases could the authors ascertain an alleged violation of a substantive MMWA provision.<sup>170</sup> In addition, in the forty-seven federal appeals court cases and the forty-two district court cases, the authors found only twelve circuit court cases and eight district court cases that seemed to allege a substantive violation rather than a breach of warranty. That number is likely even smaller, however, because in only five of the circuit cases and two of the district court cases were the authors able to find language demonstrating an allegation of a violation of a substantive MMWA provision.

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167. 15 U.S.C. § 2310(d)(1) (2012).

168. 15 U.S.C. § 2310(d)(2).

169. For example, although the authors' research revealed that consumers brought approximately 562 breach-of-warranty cases involving consumer goods in the past ten years, only 165 of those cases included a MMWA claim.

170. Of the approximately one hundred ninety unreported state cases in the past ten years that mentioned a MMWA claim, approximately forty-two seemed to involve a violation, however, in only about six of the cases could the authors find an alleged violation of a substantive MMWA provision.

The authors surmised, however, that this dearth of cases might be due to the fact that consumers were not bringing the cases to court, but were instead pursuing arbitration and going through other informal dispute resolution mechanisms. Unfortunately, this supposition regarding arbitration cannot be either corroborated or refuted by researching the number or substance of commercial law cases that go to arbitration because databases for such research do not exist.

However, in an interview with Scott Cohen of Krohn & Moss, a consumer law attorney with seventeen years of experience who manages all appeals cases for his firm, we learned that Mr. Cohen does not believe that arbitration is the reason for the low number of MMWA cases.<sup>171</sup> Mr. Cohen says this for two reasons. First, most consumer lawyers will fight arbitration because it is their belief that arbitration generally does not serve the needs of the consumer.<sup>172</sup> Thus, even if a case ultimately goes to arbitration, there usually is a court record of the case. Mr. Cohen's second basis for his belief is that, in his experience, many law firms do not know about the MMWA and thus do not sue for either MMWA violations or breach of warranty or service contract under the Act.<sup>173</sup> He cites as an example the state of California where, when Mr. Cohen's firm first started bringing complaints in the state, he discovered that most consumer complaints for automobiles were brought under California's lemon law (the Song-Beverly Consumer Warranty Act),<sup>174</sup> but not under the MMWA.<sup>175</sup>

Mr. Cohen's statement regarding attorneys' lack of knowledge is buttressed by the authors' research that demonstrates that although each state's lemon law varies, all states have them<sup>176</sup>—yet, in California, for example, while approximately 323 cases were brought under the Song-Beverly Consumer Warranty Act, only 114 of the cases included a MMWA claim.<sup>177</sup> One might argue that this finding is due to the superiority of the lemon law cause of action; however, this position is belied by comparing the requirements of most lemon laws to the

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171. Interview with Scott M. Cohen, Attorney, Krohn & Moss (July 11, 2013).

172. *Id.*

173. *Id.*

174. CAL. CIV. CODE § 1790 (West 2009).

175. Interview with Scott M. Cohen, *supra* note 171.

176. See *Learn More About State Lemon Laws*, COUNCIL OF BETTER BUSINESS BUREAUS, <http://www.bbb.org/council/programs-services/dispute-handling-and-resolution/bbb-auto-line/learn-more-about-state-lemon-laws/> (last visited Dec. 20, 2014) (providing links to Lemon Laws for all fifty states plus the District of Columbia).

177. The authors conducted a search of all Song-Beverly cases from 2003 to 2013 and obtained this data.

MMWA. For example, while a lemon law claim generally requires that the defect complained of substantially impairs the value of the automobile, a claim for breach of warranty under the MMWA does *not* require substantial impairment.<sup>178</sup> In addition, if the lemon law requires a breach of the UCC express warranty, it generally encompasses a narrower range of breaches than the MMWA breach of written warranty.<sup>179</sup> Finally, although the MMWA prohibits the disclaimer of the UCC implied warranties if a supplier gives a written warranty, if a supplier gives an express warranty under the UCC, that supplier can disclaim the UCC implied warranties so long as the supplier follows the fairly simple requirements of UCC § 2-316.<sup>180</sup> Specifically, to disclaim the implied warranty of merchantability, the supplier must simply use the phrase “as is” or something similar,<sup>181</sup> or mention merchantability in the disclaimer and, if the disclaimer is in writing, make the disclaimer conspicuous.<sup>182</sup> To disclaim the implied warranty of fitness for a particular purpose, the supplier must use the phrase “as is” or something similar,<sup>183</sup> or disclaim the warranty with a conspicuous writing.<sup>184</sup> Thus, a consumer suing under the MMWA, as opposed to a state law claim, may bring suit on an implied warranty that has purportedly been disclaimed.

