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BEEFING UP PRODUCT WARRANTIES: A NEW DIMENSION IN CONSUMER PROTECTION

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Depending upon one's taste in theological history, the first recorded sale of personalty seems to have been either Jacob's purchase of Esau's birthright for a loaf of bread and a few lentils,¹ or Apollo's exchange of his caduceus for Mercury's golden lyre.² It is untold, alas, whether these initial shoppers remained satisfied with the fruits of their respective transactions, though from a disinterested viewpoint each seems to have done rather well. (A caduceus is impressive to look at, but what can you play on it?) Perhaps this relative success explains the absence of references to consumer protection laws in these early texts. Those were, however, simpler times. It is nowadays difficult to peruse even the lightest reading material without bumping into some public savior's scheme to bring honesty to the marketplace once and for all. Such ideas occasionally have found their way into the judicial decisions and legislative enactments that supposedly govern the conduct of modern day Esaus and Mercurys. These legally accepted notions can be roughly divided into two classes: those laws aimed at curtailing or eliminating "sharp" selling practices generally regarded as unacceptable in a society not totally committed to *caveat emptor*; and those controversial regulations that attempt to more finely balance the bargaining positions of the principals to the usual retail transaction. In the latter category, no concept has received more attention in the recent past than the warranty. This is understandable. It is difficult to quarrel with the view that a product ought to work, and that a seller's promises, whether express or implied, ought to be kept. Furthermore, the warranty issue is intricately entwined with other highly visible consumer protection questions.³ The primary reason warranties have attracted so much attention, however, is that they are used essentially as a sales tool.

Exactly when retailers began using warranties as merchandising devices

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¹ *Genesis* 29:34.

² T. BULFINCH, *BULFINCH'S MYTHOLOGY* 12 (Modern Lib. ed. 1934).

³ For example, under the holder-in-due-course doctrine, the consumer who purchases a "lemon" may be forced to continue making payments to a third party, even though his defective automobile is clear evidence that the seller has flagrantly violated his express and/or implied warranties. UNIFORM COMMERCIAL CODE §§ 3-302, 305, 9-206 (1962 Official Text) [hereinafter cited as UCC].

is probably impossible to determine. Early merchandising catalogues continually repeated the boast that the company's products were "guaranteed."⁴ Such claims, however, tended to cancel out among competitors, had little legal significance in a common law world, and were only a small part of a selling pitch that relied primarily on a handsome portrayal and enticing description of the goods. The modern debut of the warranty-as-come-on is more easily pinpointed. As the economy slowly recovered from the recession of the late 1950's, new car sales jumped more than 17 percent between model years 1961 and 1962.⁵ While General Motors and Ford were riding this surge to seven-year sales highs, Chrysler Corporation's success lagged badly.⁶ In response to this loss of market share, Chrysler, in the best tradition of the free enterprise system, planned and executed a bold new stroke for model year 1963. Shunning the industry norm, the company announced that a five-year/50,000 mile "power-train warranty" would cover all new Chrysler Corporation cars. The results were as dramatic as the step. Sales increased by 40 percent for the model year and by 1968 the company had far more than recouped its pre-1960 position in the market.⁷ There can be little doubt that this marked improvement was directly attributable to heavy reliance on the warranty as a merchandising tool. The Federal Trade Commission's (FTC's) *Report on Automobile Warranties* noted:

During the period when Chrysler had the only long-term power train warranty, its advertising expenditures more than doubled, a considerable portion thereof being devoted to advertising the warranty. It ran one ad after another empha-

⁴ A Macy's advertisement in the October 24, 1875 edition of the *New York Herald* read: "Every article sold in this establishment is guaranteed to be what it is represented. Any article sold from this establishment not suiting, or not being what it is guaranteed, will be exchanged or the money refunded (as the customer may elect) within one week after the purchase."

Even before this, Macy's advertisements loosely used such ambiguous phrases as "warranted pure linen," and "every pair of gloves warranted or no sale," and "guaranteed a prime article." R. HOWER, *HISTORY OF MACY'S OF NEW YORK 1858-1919*, at 53 (1943).

In a 1902 Sears, Roebuck and Company catalogue, an advertisement for "the new, improved, Rational Body Brace" contained the phrase "SOLD UNDER OUR PERSONAL GUARANTEE" emblazoned in large type at the top of the ad. Nowhere in the advertisement is there any explanation of "our personal guarantee."

Other products were promoted through use of a promise of satisfaction or money-back. An advertisement for the "Princess Bust Developer" promised that "if your bust is not enlarged from 2 to 6 inches . . . return it after giving it a trial and we will refund your money." Similarly, an ad for the "60-cent Princess Hair Restorer" promised that "if you do not find it all and more than we claim for it, if you do not find it is just the hair tonic you want, stimulating the growth, cleansing the scalp, stopping hair from falling out . . . or promoting a new growth of hair on a bald head, return it to us at once and we will cheerfully refund your money." *THE 1902 EDITION OF THE SEARS ROEBUCK CATALOGUE 459-63* (republished ed. 1969).

By 1927 the use of the guarantee as a merchandising device had become more sophisticated. Page one of the Sears catalogue for that year was devoted entirely to a general "guarantee," purportedly covering every article in the catalogue, with the motto "SATISFACTION GUARANTEED OR YOUR MONEY BACK" appearing in large type across the bottom of the page. In addition, the catalogue is replete with individual items boasting specific guarantees. Such guarantees usually only promise that the product will be "satisfactory" for a given period of time. *THE 1927 EDITION OF THE SEARS, ROEBUCK CATALOGUE 1* (republished ed. 1970).

⁵ Total new car sales increased from 5.9 million in 1961 to 6.9 million in 1962. FEDERAL TRADE COMMISSION, *REPORT ON AUTOMOBILE WARRANTIES 39* (1970).

⁶ Chrysler sales accounted for 9.6% of the total market in 1962, compared with 14.0% in 1960. *Id.*

⁷ In 1963, Chrysler sales increased to 12.4% of the market. This share continued to rise through 1968 when the company made 16.2% of new car sales. *Id.* at 40.

sizing the warranty as proof of a better made car. Further, dealers carried this theme over in their local advertising and sales presentations.⁸

Chrysler's story did not go unnoticed. Since the mid-1960's, while youth, sex, and economy have continued to play roles in advertising campaigns, an ever-enlarging emphasis has been placed on the warranty and the "value" it purportedly represents. Manufacturers of other major-purchase items have joined the auto companies in this marketing mode, though the latter remain as the principal example of an industry that often seems to place almost total reliance on its use.⁹

This spotlighting of the warranty aspects of the "big-ticket" sales agreement has created a novel situation for our legal system. For the first time in the history of mass marketing and consumption, the attention of prospective buyers is being riveted intentionally upon explicit promises that appear to guarantee normal or better performance by the product in question. An initial result is to alter the positions of importance between express and implied warranties as those concepts have been accepted since widespread adoption of the Uniform Sales Act.¹⁰ Until the outset of the utilization of warranties as merchandising devices, express promises other than simple "money-back guarantees" seldom played an important role in the usual consumer transaction. The purchaser's legal protection had to be derived chiefly from an implied warranty of merchantability which, if not disclaimed, accompanied the product by operation of law. This new advertising tack reverses the focus of buyer protection by emblazoning the seller's guaranties of performance so boldly upon the transaction as to almost eliminate any doubt that the apparent promises are an integral part of the buyer's bargain. Superficially, this is a healthy development. The implied warranty, though often a powerful weapon,¹¹ is to most consumers a shadowy, legalistic concept that inherently deters utilization. Even an informed consumer can face severe difficulties and considerable expense in carrying the implied warranty through the court test that its lawyerly nature encourages.¹² Express warranties, on the other hand, are right there in the box, the desk drawer, or the glove compartment, explicitly committing the seller to remedy specific defects without being dragged into court. Every buyer is his own lawyer for at least the first round; he is encouraged to exercise his talents by both the distinctiveness of the as-

⁸ *Id.* at 41.

⁹ Chrysler is still a prime example if a recent full-page advertisement in the *Wall Street Journal* is any indication. The ad tells nothing whatsoever about the product being sold. The entire page is devoted to hawking the company's new 12-month unlimited mileage warranty (THE CLINCHER!). *Wall Street Journal*, Oct. 9, 1974, at 27, col. 1 (Eastern edition).

¹⁰ The Uniform Sales Act (USA), drafted in 1906 and subsequently adopted by 38 states, was the chief forerunner of the Uniform Commercial Code. The USA defined an express warranty as any promise or affirmation "if the natural tendency of such . . . is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." UNIFORM SALES ACT § 12. The USA also provided for an implied warranty in certain circumstances. *Id.* §§ 14-16.

¹¹ See text at notes 35-63 *infra*.

¹² For an excellent outline of some of the major problems a plaintiff may confront in suing on an implied warranty of merchantability see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 289-96, 335-39 (1972) [hereinafter cited as WHITE & SUMMERS].

surance and the intentionally-created impression that the seller must be eager to follow through on promises so widely and expensively touted.

Yet evidence grows that the express warranty has become not a boon to the satisfactory handling of product disputes, but rather an artfully contrived method of limiting or eliminating the kinds of warranty protection that all but the most sophisticated buyers would expect to accompany a product ostensibly guaranteed to perform properly. The most complete documentation of this trend appears in a recently released Staff Report of the United States House of Representatives Subcommittee on Commerce and Finance.¹³ At the direction of the Subcommittee Chairman, the staff surveyed approximately 200 warranties from 51 major manufacturers of household appliances, home entertainment units, mobile homes, and automobiles. An initial finding was that the average express warranty was of sufficient length to virtually preclude understanding—assuming there existed in the Republic a consumer of the requisite curiosity, parsimony, and enterprise to read the entire document.¹⁴ More importantly, the Report found that, despite federal warnings to clean up such practices, a great majority of the manufacturers were still using the express warranty “primarily to limit obligations otherwise owed to the buyer as a matter of law.”¹⁵ Typical methods of accomplishing this were carefully charted. Most popular was use of the written express warranty to disclaim all other kinds.¹⁶ Almost equally prevalent were burdensome requirements that a warranty registration card be turned in as a condition precedent to coverage.¹⁷ Other frequently used provisions limited coverage to initial buyers, excluded liability for consequential damages, and placed the burden of transportation and shipping costs for repair work on the owner.¹⁸ Another half-dozen devices were discovered that were more particularly tailored to the products in question.¹⁹ Of all express warranties from the firms surveyed, only one contained no limitations or disclaimers, and the average was three-

¹³ STAFF OF HOUSE SUBCOMMITTEE ON COMMERCE AND FINANCE, 93D CONG., 2D SESS., REPORT ON CONSUMER PRODUCTS AND WARRANTIES (Comm. Print 1974).

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“All too often these warranties shroud and effectively cover up in unclear language the obligations of the seller. Of all the warranties examined, the average length was between 300 and 600 words. The big-four American automakers offered warranties that were the longest, one of which exceeded 2,500 words. The Subcommittee staff believes that warranties can be written more clearly and more briefly.” *Id.* at 12.

¹⁵ *Id.* at 11.

¹⁶ Thirty-one of the 51 firms surveyed used an express warranty “in lieu of all other warranties, express or implied.” *Id.* at 18.

¹⁷ Twenty-seven of the 51 firms surveyed used the registration card technique. *Id.* at 19.

¹⁸ Nineteen firms limited coverage to the first owner. *Id.* at 23. Twenty-one excluded consequential damages. *Id.* at 16. Nineteen excluded shipping costs from the coverage. *Id.* at 17.

¹⁹ Other limitations found (with firms employing) included:

- home-use only covered (12)
- certain parts excluded (6)
- limited to specific parts (10)
- void if serial plate defaced (4)
- appliances excluded (10 of 16 mobile home companies)
- opinion of seller governs question of defect (8).

Id. at 16-23.

to-four. One warranty contained all of the five principal clauses listed above, plus a sixth.²⁰

Furthermore, it is not merely the text of the consumer's warranty that can shatter his Madison Avenue-created illusion. Other reviews of warranty service techniques show that convincing one's seller to repair even a covered defect can be a substantial chore. A mid-1960's study of the automobile industry found that while *poor* warranty service was the chief complaint received by manufacturers' representatives, the second most common was that warranty work had simply been refused!²¹ That study and the subsequent FTC Report²² on the industry document well the causes of this difficulty. The heavy bureaucracy of processing claims was found to be a major disincentive to retailers in accepting warranty work.²³ More direct economic disincentives also were uncovered.²⁴ Most ironically, the FTC found that an important factor in poor warranty service was the inability of dealerships to respond to the greatly increased numbers of buyers encouraged to seek such service by the company's broad advertising campaigns.²⁵ A subsequent Presidential task force report found many of these same problems in the home appliance industry.²⁶

It thus appears that while consumer expectations about warranty protection for durable goods have been raised to new heights, the very industries responsible for such increased expectations have been intentionally and, perhaps, negligently creating mechanisms that ensure that their apparent promises will go unfulfilled. Both the ethics of this approach and the resultant bitterness it engenders toward our marketing system are major causes of concern for the law. The purpose of this Article is to trace the legal development of the express and implied warranty under the UCC in an effort to determine the degree to which the law has responded to these difficulties. After an initial review of the warranty structure of the UCC, we will examine judicial treatment of warranty obligation avoidance techniques. This will be followed by a survey of the growing number of state statutes responding to the problem by altering the UCC. In something of an excursus, we will next examine how such a statute, as enacted in one state (Kansas), has liberated the implied warranty of merchantability from the shackles of disclaimer and privity and

²⁰ *Id.* at 26-27.

²¹ Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 Wis. L. Rev. 1006, 1032.

²² FEDERAL TRADE COMMISSION, REPORT ON AUTOMOBILE WARRANTIES (1970).

²³ *Id.* at 87-93.

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Warranty reimbursement rates tend to be lower than retail rates. Therefore, warranty repairs under the sharing system result in either the mechanic receiving compensation below that which he would receive for an identical customer repair, or the dealer having to necessarily absorb the differential. Apparently, the reduction is often passed on to the mechanic. This naturally affects the attitudes of mechanics toward warranty work—they would rather not do it. Inasmuch as work attitudes affect work quality, the ultimate loser is the consumer trying to get his warranty-covered car repaired.

Id. at 120.

²⁵ *Id.* at 96.

²⁶ PRESIDENTIAL TASK FORCE, REPORT ON APPLIANCE WARRANTIES AND SERVICE (1969).

thus created a comprehensive system of strict product liability under the UCC. We will then offer a detailed analysis of the most important development in warranty law since general enactment of the UCC—passage of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act²⁷ that will indelibly imprint all future warranty problems with the insignia of federal law.

I. STRUCTURE AND INFLUENCE OF THE UNIFORM COMMERCIAL CODE

Because this Article is an effort to make a comprehensive review of existing warranty law, a brief analysis of the UCC treatment of the matter seems the logical beginning point. A detailed outline of the entire UCC structure would now be an unnecessary exercise, but it is nevertheless useful to identify briefly which provisions of the UCC encourage the practices discussed in the introduction, and which do not. Our look will concentrate solely on those UCC sections most immediately involved with consumer sales of major durable items and will ignore other provisions such as the warranty of title²⁸ and the warranty of fitness for a particular purpose,²⁹ which will only rarely affect such transactions.

Although there are some difficulties of interpretation, the principal warranty provisions of the UCC seem at first glance perfectly adequate to protect the consumer. Section 2-313 provides that express warranties are given whenever the seller affirms a fact, makes a promise, or offers a description of the goods that becomes part of the basis of the bargain.³⁰ The mercurial line between promises and mere "puffs" is often difficult to draw. The courts have always stood ready, however, to afford reasonable protection to buyers, depending upon such important circumstances as the nature of the transaction, the relative sophistication of the parties, and the degree and kind of resultant harm.³¹ Because the UCC requires no specific language or intent to create an express warranty,³² advertising claims can bind a seller,³³ and the "basis of bargain" requirement prevents post-agreement hedges in almost all situations.³⁴ The implied warranty of merchantability found in section 2-314 offers even more to the purchaser. In fact, it is the touchstone of product liability under the UCC. By imposing on the usual sales contract an implied promise to the

²⁷ Pub. L. No. 93-637, §§ 101-12 (Jan. 4, 1975), 88 Stat. 2183, 15 U.S.C.A. §§ 2301-12 (Supp. 1975).