Despite this anecdotal evidence, it is possible that consumers are pursuing MMWA claims in large numbers, but are doing so through arbitration. While such may be beneficial in terms of compensation for the consumer, it does not serve to dissuade suppliers from violating the MMWA because the arbitration of most commercial law claims is done in secret.<sup>185</sup> Thus, arbitration does not provide feedback to either

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178. Interview with Scott M. Cohen, *supra* note 171.

179. *Id.*

180. See U.C.C. § 2-316 (2012).

181. U.C.C. § 2-316(3)(a).

182. U.C.C. § 2-316(2).

183. U.C.C. § 2-316(3)(a).

184. U.C.C. § 2-316(2).

185. Interview with Samantha Zyontz, Doctoral Candidate, MIT Sloan School of Management (July 2013). In the conversation concerning an article that she co-wrote with University of Kansas Law Professor Christopher Drahozal, Zyontz explained that she and Drahozal had to sign a confidentiality agreement before being allowed access to the arbitration cases that they researched for the article. The article is Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010). Further, Professor Drahozal states that it is difficult to obtain data on arbitrations because, unlike court cases, arbitrations are secret. Christopher R. Drahozal, John M. Rounds Professor of Law and Associate Dean for Research and Faculty Development, University of Kansas School of Law, Lecture on Consumer Arbitrations Before the American Arbitration Association, available at <http://www.youtube.com/watch?v=AdRUgomaFss>. For a broader look at secrecy and privacy in

regulators or manufacturers about what is in and out of bounds, and by operating so confidentially, it removes the disincentive for manufacturers to comply with the Act. If suppliers violate the Act and they get caught, no one is the wiser because the suppliers take the case to binding secret arbitration.

## V. RECOMMENDATIONS FOR ADDRESSING THE IDENTIFIED PROBLEMS

The above research demonstrates that, to varying degrees, none of the four purposes of the MMWA are being fully realized. To help improve consumer understanding of current warranties, this article proposes that the FTC promulgate new readability regulations; require the use of a new, standardized, warranty display; and launch an education campaign to educate consumers regarding the warranty display. In addition, to alleviate the lack of enforcement of the MMWA, this article provides ideas on how to educate both consumers and attorneys regarding the availability of the MMWA actions, suggests a way to increase FTC enforcement of the MMWA, and proposes a slight modification of the Act to buttress private enforcement.

### A. *Improve Consumer Understanding*

Over the last few decades, the content and length of warranties has not only reverted to the levels seen prior to enactment of the MMWA, but has gotten worse.<sup>186</sup> Additional mechanisms are needed, then, to help consumers understand warranties and compare warranty protections across multiple products. To provide this assistance, the authors recommend new readability regulations and a new, standardized, warranty display.

#### 1. Readability Law

To redress the problem of consumers not understanding the warranties that they are receiving—and the limitations therein—the language used needs to be accessible to the average consumer. The FTC

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arbitration, see Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006).

186. See *supra* Part III.C.

attempted to address this problem via 16 C.F.R. § 701.3(a), requiring that “[a]ny warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than \$15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information . . . .”<sup>187</sup> However, a more concrete approach can be found in the readability score requirements in several states’ insurance statutes.<sup>188</sup> If it so chose, the FTC could add this requirement to 16 C.F.R. § 701.3(a).

State readability laws largely rely on the same measurement, the Flesch Reading Ease test.<sup>189</sup> Developed by Rudolf Flesch in 1948, the rating focuses primarily on average sentence length and average word length.<sup>190</sup> Higher scores indicate material that is easier to read; within the 30–49 range, material is considered “difficult,” while scores 70 or above are “fairly easy,” “easy,” or “very easy.”<sup>191</sup> In addition to state usage, the U.S. Department of Defense uses a similar measurement for the text of department manuals.<sup>192</sup>

The authors propose that the regulations set the reading score threshold at 45. While this score places the content within the difficult range, it does roughly correspond to a high-school-graduate’s reading level.<sup>193</sup> Of a handful of state insurance readability statutes surveyed, some put the threshold at 40 while others place it at 45,<sup>194</sup> so this level is comparable to other, similar documents. Further, note that the study of current warranties found that most carry a reading score in the low 30s.<sup>195</sup> Setting a threshold of 45 would dramatically improve consumers’ ability to understand the parameters of their warranties.

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187. 16 C.F.R. § 701.3(a) (2012).

188. *See, e.g.*, ARK. CODE ANN. § 23-80-206(a)(1) (West 2012); CONN. GEN. STAT. ANN. § 38a-297(a) (West 2012); DEL. CODE. ANN. tit. 18, § 2741(a) (West 2006); FLA. STAT. ANN. § 627.4145(1) (West 2011).

189. *See, e.g., id.*

190. Flesch, *supra* note 120, at 228–30.

191. *Id.* at 230 tbl. 5.