²⁸ UCC § 2-312.

²⁹ UCC § 2-315.

³⁰ Whether a particular promise becomes part of the basis of the bargain will not be easy to determine in many cases. This problem has prompted the suggestion that the wise plaintiff's lawyer will plead reliance on the warranty in question despite the absence of that pre-Code requirement (USA § 12) from the UCC scheme. See WHITE & SUMMERS, *supra* note 12, at 278-80.

³¹ Compare *Wat Henry Pontiac Co. v. Bradley*, 202 Okla. 82, 210 P.2d 348 (1949) with *Frederickson v. Hackney*, 159 Minn. 234, 198 N.W. 806 (1924).

³² "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty . . ." UCC § 2-313(2).

³³ See, e.g., *Harris v. Belton*, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1968).

³⁴ While Comment 7 to § 2-313 indicates that any post-writing agreements need not be supported by consideration (§ 2-209), courts have had no difficulty in finding that non-negotiated warranty limitations that are presented to the buyer after an agreement is concluded are without force and effect. See, e.g., *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. App. 1972); *Dougall v. Brown Bay Boat Works & Sales, Inc.*, 287 Minn. 290, 178 N.W.2d 217 (1970).

consumer that the goods "are fit for the ordinary purposes for which such goods are used,"³⁵ the draftsmen have given the buyer the most basic protection needed—an assurance that the product is acceptable in quality and free from defects that would impair utilization under normal circumstances. This standard is somewhat less exacting than that employed in comparable strict tort liability tests,³⁶ yet it triggers a wider array of remedies.³⁷ A chain of causation between the defect and the injury must be proved,³⁸ of course, but in the garden variety purchase of a new, big-ticket item, that hurdle is less imposing than in other situations.

Lapse of the statute of limitations, failure to give timely notice of breach, and absence of privity are important defenses to warranty claims under the UCC, but these defenses are either generally fair or cannot be targeted as the source of consumer vulnerability to predatory marketing practices. The UCC statute of limitations provision³⁹ could benefit by amendment, but it creates at least as many problems for the seller as for the buyer. The principal difficulty is that the section subjects both parties to a kind of roll-of-the-dice determination in causes of action covered by both the UCC and strict liability tort law.⁴⁰ In our particular situation, however, the provision can also operate to the direct benefit of the consumer by extending seller liability when limited express warranties have been used.⁴¹ Another UCC defense, failure to give notice of breach,⁴² seems inherently fair, especially when a consumer moves solely against a remote manufacturer. What harshness remains for the uninformed buyer is greatly eased by the Official Comment to the notice provision instructing vigilance on the issue;⁴³ sympathetic judicial decisions all but eliminate the notice requirement as a trap for the unwary consumer.⁴⁴ Privity, on the other hand, can theoretically serve as a major stumbling block.

³⁵ UCC § 2-314(2)(c).

³⁶ To prove a case under strict tort liability, the plaintiff must prove that the product was in a "defective condition unreasonably dangerous . . ." RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

³⁷ Recovery under strict liability is limited to "physical harm . . . to the ultimate user . . . or his property . . ." *Id.* The broader range of UCC remedies, which can include rescission and consequential economic loss, is set out in the text at notes 50-63 *infra*.

³⁸ Though Comment 13 to UCC § 2-314 seems to require the plaintiff to reconstruct the chain of causation between defect and damage when a new consumer product goes awry, proof of both defect and loss will, barring evidence of misuse, usually suffice to establish causation.

³⁹ UCC § 2-725. Under UCC § 2-725(2), the statute for breach of warranty expires four years from the date of sale regardless of the date of injury.

⁴⁰ WHITE & SUMMERS, *supra* note 12, at 339-43. See also the discussion in text at notes 234-38 *infra*.

⁴¹ Section 2-725(2) states that "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." This provision could be interpreted to extend the period of liability when express warranties of performance are limited to a stated number of years. *Rempe v. General Electric Co.*, 28 Conn. Supp. 160, 254 A.2d 577 (1969) adopts this approach, though not relying specifically on UCC § 2-725.

⁴² UCC § 2-607(3)(a) requires notice of breach within a "reasonable time" after discovery of the defect, and flatly bars the plaintiff from "any remedy" if such notice is not given.

⁴³ "The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." UCC § 2-607, Comment 4.

⁴⁴ A recent example is *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn. App. 1973), where notice eight months after purchase and six months after filing suit was found reasonable. See also *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wash. App. 892, 491 P.2d 241 (1972).

Both the intentionally imposed limitations on possible plaintiffs⁴⁵ and the passively created opportunity that courts have to insulate possible defendants⁴⁶ have worked to manufacturers' benefit in the past. Yet the draftsmen themselves have encouraged erosion of "horizontal" privity protection with a fair measure of success,⁴⁷ and the "vertical" privity concept has never been a major impediment to suits involving manufacturer-created express warranties of the kind alluded to in the introduction.⁴⁸ Moreover, because manufacturers know that actions brought for personal injury or property damage under a strict liability theory cannot be avoided by invoking privity defenses,⁴⁹ it seems improbable that the prospect of avoiding litigation on such grounds underlies covert warranty-limiting techniques. Thus, while privity cannot be willed away and must be dealt with squarely in any proposed legislative solution to the warranty problem, these defenses should be recognized more as *post-factum* palladiums than as initial inducements to warranty shell games.

The liberal remedy scheme offered buyers by the UCC is definitely not the headwater of consumer troubles. If properly invoked, these protections assure an aggrieved purchaser both the full benefit of his bargain and complete compensation for other proven losses. On the front end, the buyer may force the seller to "cure" a non-conforming tender; if a cure is not forthcoming, he may reject the goods.⁵⁰ At this stage the burden of proving a proper tender or cure remains on the seller.⁵¹ Many consumers, however, will not have the expertise to spot serious mechanical or other defects at the delivery stage, and a more important remedy is often the power to revoke acceptance after delivery has been completed and the goods accepted.⁵² To utilize this lemon-ridding device successfully, the buyer must prove that the goods were non-conforming to an extent substantially impairing their value; that timely notice of non-conformity was given; and either (1) that the seller failed to cure or gave assurance inducing acceptance, or (2) that acceptance was induced because the defect was so difficult to discover.⁵³ The "substantiality" requirement seems equitable, as money damage remedies are available for other non-conformities such as scratched paint on a new car,⁵⁴

⁴⁵ UCC § 2-318.

⁴⁶ The 1962 Official Text of the UCC takes no position on the question of whether manufacturers can be sued by a plaintiff who falls within the ambit of § 2-318.

⁴⁷ Optional versions of UCC § 2-318 authored by the UCC Permanent Editorial Board in 1966 extend the class of third-party beneficiaries of implied warranties far beyond the family and household guests protected under the 1962 Official Text (now known as "Alternative A"). Alternative B extends warranty protection to any natural person reasonably expected to "use, consume or be affected by the goods" and injured "in person" by defective goods. Alternative C, which pushes horizontal privity to the limits of foreseeability, does not restrict recovery to "natural person" plaintiffs or to any particular kind of loss.

⁴⁸ Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

⁴⁹ "[Strict liability] applies although . . . the user or consumer has not bought the product or entered into any contractual relation with the seller." RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1965).

⁵⁰ While UCC § 2-601 seems to allow rejection for any nonconformity, § 2-508 gives the seller the right to cure defects within the "time for performance."

⁵¹ UCC § 2-508.

⁵² UCC § 2-608.

⁵³ UCC §§ 2-607(3)(a), 608(1).

⁵⁴ See note 57 and accompanying text *infra*.

and the "timeliness" requirement seems no more ferocious here than in the general provision referred to above.⁵⁵ The cure requirement is particularly protective since the purchaser need not even show that the seller was given the opportunity to cure unless the non-conformity was obvious and the seller gave no assurances that encouraged acceptance. Unfortunately, the novelty of this remedy has apparently discouraged its use—as well as confused some judges⁵⁶—but it stands as a powerful weapon for the buyer lucky enough to have his acquisition disintegrate at an early stage. For those not so fortunate, the Code gives the full panoply of traditional money damage remedies. Section 2-714 guarantees a buyer the full benefit of his bargain, *i.e.* the difference between the value of the goods as warranted and as delivered.⁵⁷ While only "value" is assured, this limitation will seldom undercut the consumer's ability to be made whole, especially in a constantly inflationary market. Section 2-715(1) then allows collection of any incidental damages flowing from the breach.⁵⁸ While cases are sparse in this area, recovery would almost certainly include expenses incurred in caring for defective goods and in seeking non-monetary relief from the seller.⁵⁹ Finally, when matters go from bad to worse, section 2-715(2) gives protection that is essential, the ability to collect foreseeable consequential damages resulting from a breach.⁶⁰ Recovery can include not only property damage and personal injury,⁶¹ but also, in appropriate circumstances, more ephemeral losses.⁶² "Foreseeability" is an ever-present limit to plaintiff recovery, but no more so in warranty cases than in others.⁶³

It is thus not the warranty provisions themselves, nor the warranty-related defenses, nor the remedies provided for breach, that have inspired the warranty problem triggering much recent consumer protection legislation. The heart of the problem is found in four related provisions of the UCC, each of which in its own way allows a seller to contractually circumvent an otherwise well-designed warranty scheme. Though differing in make-up, each of the four sections is based on common premises—equality in bargaining power and consequent ability to protect oneself through agreement—that are central to commercial transactions. It is not our purpose once again to brief the issue

⁵⁵ See text at note 42 *supra*.

⁵⁶ WHITE & SUMMERS, *supra* note 12, at 255.

⁵⁷ UCC § 2-714(2).

⁵⁸ UCC § 2-715(1).

⁵⁹ UCC § 2-715, Comment 1; *Lanners v. Whitney*, 247 Ore. 223, 428 P.2d 398 (1967).

⁶⁰ "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know . . . and (b) injury to person or property proximately resulting from any breach of warranty." UCC § 2-715(2).

⁶¹ See, *e.g.*, *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 315 A.2d 16 (1974).

⁶² In *Wisniewski v. Great Atlantic & Pacific Tea Co.*, 14 UCC REP. SERV. 599 (Pa. Super. 1974), the court upheld plaintiff's substantial recovery under § 2-715(2) for personal illness she had suffered. The illness had allegedly been caused by a fear (ill-founded) that she had been poisoned by foreign substances she discovered in defendant's bread several minutes after consuming some of it.

⁶³ The foreseeability question is seldom of consequence in consumer cases where such speculative commercial losses as lost profits are not frequently in question. Moreover, the language of § 2-715(2) seems to incorporate the more liberal of the two classic interpretations of "foreseeability." WHITE & SUMMERS, *supra* note 12, at 315-18.

of the inapplicability of these premises to the usual consumer sale. For those who cannot imagine what would happen if they tried to negotiate the warranty terms of their next new car or appliance purchase, there is plenty of readily-available writing on the subject.⁶⁴ The point is raised here merely as an assurance that the disease is recognized along with the symptoms, and that it has been properly considered in the recommended treatment.

The symptoms come in both obvious and subtle varieties. Principal sources of the problem include section 2-316, allowing any or all warranties to be limited or totally disclaimed within the sales contract, and section 2-719(1), permitting remedies to be limited in ways not disallowed by the remaining subsections of that provision.⁶⁵ Section 2-316(1) authorizes disclaimers of express warranties when the warranty and disclaimer can be read as consistent with each other. This anomalous concept was not a part of the original UCC draft; and while it is written in a manner that suggests protection, it nevertheless stands as a possible way for the seller to avoid even those promises found to have become part of the basis of the bargain. More relevant to the usual manufacturer's warranty is the possibility of using section 2-316(1) in conjunction with the UCC's parol evidence provision.⁶⁶ These sections are keyed together by the draftsmen⁶⁷ to create a substantial presumption that the written sales contract encompasses the entire agreement of the parties. The result is an effective disclaimer of any oral promises given by the manufacturer or dealer before the sale is consummated.⁶⁸ It is this ability to reduce a warranty issue to an examination of the four corners of the agreement which, when coupled with an effective disclaimer of the implied warranty of merchantability, is the heart of the problem. Sections 2-316(2) and (3) supposedly bring fairness to warranty bargaining by forcing the seller to take special pains to bring disclaimers of the implied warranty of merchantability to the attention of the buyer.⁶⁹ To be effective in the usual written warranty situation, a disclaimer must either mention "merchantability" in a conspicuous manner, or use other terms that call "the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."⁷⁰ Adequate as these and similar provisions may be in a commercial context, they provide precious little protection in consumer transactions. In-

⁶⁴ See, e.g., Shanker & Abel, *Consumer Protection Under Article 2 of the UCC*, 29 OHIO ST. L.J. 689 (1968); Terry & Fauvre, *Unconscionability Offense*, 4 GA. L. REV. 469 (1970); Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006.

⁶⁵ Section 2-719(1)(a) provides that the parties may "limit or alter the measure of damages recoverable under this Article . . ." subject to the provisions of §§ 2-719(2) and (3). See notes 72-74 and accompanying text *infra*.

⁶⁶ UCC § 2-202.

⁶⁷ The 1962 Official Text cross-references § 2-202 and § 2-316 to each other, and § 2-202 provides that any writing "intended by the parties as a final expression . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . ."

⁶⁸ See, e.g., *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

⁶⁹ UCC § 2-316(2), (3). In subsection (3), "as is" and "with all faults" are suggested as proper language for an effective disclaimer.

⁷⁰ UCC § 2-316(3)(a).

stead, they become objective standards that alert sellers can easily meet, thereby maximizing the probability of successful insulation.

As will be evident in the next section of this Article, courts have struggled mightily with this problem and have frequently struck down a written disclaimer when a consumer has been the victim. At this point, it is enough to note that such a disclaimer nevertheless has a substantial *in terrorem* effect on both the purchaser himself and the lawyer to whom the matter is entrusted. This effect often is reinforced by the presence in the written contract of a clause purporting to limit the remedy available if breach can be proved and the disclaimer avoided. Such clauses are authorized by section 2-719 of the UCC, so long as the remedy left the buyer does not "fail of its essential purpose"⁷¹ or attempt to exclude or limit the possibility of collecting consequential damages for personal injury.⁷² The former limitation is a very narrow restriction on the seller's freedom of contract,⁷³ and the latter is obviously of no value to the consumer who has remained bodily intact. A properly drawn remedy-limitation clause thus stands not only as a handy accomplice to a carefully drafted disclaimer, but is, for most purposes, a fungible substitute. If all of this were not enough, the UCC gives sellers one final method of avoiding the responsibility of delivering a merchantable item. Section 2-317 offers rules of construction when conflicting warranty provisions appear, and subsection (c) thereof suggests that express warranties displace the implied warranty of merchantability.⁷⁴ In the usual major-purchase case where the seller gives a limited express warranty regarding expected performance, it thus seems that the implied warranty of merchantability is automatically disclaimed, regardless of whether the disclaiming clause meets the technical requirements of section 2-316. The consumer can argue that the express warranty is not inconsistent with the implied, but even those who have offered acceptable rationales for reaching such a result admit that to do so would both ignore likely buyer understanding and strain the definition of "inconsistent."

II. JUDICIAL TREATMENT OF DISCLAIMERS

Until the advent of the curative legislation discussed in the following sections, the task of shielding consumers from the harshness of seller-imposed disclaimers and remedy limitations fell exclusively to the courts. The general response has been one of great sympathy for the buyer's unhappy legal plight. Rarely has a plaintiff with both a provable warranty claim and the perseverance to press that claim as far as necessary within the court system

⁷¹ UCC § 2-719(2).