192. DEP’T OF DEF., STANDARD PRACTICE FOR MANUALS, TECHNICAL: GENERAL STYLE AND FORMAL REQUIREMENTS § 4.3.3. (1995).

193. Flesch, *supra* note 120, at 225. A grade-level formula that allows for some comparison and analysis is the Flesch-Kincaid Grade Level test, also co-developed by Rudolf Flesch. For more information, *see generally* KINCAID ET AL., *supra* note 125.

194. *See supra* note 188.

195. *See supra* Part III.C.3.

## 2. Uniformity of Displaying Standard Warranty Terms

As initially enacted, the MMWA sought to create uniformity among written warranties by standardizing their designations as full or limited.<sup>196</sup> “Full” warranties are those that meet the minimum warranty standards, while “limited” warranties do not.<sup>197</sup> Given that less than 15% of the contemporary warranties examined had any portion that was full, however, that distinction is no longer as illustrative as it once was.<sup>198</sup> An analog to this evolution can be found in food labeling. In 1966, the Fair Packaging and Labeling Act established basic disclosure rules for food items.<sup>199</sup> Under the legislation, labels were required to state the product’s identity, where it was made (and by whom), and the net quantity of the contents.<sup>200</sup> Over the ensuing decades, however, marketers followed the law while adding confusion (e.g., making nutrient claims like “light” and “low fat”).<sup>201</sup>

To address this return to consumer confusion, Congress passed the Nutrition Labeling and Education Act in 1990, nearly 25 years later.<sup>202</sup> In addition to enabling new standards for health and nutrition claims, this law required that almost all foods bear a unified “Nutrition Facts” label with a standard set of informational elements.<sup>203</sup> The result is a box now familiar to most Americans:

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196. 15 U.S.C. § 2303(a) (2012).

197. *Id.*

198. *See supra* Part III.C.1.

199. 15 U.S.C. §§ 1451–1461 (2012).

200. 15 U.S.C. § 1453(a).

201. *See, e.g.,* Bruce A. Silverglade, *The Nutrition Labeling and Education Act—Progress to Date and Challenges for the Future*, 15 J. PUB. POL’Y & MARKETING 148, 148 (1996) (“The mandate for the FDA’s new regulations came on the heels of a decade of misleading claims for products ranging from ‘light’ cheesecake that had more fat and as many calories per serving as traditional cheesecake to high fiber breakfast cereals promoted as the newest miracle weapon in the fight against cancer.”).

202. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified at 21 U.S.C. § 343 (2012)).

203. *Id.*

Nutrition Facts		
Serving Size 1 Cup (35g)		
Servings Per Container 10		
Amount	with	
Per Serving	Cereal	1/2 cup Skim milk
Calories	130	170
Calories from Fat	0	0
% Daily Value**		
Total Fat 0g*	0%	0%
Saturated Fat 0g	0%	0%
Trans Fat 0g		
Cholesterol 0mg	0%	0%
Sodium 200mg	8%	11%
Total Carbohydrate 30g	10%	12%
Dietary Fiber 4g	16%	16%
Sugars 18g		
Protein 3g		
Vitamin A	25%	25%
Vitamin C	25%	25%
Calcium	0%	15%
Iron	10%	10%
* Amount in cereal. One half cup skim milk contributes an additional 40 calories, 65mg sodium, 6g total carbohydrate (6g sugars), and 4g protein.		
**Percent Daily Values are based on a 2,000 calorie diet. Your Daily Values may be higher or lower depending on your calorie needs:		
	Calories:	2,000    2,500
Total Fat	Less than	65g    80g
Sat Fat	Less than	20g    25g
Cholesterol	Less than	300mg    300mg
Sodium	Less than	2,400mg    2,400mg
Total Carbohydrate		300g    375g
Dietary Fiber		25g    30g
Calories per gram:		
Fat 9 • Carbohydrate 4 • Protein 4		

204

With the increased ubiquity of limited warranties, a similar, standardized consumer information mechanism is needed. This mechanism would provide the means for a consumer to easily compare product warranties on some of the key terms included under the MMWA. Drawing from the law and its supporting regulations, the information includes when the warranty starts, what is covered and the term of coverage, who pays for service and shipping, whether the warranty is transferable, and whether the dealer provides the service.<sup>205</sup>

Less than a dozen key elements are featured so as not to overwhelm the consumer. Additionally, the proposed box does not include

204. U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: A FOOD LABELING GUIDE 42 (2013), available at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm> (follow “English PDF, 990KB” hyperlink). Note that in February 2014, the FDA announced rulemaking to refine the typography and layout of the box, although the overall look remains relatively unchanged. *FDA News Release: FDA Proposes Updates to Nutrition Facts Label on Food Packages*, U.S. FOOD & DRUG ADMIN. (Feb. 27, 2014), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm387418.htm>.