⁷² UCC § 2-719(3).

⁷³ Although the clause has been used to benefit consumers left with little recourse after a defect has resulted in substantial property damage (see notes 96-101 and accompanying text *infra*), this use probably stretches its intended purpose. 1 N.Y. STATE LAW REV. COMM. 1955 REP. 584 (1955).

⁷⁴ "Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose." UCC § 2-317(c).

been denied full relief because of a disclaimer or other limitation. The rationales employed by the judiciary to reach such results have ranged from the inarguable to the unbelievable. Indeed, since the result is usually preordained, a fair summary of disclaimer cases would be that getting there is *all* the fun. There seem to be three main vehicles: (1) painful scrutiny of disclaimer and limitation clauses; (2) use of the UCC prohibition against unconscionability; and (3) other very creative means.

A. *The Painful Scrutiny Approach*

A common lead-in to flyspecking of a disclaimer or limitation clause is invocation of the doctrine that such provisions are to be "strictly construed." This pre-UCC notion is usually attributed to considerations of public policy,⁷⁵ although the commonly accepted idea that forms prepared by one party to a contract should be interpreted strictly against that party would appear to be an alternative rationale in the normal major-purchase consumer transaction.⁷⁶ Many judges, however, eschew such introductions and get directly to the task of exorcising the evil. The superficially uncomplicated requirements of section 2-316(2)⁷⁷ have proven to be a major difficulty for sellers trying to disclaim merchantability. For example, a surprising number of cases are lost because the seller's form did not contain the magic word "merchantability."⁷⁸ More are struck down because the clause was not sufficiently "conspicuous." While most of these "conspicuous" cases involve unremarkable "fine print" clauses,⁷⁹ at least one court has decided that mere location on the back of the sales contract form was sufficient proof that conspicuousness was lacking.⁸⁰ Those sellers who have attempted to use the more general language of section 2-316(3)(a)⁸¹ to disclaim merchantability have received no better treatment. Although the UCC authorizes "other language which in common understanding calls the buyer's attention to the exclusion of warranties," the most cautious straying from the explicitly suggested "as is" or "with all faults" has been looked upon with jaundiced eye. One court determined that the straightforward "in present condition" was an insufficient warning to the buyer.⁸² If the suggested terms are used, another trap often awaits. The "conspicuousness" standard of section 2-316(2) is not carried forward in section 2-316(3)(a). Despite the obvious argument that the draftsmen had shown they knew how to write such a requirement in the immedi-

⁷⁵ *Karczewski v. Ford Motor Co.*, 382 F. Supp. 1346 (N.D. Ind. 1974); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

⁷⁶ *Overland Bond and Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).

⁷⁷ See text at note 69 *supra*.

⁷⁸ See, e.g., *Overland Bond and Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); *Realmuto v. Straub Motors, Inc.*, N.J., 322 A.2d 440, 442 n.2 (1974); *Tracy v. Vinton Motors*, 130 Vt. 512, 296 A.2d 269 (1972).

⁷⁹ See, e.g., *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (Law Div. 1968).

⁸⁰ *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967). See also *General Electric Credit Corp. v. Hoey*, 7 UCC REP. SERV. 156 (N.Y. Sup. Ct. 1970).

⁸¹ See text at note 70 *supra*.

⁸² *Hull-Dobbs, Inc. v. Mallicoat*, 57 Tenn. App. 100, 415 S.W.2d 344 (1966). But see *First Nat'l Bank v. Husted*, 57 Ill. App. 227, 205 N.E.2d 780 (1965).

ately preceding subsection, several courts have concluded that section 2-316 (3)(a) language must also meet the conspicuousness criterion.⁸³ With this kind of fortune in disclaiming implied warranties under the objective standards of sections 2-316(2) and (3)(a), one can imagine the success sellers of consumer products have enjoyed in disclaiming express warranties under the more nebulous language of section 2-316(1). Some courts simply refuse to believe that this can be done. "[W]e hold that these express warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer . . . are repugnant to the basic dickered terms."⁸⁴ Other, less bold jurists have given at least passing notice to the language of the section before throwing out the disclaimer.⁸⁵

Beyond section 2-316, courts seem ready to pounce on the least ambiguity in the transaction as grounds for dashing a disclaimer. In *Tracy v. Vinton Motors, Inc.*,⁸⁶ for example, the Vermont Supreme Court held invalid an apparently otherwise valid disclaimer merely because it referred to a "new" car when the auto being sold was used. A similar attitude is reflected in *Mobile Housing, Inc. v. Stone*,⁸⁷ where the court avoided a disclaimer by finding slight incongruities within the four corners of the document⁸⁸ and admitting parol evidence.⁸⁹ Even the method of obtaining the disclaimer can prove troublesome. When the seller in *Overland Bond and Investment Corp. v. Howard*⁹⁰ elicited a separate, express statement that was signed by the purchaser and clearly related the latter's understanding of warranty coverage, the court found it unenforceable because its independence from the sales contract raised the possibility that it had not become "part of the basis of the bargain."⁹¹

B. Use of Other UCC Provisions

A second popular method of eliminating seller-insulating clauses has been the use of specific sections of the UCC circumscribing remedy limitations or prohibiting "unconscionable" clauses. While section 2-719(1)(a) embodies the operation of the freedom of contract principle in remedy negotiations by allowing a remedy to be limited to either "return . . . and repayment" or "repair and replacement," this freedom is narrowed in subsequent subsections. Specifically, a limited remedy must be expressly "exclusive;"⁹² it may be

⁸³ *Osborne v. Genevie*, 289 So. 2d 21 (Fla. App. 1974); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970) (commercial case).

⁸⁴ *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611, 615 (Tex. Civ. App. 1973).

⁸⁵ See, e.g., *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971); *Realmuto v. Straub Motors, Inc.*, . . . N.J. . . ., 322 A.2d 440 (1974).

⁸⁶ 130 Vt. 512, 296 A.2d 269 (1972).

⁸⁷ 490 S.W.2d 611 (Tex. Civ. App. 1973).

⁸⁸ The alleged ambiguities generally involved the furnishings of a trailer home. A specific home was referenced as the standard for such furnishings, but the court found this to be in conflict with a printed section of the contract stating that models were not "used or regarded as part of this contract." 490 S.W.2d at 615.

⁸⁹ See text at notes 66-68 *supra*.

⁹⁰ 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).

⁹¹ *Id.* at 175.

⁹² UCC § 2-719(1)(b).

avoided by a showing that, in the particular circumstances of the case, it has failed of "its essential purpose;"⁹³ and, in consumer cases, it is presumed unconscionable if it attempts to limit consequential damages for personal injury.⁹⁴ The requirement of "express" exclusivity was employed in *Ford Motor Co. v. Reid*⁹⁵ to strike down a typical automobile manufacturer clause limiting the remedy for defects to "repair or replacement." The court there found that a provision stating that defective parts would be repaired or replaced free of charge was part of the *warranty* rather than the *remedy* provisions, that it was thus not an exclusive remedy, and that money damages could be awarded for plaintiff's substantial property losses. This kind of destroyed-or-unrepairable product case also has spurred several courts to find that a repair or replacement remedy has failed of "its essential purpose," although this result has been reached by various methods. While one court analyzed the language in commendable, logical sequence,⁹⁶ another arrived at the same conclusion without bothering to rely on section 2-719(2) at all.⁹⁷ A third analysis sometimes employed is exemplified by *Jacobs v. Metro Chrysler-Plymouth Inc.*,⁹⁸ where the court found that the inability of the dealer to repair or replace parts in a fire-damaged car was a breach of the remedy-limiting provisions, thereby triggering availability of the revocation of acceptance remedy.⁹⁹ This latter approach is not only a bit convoluted, but also begs the question of what remedies accrue to the plaintiff if a section 2-719(2) "failure" is found. In fact, however, this hypothetical problem raised by the writers¹⁰⁰ seems to have been totally ignored by the courts in consumer matters, and each panel has proceeded directly to the question of what awards would be proper without the briefest glance at whether such freedom is authorized by the UCC.¹⁰¹

It is thus far safe to say that, absent a disclaimer, the unconscionability presumption in section 2-719(3) can always be successfully invoked¹⁰² when a remedy-limiting clause would prevent a plaintiff (or his estate) from collecting for personal injuries.¹⁰³ Only one, lone dissenting judge has discovered a case in which he felt the presumption had been, or at least could have been, overcome.¹⁰⁴ Moreover, some courts, caught up in the spirit of the famous

⁹³ UCC § 2-719(2).

⁹⁴ UCC § 2-719(3).

⁹⁵ 250 Ark. 176, 465 S.W.2d 80 (1971).

⁹⁶ *Moore v. Howard Pontiac-American, Inc.* 492 S.W.2d 227 (Tenn. App. 1973).

⁹⁷ *Russo v. Hilltop Lincoln-Mercury, Inc.*, 479 S.W.2d 211 (Mo. App. 1972).

⁹⁸ 125 Ga. App. 462, 188 S.E.2d 250 (1972).

⁹⁹ See also *Riley v. Ford Motor Co.*, 442 F.2d 670 (5th Cir. 1971).

¹⁰⁰ WHITE & SUMMERS, *supra* note 12, at 382.

¹⁰¹ The language of the UCC seems to support this reaction. Section 2-719(2) states that when a failure of essential purpose is found "remedy may be had as provided in this Act," and Comment 1 to the section notes that in such cases the prescribed remedy "must give way to the general remedy provisions of this Article."

¹⁰² See note 94 and accompanying text *supra*.

¹⁰³ See, e.g., *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 315 A.2d 16 (1974). Although at least one court has mysteriously held that an "as is" sale of a used tractor precludes warranty recovery for personal injury, the availability of strict liability in tort rendered the holding academic. *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975).

¹⁰⁴ *Collins v. Uniroyal, Inc.*, 64 N.J. 260,, 315 A.2d 16, 18-25 (1974).

Henningsen case,¹⁰⁵ have found more general limitations to be unconscionable under section 2-302, the broader unconscionability provision of the UCC. In the recent case of *Haugen v. Ford Motor Co.*,¹⁰⁶ for example, where an immaculately drawn remedy-limitation clause allowed recovery for personal injuries but excluded "damage from accident, fire or other casualties," the North Dakota Supreme Court remanded the case to the trial court with instructions that a hearing be held to determine whether this exclusion was unconscionable under section 2-302.¹⁰⁷ A more difficult problem arises when the seller has the wisdom to disclaim the warranty itself, either in lieu of, or in addition to, a remedy limitation. Assuming the disclaimer is otherwise valid, this forces the basic determination of whether a UCC-sanctioned method of conducting business is, under the particular circumstances, unconscionable. At least one situation comes to mind in which there is intense pressure on a court to so rule. A plaintiff-consumer seeking recovery for personal injuries is presumed under section 2-719(3) to have the right to collect regardless of seller-imposed limitations. If the warranty itself has been successfully disclaimed, however, the recovery policy is effectively thwarted. Not surprisingly, this apparent dilemma has often been resolved to the benefit of the plaintiff by finding the disclaimer to be unconscionable under section 2-302.¹⁰⁸ Many writers have urged such a result,¹⁰⁹ all basically relying on the reasoning that was well captured in one text:

If neither § 2-302 nor § 2-719(3) operate [sic] as restrictions on disclaimers drafted pursuant to § 2-316, then the seller has the power to thrust on the consumer all risks of personal injury resulting from defects in its products. Even adherents of "strict-construction" concede that such power is not needed in order to keep the wheels of commerce turning.¹¹⁰

This undeniably moving argument is not without problems,¹¹¹ but there is little doubt that those courts tackling personal injury cases based on a warranty theory will continue to use it as the foundation for granting personal injury recoveries. Whether this is done forthrightly, or in a more "creative" way, will often be the principal issue.

C. *The Super-Creative Approach*

As the subtitle implies, the cases discussed in this section have as their only

¹⁰⁵ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Though a pre-UCC case which never uses the word "unconscionable," *Henningsen* has become the touchstone for those who would have the courts liberally utilize the UCC's unconscionability provisions. See, e.g., Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

¹⁰⁶ 219 N.W.2d 462 (N.D. 1974).

¹⁰⁷ *Id.* at 466-67.

¹⁰⁸ See, e.g., *Matthews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973); *Ford Motor Co. v. Tritt*, 244 Ark. 883, 430 S.W.2d 778 (1968); *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969).

¹⁰⁹ Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 282-83 (1963); Speidel, *The Virginia "Anti-Privy" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 838 (1965).

¹¹⁰ WHITE & SUMMERS, *supra* note 12, at 396.

¹¹¹ See text at note 101 *supra*.

common bond a certain uniqueness of approach that results in the almost mystical disappearance of the disclaimer or limitation in question. Most courts at least purport to rely on the UCC as a foundation for their decisions, although the statute itself has been disregarded on occasions where it appeared to erect annoying impediments to a plaintiff's recovery. Regardless of the type, one gets a picture in reading these cases of lights going off, talismanic phrases being mumbled in the dark, and the light flashing back on just in time to show the consumer exiting with a check in his pocket.

A mild example is *DeCoria v. Red's Trailer Mart, Inc.*,¹¹² where the court curiously decided that the UCC did not apply to the sale of a trailer home.¹¹³ This maneuver led the court around the UCC disclaimer provisions to the state's tough, pre-UCC rule requiring that such clauses be proved by the defendant to have been "explicitly negotiated." A related analysis appears in *Zabriskie Chevrolet, Inc. v. Smith*,¹¹⁴ where a disclaimer was tossed out not only because it was insufficiently conspicuous, but also because it had not been brought to the buyer's attention.

Courts unable to find fault with the manner in which the disclaimer was negotiated have had to concentrate more directly on the language of the clause. One facile way to avoid disclaimers of express warranties is to find the disclaimer and warranty provisions to be in conflict when they clearly are not. *Walsh v. Ford Motor Co.*¹¹⁵ is a prototype. There the disclaimer was struck down and the warranty of merchantability resurrected despite the existence of express warranties in the contract and a clause in the disclaimer applying it to all warranties except those "herein." A variation of the language theme can be found in *Matthews v. Ford Motor Co.*,¹¹⁶ which indicates that a manufacturer-drawn disclaimer must expressly embrace the dealer if the latter is to seek its protections.¹¹⁷ Another convenient way to revive, or at least retain, merchantability is to ignore the existence of the section 2-317 "inconsistency" provisions.¹¹⁸ *Gable v. Silver*¹¹⁹ does this well while seeming to apply similar standards. Still another creative approach was taken by the California Supreme Court in *Seely v. White Motor Co.*,¹²⁰ where Justice Traynor suggested that failure of a dealer to fix a lemonish vehicle after numerous trips to the shop was a violation of the written express warranty. Since the express warranty had been violated, the disclaimer of the implied warranty that accompanied

¹¹² 5 Wash. App. 892, 491 P.2d 241 (1972).

¹¹³ Warranties under the UCC attach to "goods," defined in § 2-105 as "all things (including specially manufactured goods) which are moveable at the time of identification to the contract . . ." As the trailer here was "delivered and installed" after the sales contract was signed (5 Wash. App. at ..., 491 P.2d at 242), the court's use of non-UCC law seems curious indeed. See also *Redman Indus. v. Binkey*, 49 Ala. App. 595, 274 So. 2d 621 (1973); *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973).

¹¹⁴ 99 N.J. Super. 441, 240 A.2d 195 (1968).

¹¹⁵ 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969).

¹¹⁶ 479 F.2d 399 (4th Cir. 1973).

¹¹⁷ See also *Redman Indus. v. Binkey*, 49 Ala. App. 595, 274 So. 2d 621 (1973).

¹¹⁸ See text at note 74 *supra*.