205. These elements were drawn from, among other sections, 16 C.F.R. § 701.3 (2012).

information about disclaimer of implied warranty because—though forbidden by law—its inclusion may encourage warrantors to discourage claims by incorrectly showing such claims as disallowed. Using a similar format as the Nutrition Facts box above, a corresponding Warranty Facts box could look like:

<b>Warranty Facts</b>		
<b>Type:</b> Limited Warranty		
<b>Starts:</b> When consumer takes possession		
<b>What's Covered</b>	<b>Duration</b>	
Materials/Construction	1 year/12,000 miles	
Structural Defects	2 years/24,000 miles	
<hr/>		
	<b>Yes</b>	<b>No</b>
Warrantor pays for service?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Warrantor pays shipping costs?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Transferable to next owner?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Service provided by dealer?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Service provided without registration card?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<hr/>		
Read full warranty document carefully. Under state and federal law, "implied warranties" may give you additional rights.		

The binary boxes (entitled "Yes" and "No") on the proposed label are structured so that any item marked "No" provides less coverage than one marked "Yes." This allows a consumer to easily scan the checkboxes and determine the relative merit of these warranty terms, without parsing an extended text or needing to open a product's packaging to find a warranty booklet. Such a box would once again help consumers easily compare potential purchases based on the strength of their warranties.



*B. Consumer and Attorney Education*

Once the FTC has enacted the regulations above concerning the warranty box, it will need to run a consumer education campaign. The FTC can fund this campaign using the penalties and fines mentioned in Part V.C.<sup>206</sup> Once the campaign is funded, the FTC can run educational advertisements with catchy slogans. For example, “Check the Chart” may prompt consumers to make sure to examine the new warranty box to review the protections provided.

In addition to educating consumers about the new warranty box, the FTC can also educate consumers and attorneys as to consumers’ private enforcement rights under the MMWA and the availability of attorneys’ fees. Such education is needed because, as demonstrated in Part III, consumers are not pursuing MMWA claims as vigorously as one might suppose, given the widespread MMWA violations. In addition to encouraging the FTC to act, the authors will contribute to the education enterprise by condensing this article down to a trade article and forwarding the article to the FTC and other entities that are concerned with consumer protection. The trade article will alert the FTC to the existing violations, and will alert the other entities to the availability of MMWA actions and the advantage of pursuing such actions.

Further, although the FTC educates suppliers as to the requirements of the MMWA,<sup>207</sup> we believe that the FTC should also educate three additional groups: law school legal clinics, private attorneys, and state attorneys general. Again, the money to finance this educational effort would come from the fees that the authors have suggested that Congress appropriate to the FTC.<sup>208</sup>

The consumer law clinics of law schools are prime candidates for having the manpower and the desire to pursue MMWA actions. In addition, pursuing MMWA actions will benefit the clinics in that the cases will bring in attorneys’ fees that will help the clinics to continue pursuing their mission. Further, the cases are also generally small and fairly simple, enabling students to begin and start a case during the course of their experience. The belief that law schools might not be doing this is suggested by the fact that none of the legal clinics at the

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206. *See infra* Part V.C.

207. *Businessperson’s Guide to Federal Warranty Law*, BUREAU OF CONSUMER PROT., <http://www.business.ftc.gov/documents/bus01-businesspersons-guide-federal-warranty-law> (last visited Dec. 20, 2014).

208. *See infra* Part V.C.

three Oregon law schools are pursuing MMWA actions as a part of their caseload.<sup>209</sup> Those cases that are more complicated or that involve large numbers of consumers should likely be brought by a private law firm or a state attorney general.

### C. Increased FTC Enforcement

The growth in MMWA compliance issues in the decades since the law's passage corresponds with a reduction in enforcement by the FTC.<sup>210</sup> The first recommendation, then, is to increase the level of enforcement by the FTC of the Act's provisions.

Under the MMWA, the FTC has broad enforcement powers. The Commission is empowered to seek injunctive relief for deceptive warranty actions, as well as for any violation of the Act itself.<sup>211</sup> Further, the FTC Act grants that body broad enforcement powers to combat "unfair or deceptive acts or practices in or affecting commerce."<sup>212</sup> The limitations on administrative enforcement of the MMWA, then, are not matters of statutory authority. Rather, they appear to be initiated by limited funding and a shift in agency focus.