¹¹⁹ 258 So. 2d 11 (Fla. App. 1972).

¹²⁰ 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

it had to go out the window also. This left the implied warranty of merchantability free to operate.

When all else fails, desperation occasionally begets decisions that are difficult to categorize. Faced with an apparently proper disclaimer of implied warranties on the back of the sales contract, a lower Michigan court decided that since the buyer had not "been shown" the clause, was not required to sign the reverse side, and had not been found to have knowledge of the provision, it was invalid.¹²¹ This strange reasoning is even stranger in light of the court's finding that "both parties hereto knew of the terms of the [express] warranty."¹²² The grand prize for creativity, however, must go to the Florida District Court of Appeals. After determining that a dealer's auto warranty disclaimer was ineffective because it was not part of the signed agreement, the court opined that, although the buyer could sue the manufacturer for breach of the warranty of merchantability, the manufacturer could not invoke the protection of its own conspicuous disclaimer because it was not a "seller!"¹²³

D. Summary

While the cases discussed above reflect a judicial temperament strongly disinclined to allow sellers of consumer goods to escape liability through unilaterally imposed disclaimers, they also demonstrate the weaknesses that adhere to the traditional UCC treatment of the subject. Forcing sellers to dot every "i" is perfectly legitimate, but how long can it be until manufacturers' lawyers become sufficiently conversant with sections 2-317 and 2-719 that all disclaimers and remedy limitations are perfectly drawn? Once that day is reached, all that remains is the potpourri of rationales described above and the unconscionability provisions of section 2-302. Of the former, it can only be hoped that our system is capable of creating a scheme of consumer protection laws that does not encourage such obvious straining, intentional obtuseness, and quixotic ingenuity. Moreover, section 2-302 cannot bear the load alone. Persuasive arguments have been both proffered¹²⁴ and accepted¹²⁵ that section 2-316 was not meant to be limited by section 2-302, and even stronger evidence exists that section 2-719(3) was fully intended to be subject to the disclaimer-authorizing provision.¹²⁶ Moreover, it will be difficult to convince many courts to find that a well-drawn disclaimer is unconscionable in the usual major-purchase situation, for the simple reason that the judges will know that the facts in the case before them differ little from those that will come in subsequent cases. In a marketing environment where all disclaimers

¹²¹ *Williams v. College Dodge, Inc.*, 11 UCC REP. SERV. 958 (Mich. Dist. Ct. 1972).

¹²² *Id.* at 959.

¹²³ *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. App. 1972).

¹²⁴ *Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

¹²⁵ *Ford Motor Co. v. Moulton*, 511 S.W.2d 690 (Tenn. 1974); *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967).

¹²⁶ UCC § 2-316, Comment 2, notes that "[i]f no warranty exists, there is of course no problem of limiting remedies for breach of warranty." UCC § 2-719(3), Comment 3, adds "[t]he seller in all cases is free to disclaim warranties in the manner provided in section 2-316" (emphasis added).

are pre-packaged and not negotiated, all of them must be either in or out to an intellectually honest panel. Yet how can the court decide that no disclaimer can be valid in consumer situations when the operative law draws no distinction between commercial and consumer sales? This vexacious question seems to have influenced a recent decision to deny recovery to a seriously injured plaintiff.¹²⁷ More important for our purposes, the question has been the principal motivating force that has spawned the state and federal legislative innovations that are described below.

III. STATE STATUTORY ATTEMPTS TO PROHIBIT CONSUMER WARRANTY DISCLAIMERS

In the interest of consumer warranty protection, a number of states have begun to take the burden off the courts by tinkering legislatively with UCC sections 2-316 and 2-719. The new statutes employ a variety of methods to eliminate the disclaimer problem. Some of the tinkering is quite conservative, while some virtually abolishes the warranty disclaimer irrespective of whether the claim is for personal injury or economic loss. Some of the states have done a good job of drafting, while others have enacted provisions that are models of ambiguity. The following is a summary of the state legislative approaches to date.

A. *The Mississippi Approach*

The Mississippi UCC, effective in 1968, takes the rather curious, but simple, approach of deleting section 2-316 altogether. The legislature has presumably thrown the matter entirely to the courts for resolution on a case-by-case basis. The obvious weakness of this approach is its lack of certainty. Competing implications can be drawn from the deletion of section 2-316: (1) the deletion was intended to allow the disclaimer to operate freely as a matter of *laissez faire* contract, possibly without the burden of "conspicuousness" and the other requisites of an effective disclaimer under the UCC; or (2) the deletion means that warranty disclaimers are now totally ineffective in Mississippi, whether personal injury or economic loss is involved. In addition to these competing hypotheses, and the absence of any enlightening legislative history, the Mississippi deletion did not include any change in UCC section 2-719. As discussed above, limitations of remedy under that provision are generally allowed but are deemed prima facie unconscionable in a personal injury context.¹²⁸ Is a Mississippi court to draw the same line with respect to outright disclaimers? In other words, is there any "echo effect" from section 2-719? No one knows the answer, and there are as yet no court decisions on the point. In sum, it seems that the Mississippi approach illustrates the vice of uncertainty in a situation where statutory lines should be clearly drawn for the benefit of seller

¹²⁷ Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn. 1974).

¹²⁸ UCC § 2-719(3).

and consumer alike. As an example of piecemeal modification of the UCC, it shows the difficulty of amending one provision without casting an eye to related sections.

B. *The Alabama Approach*

A rather conservative but constructive approach has been taken by the Alabama legislature, which added a new subsection (5) to UCC section 2-316: "Nothing in subsection (2) or (3)(a) or in the succeeding section shall be construed so as to limit or exclude the seller's liability for damages for injury to the person in the case of consumer goods."¹²⁹ Wisely, a parallel subsection was added to section 2-719.¹³⁰ The clear purpose of these changes is to wipe out potential disclaimers in a personal injury context, thus allowing the UCC to become a perfect vehicle for products liability actions based on breach of warranty. This approach goes one step beyond section 2-719(3), which only makes such limitations of remedy prima facie unconscionable. It also takes care of the anomaly presented by the lack of a parallel "unconscionability" provision in section 2-316 and eliminates any argument that a total disclaimer of warranty is *not* prima facie unconscionable. Although most courts would probably find a way to invalidate such disclaimers in any case, the Alabama amendments eliminate any argument based upon the text of the UCC. On the other hand, the Alabama approach does not go beyond personal injury in the case of consumer goods.

C. *The National Consumer Act Approach: A Model of Consumer Protection*

In January of 1970, the National Consumer Law Center in Boston promulgated the National Consumer Act (NCA),¹³¹ a model code which was intended as the standard against which all consumer protection legislation could be measured. Part 3 of the NCA is entitled "Warranties and Advertising," and it contains far-reaching provisions to eliminate contractual defenses to warranty actions brought by consumers. Although the NCA *per se* has not been enacted in any states, its approach deserves consideration because a number of states, beginning with Massachusetts in 1970, plucked out and enacted portions of its provisions dealing with warranty protection.

The NCA begins by defining "merchantable" to include not only those qualities prescribed in UCC section 2-314, but also an implied promise "that the goods conform in all material respects to applicable State and Federal statutes and regulations establishing standards of quality and safety of goods, and, in the case of goods with mechanical, electrical, or thermal components, are in good working order and will operate properly in normal usage for a reasonable period of time."¹³² A Comment¹³³ indicates that this expanded

¹²⁹ ALA. CODE, tit. 7A, § 2-316(5) (1966).

¹³⁰ *Id.* § 2-719(4).

¹³¹ National Consumer Act of 1969 [hereinafter cited as NCA].

¹³² *Id.* § 3.301(2) (1970).