Although the federal discretionary budget and the FTC's resources both shrank after 1979, the federal discretionary budget has rebounded. Thus, this article suggests that more funds need to be allocated to the FTC, given the immense scope of the agency's responsibilities. In 1979, only a few years after the MMWA was enacted, the FTC had a staff of 1,746 full-time equivalent (FTE) employees.<sup>213</sup> In that same year, overall federal discretionary spending (excluding defense) was approximately \$400 billion (inflation-adjusted).<sup>214</sup> Ten years later, the FTC's staff had shrunk by nearly half, to 894 FTE employees.<sup>215</sup> Overall

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209. *Clinical Practice Areas*, WILLAMETTE U. C. L., <https://willamette.edu/wucl/centers/clp/clinics/index.html> (last visited Dec. 20, 2014); *Clinics and Externships*, OR. L., <http://law.uoregon.edu/clinics-externships/clinics/> (last visited Dec. 20, 2014); *Lewis & Clark Legal Clinic*, LEWIS & CLARK L. SCH., [https://law.lclark.edu/clinics/legal\\_clinic/](https://law.lclark.edu/clinics/legal_clinic/) (last visited Dec. 20, 2014).

210. See *supra* Part IV.A.

211. 15 U.S.C. § 2310(c) (2012).

212. 15 U.S.C. § 45(a)(1)–(2), (c).

213. FED. TRADE COMM'N, FISCAL YEAR 2014 CONGRESSIONAL BUDGET JUSTIFICATION 35 (2013) [hereinafter CONGRESSIONAL BUDGET JUSTIFICATION], available at <http://www.ftc.gov/reports/fy-2014-congressional-budget-justification> (follow "FY 2014 Congressional Budget Justification (4.78 MB)" hyperlink).

214. D. ANDREW AUSTIN, CONG. RESEARCH SERV., TRENDS IN DISCRETIONARY SPENDING 22 fig.3 (2014), available at <http://fas.org/sgp/crs/misc/RL34424.pdf>.

215. CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 213, at 35.

federal discretionary (non-defense) spending had shrunk as well, down to approximately \$285 billion.<sup>216</sup> In the twenty-five years since, however, the federal discretionary budget has rebounded while the FTC rolls have not. In 2013, federal discretionary (non-defense) spending had grown to \$525 billion—far in excess of the 1979 level.<sup>217</sup> Yet FTC staffing had only been restored to 1,176 FTE employees.<sup>218</sup> Budgeting and spending priorities have shifted.

In addition to suggesting that additional federal general funds be allocated to the agency, however, there is another complementary approach. Proceeds from MMWA actions could be directed back to the agency for further enforcement. Currently, the Commission retains two categories of fees: those related to pre-merger notifications and those from the do-not-call registry.<sup>219</sup> The authority to retain these fees is found in the agency's appropriations bill.<sup>220</sup>

Undoubtedly, there are significant political barriers to altering the appropriations process, as there have been throughout modern history.<sup>221</sup> However, this change is unlikely to reduce current federal funds, because there have been no fines levied in many years.<sup>222</sup> The primary opposition is likely to come from business groups seeking to keep enforcement at current levels, and from political factions who want to diminish federal regulatory systems generally.

By expanding the scope of agency funds retention to include the proceeds of MMWA enforcement actions, however, multiple positive outcomes are achieved. The agency gains a new revenue stream to enforce the provisions of the legislation. In doing so, there is a renewed incentive to pursue such enforcement. Finally, the Commission has a greater incentive to pursue financial penalties in addition to injunctive relief.

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216. AUSTIN, *supra* note 214, at 22 fig.3.

217. *Id.* Note that this level is after spending was completed on the Recovery Act and before 2013 sequestration caps took effect, so it is a “normalized” snapshot. *Id.*

218. CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 213, at 35.

219. *Id.* at 37.

220. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786, 910 (2011).

221. See generally, e.g., Richard F. Fenno, Jr., *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. 310 (1962). Or, more historically, Mark S. Peacock, *The Origins of Money in Ancient Greece: The Political Economy of Coinage and Exchange*, 30 CAMBRIDGE J. ECON. 637 (2006). Money and politics are forever intertwined.

222. See *supra* Part IV.

*D. Private Enforcement*

An additional solution to the lack of governmental resources for the prosecution of MMWA violations is the use of private litigation by consumers to supplement the FTC's enforcement efforts.<sup>223</sup> The MMWA currently provides consumers with a federal cause of action for, *inter alia*, violations of the MMWA.<sup>224</sup> In order to provide for a greater amount of deterrence, this Article proposes a slight revision of the Act to allow for penalties to be imposed for particularly egregious violations.

As previously noted, a lack of knowledge by attorneys concerning the Act's provisions hampers the deterrence that might otherwise be achieved through consumer lawsuits.<sup>225</sup> Consumers have, however, utilized the MMWA to pursue manufacturers for MMWA violations. An example of this type of suit is *Lawhorn v. Joseph Toyota, Inc.*, where a handful of purchasers launched several class-action suits against a Toyota dealer for misleading warranty language.<sup>226</sup> Here, the dealer had language disclaiming implied warranties, but also included the required FTC window sticker that allowed implied warranties.<sup>227</sup> The lower court found that the window sticker language was enough to overcome the confusion created by the implied warranty disclaimer in the sale documents, and the consumers appealed.<sup>228</sup> The state intermediate appeals court overturned, stating:

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223. The utility of the private right of action to supplement governmental enforcement was well stated by Senator Strom Thurmond in describing the private right of action portion of RICO: "this private cause of action was included as an incentive for victims of organized crime activity to redress wrongful actions against their legitimate businesses. Because of the limited resources available to assist the Government in its fight against organized crime, it was believed that 'private attorneys general' could supplement Government efforts." *Hearing on Oversight on Civil RICO Suits Before the S. Comm. on the Judiciary*, 99th Cong. 2 (1985) (opening statement of Senator Strom Thurmond, Chairman, S. Comm. on the Judiciary), *quoted in* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 20 (2002).

224. Magnuson-Moss Act, Pub. L. No. 93-637, § 110(d)(1), 88 Stat. 2183, 2191 (1975) (codified at 15 U.S.C. § 2310(d)(1) (2012)) ("a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title . . . may bring suit"). Although the MMWA places considerable constraints on the ability to bring claims in federal court, see Magnuson-Moss Act § 110(d)(3) (codified at 15 U.S.C. § 2310(d)(1)) (requiring \$50,000 amount in controversy and 100 named plaintiffs for a class action), and the courts have placed additional unwarranted limitations on this private right of redress, see Steverson, *supra* note 2, at 169-97, such constraints and limitations are beyond the scope of this article.

225. It is hoped that this Article will help to alleviate some of the ignorance concerning the MMWA.

226. 750 N.E.2d 610, 611, 613 (Ohio Ct. App. 2d Dist. 2001).

227. *Id.* at 613-14.

228. *Id.* at 613.

we conclude that the mere act of supplying a standard FTC window form cannot relieve a dealer of its duty to comply with the terms of the MMWA. There is no indication that either Congress or the FTC intended to permit a dealer to clearly violate the MMWA with specific language in one contract document while hiding behind the claimed curative effect<sup>229</sup> of a general, vague statement in another form document . . . .

Although the *Toyota* case gives no indication of the remedy sought by the plaintiffs, we know that the available remedy was limited to economic (as opposed to personal injury) damages,<sup>230</sup> equitable relief, and attorneys' fees.<sup>231</sup> Given the high level of MMWA violations, these types of suits are not providing sufficient deterrence to violators. Something more is needed.

The MMWA federal cause of action for statutory violations is only one in a long list of statutes that provide for a private right of action. In determining whether to modify the existing MMWA, it is helpful to examine the various categories of private actions that currently exist. Professor Pamela Bucy, who wrote a comprehensive article on the advantages of so-called private justice, provides some guidance.<sup>232</sup> In that article, she identified three models of private justice:

"Victim" actions are brought by persons who have been injured or damaged by an actor's conduct. Such actions have been statutorily created, and judicially implied from existing statutes.

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229. *Id.* at 614.

230. Although the authors believe that the MMWA does not preclude an award of personal injury damages (*see* Steverson, *supra* note 2, at 191-196), the majority of courts that have addressed this issue have found that personal injury damages caused by the breach of a written warranty or an implied warranty are not allowed for a MMWA claim. *See, e.g.,* Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516, 525 (7th Cir. 2003) (citing *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1066 (5th Cir. 1984)) (finding that personal injury claims based on a breach of warranty are not cognizable under the MMWA); *Grant v. Cavalier Mfg., Inc.*, 229 F. Supp. 2d 1332, 1334-35, 1338 (M.D. Ala. 2002) (citing *Boelens*, 748 F.2d at 1065-66) (finding that mental anguish damages are not available under MMWA because they are personal injury damages). The two lead cases upon which the other cases have relied are: *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1035 (N.D. Ind. 1981) (consumers may not recover personal injury damages for MMWA claims), and *Boelens*, 748 F.2d at 1060-66 (personal injury claims arising from breach of warranty are not cognizable under MMWA, rejecting plaintiff's argument that 15 U.S.C. § 2311 (2012) means only that the MMWA does not create any new substantive rights to personal injury damages, but if state law provides that right, then it is cognizable under the MMWA).

231. Magnuson-Moss Act, Pub. L. No. 93-637, § 110(d)(1)-(2), 88 Stat. 2183, 2191 (1975) (codified at 15 U.S.C. § 2310(d)(1) (2012)) (consumer may bring suit for damages and other legal and equitable relief and a finally prevailing consumer may recover costs and expenses, including attorneys' fees).

232. Bucy, *supra* note 223.

“Common good” private justice actions are brought by plaintiffs who have suffered no personal injury but who have been given authority to sue malfeasors because their lawsuits, which bring additional resources to law enforcement’s efforts, are viewed as helpful to the common community. Examples include citizen suits, generally available in environmental laws and in some consumer protection statutes, and the civil False Claims Act’s qui tam provisions.

“Hybrid” private justice actions are available only to plaintiffs who have been injured but, depending on the extent of the injuries and recoveries, resemble either “victim” or “common good” actions. Many of the “hybrid” actions proceed as class actions.<sup>235</sup>

Professor Bucy points to the following statutes as examples of victim statutes: the Civil Rights Act of 1964, the Electronic Communications Privacy Act, the Consumer Product Safety Act,<sup>234</sup> the Americans with Disabilities Act (ADA), and the Federal Tort Claims Act.<sup>235</sup> Under each of these laws, the plaintiff must be harmed by the defendant’s violation of the statute. Further, the statutes only provide for remedial relief—when damages are available, they are limited to compensatory damages.<sup>236</sup> The difficulty with victim statutes is that, while they compensate injured parties, they are not designed to supplement governmental enforcement efforts, and thus do not deter future violations.<sup>237</sup>

Hybrid private justice actions combine aspects of the victim actions and the common good actions in that the plaintiff has to have been harmed by the defendant’s action; however, the actions are able to deter future conduct through the availability of class actions, attorney’s fees, and, in some cases, treble damages.<sup>238</sup> Professor Bucy explains that class actions often entice private attorneys to bring such actions because they

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233. *Id.* at 13.

234. Consumer Product Safety Act of 1972, 15 U.S.C. § 2072(a) (2012) (“Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys’ fees . . .”).

235. Bucy, *supra* note 223, at 13 (citing 42 U.S.C. §§ 1981–2000 (2012); 18 U.S.C. § 2520 (2012); 15 U.S.C. § 2072 (2012); 42 U.S.C. § 12101 (2012); 28 U.S.C. § 2680(h) (2012)).

236. *Id.* at 15, 17–19.

237. *See id.* at 15 (“when these [victim] causes of action have been created, there is almost no mention of vindicating the public’s rights, supplementing public regulatory efforts, or other similar expressions of serving the common good”).

238. *Id.* at 18.

provide lucrative compensation for the attorneys.<sup>239</sup> Thus, the private attorneys supplement the government enforcement efforts. Further, class actions, attorneys' fees, and treble damages all can lead to large judgments that serve to deter future wrongdoing.<sup>240</sup> Professor Bucy cites securities fraud offenses and violations of the Clayton Act, the Computer Fraud and Abuse Act, and the Racketeering Influenced and Corrupt Organizations Act (RICO) as examples of hybrid statutes.<sup>241</sup>

The final category of private justice actions is the common good action. In this action the plaintiffs need not show any harm to themselves. Rather, the statutes give these plaintiffs "the right to sue on behalf of the party who has been harmed or simply because public harm is threatened."<sup>242</sup> The plaintiffs in these suits are commonly referred to as "private attorneys general" in that the plaintiff sues "to vindicate public interests not directly connected to any special stake of her own."<sup>243</sup> Accordingly, instead of seeking compensatory damages, the plaintiffs seek "injunctive or other equitable relief aimed at altering the practices of large institutions."<sup>244</sup> Statutes that provide for common good actions include many environmental statutes, some consumer protection

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239. *Id.*

240. *Id.* at 17–18.

241. *Id.* at 18–19 (citing Clayton Act, 15 U.S.C. § 15(a) (2012); Computer Fraud and Abuse Act of 1986 (CFAA), 18 U.S.C. § 1030 (2012); Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (2012)). The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [sic] in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). The CFAA "creates a number of criminal offenses pertaining to improper accessing and use of computers, and computer fraud." Bucy, *supra* note 223, at 18 n.81. In addition to criminal penalties, § 1030(g) provides a private cause of action: "Any person who suffers damage or loss by reason of a violation of the section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." 18 U.S.C. § 1030(g). Several cases demonstrate its potential as a private cause of action. *See, e.g., Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 960–61 (E.D. Tex. 2000) (class action was brought under the CFAA, and the parties settled the action for \$2.1 billion with \$147.5 million in attorneys' fees).

242. Bucy, *supra* note 223, at 31.

243. Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005); *see also* Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 43 (1995) ("Environmental citizen suit provisions are different" from other private enforcement statutes because "[t]hey grant citizens the ability to act as real private attorneys general to sue on behalf of the community at large, rather than to vindicate individual rights resulting in economic loss"). Thus, environmental citizen suit provisions typically provide a means to obtain injunctive relief and do not afford the citizen an avenue to recover damages resulting from violations of environmental laws. *Id.*

244. Morrison, *supra* note 243, at 590.

statutes, and the qui tam provisions of the False Claims Act.<sup>245</sup> Specifically, the Clean Water Act,<sup>246</sup> the Clean Air Act,<sup>247</sup> the Resource Conservation and Recovery Act (RCRA),<sup>248</sup> and the Endangered Species Act<sup>249</sup> “authorize citizens to sue alleged violators directly through citizen enforcement actions.”<sup>250</sup> The consumer protection statute is the Consumer Product Safety Act of 1972.<sup>251</sup>

Although the common good environmental citizen suits have met with success, this article proposes the use of a hybrid model for the MMWA because it is closer to what currently exists and it avoids the problems that shadow the common good statutes. As Professor Greve explains in his criticism of such statutes, Congress puts private enforcers to work with reluctance.<sup>252</sup> “Behind this reluctance lies a set of simple,

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245. Bucy, *supra* note 223, at 31 (citing 31 U.S.C. § 3729 (2012)); *see also* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 339–40 (1990) (citations omitted) (“Private enforcers have been put to work for purposes ranging from consumer protection to the prevention of procurement fraud to curbing insider trading . . . . Virtually all federal environmental statutes contain a citizen suit provision that, typically, allows ‘any person to sue private parties for noncompliance with statutory provisions or with standards and regulations issued under the statute. Groups and individuals suing under these provisions have sustained no injury or, at most, a minimal injury-in-fact. They act not as victims who redress a wrong done to them but as ‘private attorneys general.’”).

246. 33 U.S.C. § 1365(a) (2012) (“any citizen may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation”).

247. 42 U.S.C. § 7604(a) (2012) (“any person may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation”).

248. 42 U.S.C. § 6972(a) (2012) (“any person may commence a civil action on his own behalf (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter”).

249. 16 U.S.C. § 1540(g)(1)(A) (2012) (“any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof”).

250. Melissa Powers, *Citizen Suits in U.S. Environmental Law: An Overview and Assessment*, 11 ENVTL. L. & POL’Y 125, 135 (2013).

251. 15 U.S.C. § 2073(a) (2012) (“Any interested person (including any individual or nonprofit, business, or other entity) may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 2064 of this title, and to obtain appropriate injunctive relief.”).

252. *See* Greve, *supra* note 245, at 343 (“While Congress has on occasion put private enforcers



intuitive assumptions. Private citizens are generally competent judges of their own rights and interests. Therefore, they can be relied upon to right the wrongs that are done to them, such as breaches of contract, torts, or trespass.”<sup>253</sup> Professor Greve believes that private citizens are terrible at judging the interests of others, however, including (and especially) public interests.<sup>254</sup> Additionally, he contends that private enforcers may simply “hunt for bounties [because they] do not care about the societal consequences of their actions.”<sup>255</sup>

While expanding the private enforcement section of the MMWA may be difficult politically, only a minor change is needed to increase the deterrence of violations. To align the Act with Professor Bucy’s hybrid model, Congress need only add a treble damages provision for egregious violations. The other elements of the model—class actions and attorneys’ fees—already exist in the statute. However, while the proposed alteration is minor, it could lead to a significant increase in compliance with the law.

## VI. CONCLUSION

After comparing both the current state of consumer warranties and the levels of administrative and judicial enforcement, it is clear that the Magnuson-Moss Warranty Act is not fully satisfying its intended aims. After nearly forty years, it is appropriate to make some minor modifications in statute and rule to take into account the changed manufacturing, retail, and technological landscape. Through a combination of strengthened enforcement, clearer warranty disclosures, and education, this landmark legislation can better meet the needs of the twenty-first century consumer.

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to work for public purposes, it has done so rarely, reluctantly, and in recognition of the problematic nature of its undertaking.”).

253. *Id.* at 343–344.

254. *Id.* at 344.

255. *Id.*

## Appendix: Manufacturers' Warranties Selected

<i>Category</i>	<i>Original</i>	<i>Today</i>
<b>Appliances</b>	Admiral	Dell
	Amana	Amana
	Carrier	Carrier
	Emerson	InSinkErator
	Fedders	Fedders
	Friedrich	Friedrich
	Frigidaire	Frigidaire
	GE	GE
	Gibson	HP
	Hardwick	Cuisinart
	Hoover	Hoover
	Kelvinator	Fisher & Paykel
	Maytag	Maytag
	McGraw-Edison	Skil (Bosch)
	Modern Maid	Miele
	Roper	Sub-Zero
	Tappan	Viking
	Westinghouse	Westinghouse
	Whirlpool	Whirlpool
<b>Mobile Home/RV</b>	Airstream	Thor
	Avco	Fleetwood
	Champion	Champion
	Coachman	Coachmen
	Commodore	Commodore
	Guerdon	Clayton Homes
	Midas	Tiffin
	Monitor	Jayco
	Redman	Excel Homes
	Skyline	Skyline
	Superior Coach	Gulf Stream Coach
	Vesely	Keystone
	Winnebago	Winnebago

**Automobiles**

American Motors  
Chrysler  
Ford  
GM

Honda  
Chrysler  
Ford  
GM

**Home Entertainment**

JVC  
KLH  
Magnavox  
Zenith

JVC  
Apple  
Samsung  
LG