¹³³ *Id.* § 3.301, Comment (1970).

definition of "merchantable" could include the criteria established in such federal legislation as the Consumer Product Safety Act¹³⁴ and regulations adopted under the Act by the Consumer Product Safety Commission. In addition, the NCA clearly prohibits any attempt to exclude, modify, or otherwise attempt to limit any express or implied warranty or any remedy provided by law for breach of warranty.¹³⁵ This prohibition would presumably cover the typical disclaimer clause inserted in connection with a written express warranty. Its scope also seems broad enough to catch the oral express warranty that is "disclaimed" in a written contract by relying upon the UCC's parol evidence rule.¹³⁶ Violation of the NCA provision triggers a minimum civil penalty and attorney's fees.¹³⁷ The NCA finishes the job by expressly providing that "no action by a consumer for breach of warranty . . . with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the defendant."¹³⁸ This provision, which the Comment states "is designed clearly and succinctly to 'topple the citadel of privity' once and for all,"¹³⁹ would eliminate the other primary contractual defense to UCC warranty claims in a consumer context. Although this anti-privity provision contains some loopholes, such as the fact that "consumer" is defined in the NCA to include only the immediate purchaser and not other users or bystanders,¹⁴⁰ the purpose is clear. It is significant that a number of states have begun to adopt at least portions of this NCA approach to warranty protection.

D. *The Massachusetts and Maryland Approaches*

In 1970, Massachusetts became the first state to deal effectively with the disclaimer problem when it added a new section 2-316 to the UCC which provides that disclaimers may not be used in connection with the sale of consumer goods. Any language, oral or written, by which a manufacturer or dealer attempts to exclude or modify any implied warranties or remedies for breach of those warranties, is rendered unenforceable.¹⁴¹ In 1971 the legislature amended UCC section 2-318 to provide that lack of privity between a plaintiff and defendant cannot be a defense in a warranty action brought against a manufacturer or dealer by a plaintiff whom the seller might reasonably have expected to use, consume, or be affected by the goods. That same amendment effectively alters section 2-607 by providing that failure of a consumer to give notice to the defendant shall not bar recovery for breach of warranty unless

¹³⁴ 15 U.S.C.A. § 2051 *et seq.* (1974). Other federal acts that would be incorporated by reference into such an expanded definition of "merchantable" include the Federal Hazardous Substances Act, 15 U.S.C.A. § 1261 *et seq.* (1974); the Poison Prevention Packaging Act, 15 U.S.C.A. § 1471 *et seq.* (1974); the Refrigerator Safety Act, 15 U.S.C. § 1211 (1970); and the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.* (1970).

¹³⁵ NCA § 3.302 (1970).

¹³⁶ *See* UCC § 2-202.

¹³⁷ NCA §§ 3.303, 5.303 (1970).

¹³⁸ *Id.* § 3.304.

¹³⁹ *Id.*, Comment.

¹⁴⁰ *Id.* § 1.301(8).

¹⁴¹ MASS. GEN. LAWS ANN. ch. 106, § 2-316A (Supp. 1975).

the defendant proves that he was prejudiced by the failure.¹⁴² Thus, in two fell swoops, the Massachusetts UCC was amended to eliminate artificial contractual defenses to a cause of action based upon breach of the implied warranty of merchantability. The only NCA approaches that were not included were the broader definition of "merchantability" and the imposition of civil penalties for use of disclaimers in form contracts. Nonetheless, it now appears that the Massachusetts UCC is a more useful vehicle than the official text version for plaintiffs bringing actions based upon breach of warranty, whether damages are sought for personal injury or for economic loss.

In 1971, Maryland followed the lead of Massachusetts and the NCA by rendering unenforceable any disclaimers of implied warranties or remedies for breach in connection with the sale of consumer goods.¹⁴³ The Maryland legislature added a caveat that a dealer liable in damages for breach of implied warranty could receive indemnity from the manufacturer, a result that was presumably available anyway under third-party practice. Unlike Massachusetts, Maryland did not amend the privity or notice sections of the UCC.

Under both the Massachusetts and Maryland approaches, an interesting side issue is whether continued use of written disclaimers invalidated by the statute constitutes a deceptive trade practice insofar as consumers might not realize that such disclaimers were legally unenforceable. Such an argument certainly would seem to be available to an aggrieved consumer in such a case.¹⁴⁴

Another significant aspect of the Massachusetts and Maryland approaches is that their prohibition against disclaimers applies not only to new goods, but to used goods as well. Since UCC section 2-316(3)(a) provides that a sale "as is" or "with all faults" constitutes a disclaimer of the implied warranty of merchantability, such a limitation on a written contract for sale of used cars (which are frequently sold "as is") would appear to be illegal under the two statutes. In order to avoid potential deceptive trade practice liability, the seller would probably be well advised to indicate clearly that the "as is" language means only that no *express* warranty is made. Thus far, there is no reported litigation involving the Massachusetts or Maryland statutes.

E. *The Washington Approach*

The 1974 Washington amendment to UCC section 2-316 adds a new sentence which reads as follows:

Notwithstanding the provisions of subsections (2) and (3) of this section . . . in any case where goods are purchased or leased primarily for personal, family or household use or for commercial or business use, disclaimers of the warranty of merchantability or fitness for particular purpose shall not be effective to limit the liability of merchant sellers or lessors or manufacturers except insofar as the dis-

¹⁴² *Id.* § 2-318.

¹⁴³ MD. CODE ANN. art. 95B, § 2-316A (Supp. 1975).

¹⁴⁴ For an example of the deceptive trade practice statute that might be involved in Massachusetts, see MASS. GEN. LAWS ANN. ch. 93A, § 2 (1972).

claimer sets forth with particularity the qualities and characteristics which are not being warranted.¹⁴⁵

Interestingly enough, the Washington prohibition extends to leased goods and non-consumer goods, the first attempt by a statute of this type to press beyond the sale of consumer products. On the other hand, the Washington amendment to section 2-719 does not go nearly so far; it invalidates limitations of consequential damages "unless it is proved that the limitation is not unconscionable" and it prohibits limitations of remedy to repair or replacement of defective parts or nonconforming goods only if the manufacturer or seller does not maintain facilities within the state "adequate to provide reasonable and expeditious performance of repair or replacement obligations."¹⁴⁶ Under the Washington approach, it may be possible for a manufacturer and dealer to combine a limited express warranty with a limitation of remedy for breach of express *or implied* warranty to repair or replacement of defective parts. Could a Washington consumer in possession of a "lemon" obtain a refund of his money by revoking acceptance under UCC section 2-608? The answer appears to be negative, at least if the seller maintains repair facilities in the state of Washington. Furthermore, recovery of economic loss under section 2-715 appears unlikely. Not only does this Washington amendment afford less protection to the consumer than the Massachusetts or Maryland amendments, but the internal inconsistency between sections 2-316 and 2-719 still lurks in the Washington statute. Moreover, what of a written express warranty that carefully delineates the parts covered; is this a disclaimer that "sets forth with particularity the qualities and characteristics which are not being warranted"? It would appear not, although the negative language leaves some room for argument. Finally, would a Washington court give effect to an "as is" contract for a used car? By making it clear that the seller is not standing behind the product one iota, the "as is" language arguably constitutes a disclaimer that "sets forth with particularity" that *nothing* is being warranted. In sum, if the Washington legislature intended to do away with disclaimers and limitations of remedy, its language is hardly up to the task.

F. *The California Approach*

The California Song-Beverly Consumer Warranty Act,¹⁴⁷ effective in 1971, is the first and most significant state attempt to shift the focus of consumer protection *from the implied warranty to the express warranty*. The basic premise of the Song-Beverly Act is that the written express warranties of a manufacturer and dealer are essentially merchandising devices; therefore, if the seller wishes to employ a written warranty to help push his product, he must fulfill that warranty with no strings attached if the product proves

¹⁴⁵ Ch. 78, § 1, [1974, 1st Ex. Sess.] Wash. Laws 167.

¹⁴⁶ *Id.* § 2.

¹⁴⁷ CAL. CIV. CODE §§ 1790-94.2 (West 1973).

defective. It is basically the presence of a written express warranty that triggers the provisions of the Act. If no written warranty is used, then the manufacturer is free to deliver the goods on an "as is" basis. If he chooses to employ a written warranty, however, he must elect either (1) to maintain authorized service facilities to take care of defective products quickly and without cost to the consumer, or (2) to reimburse fully the actual, reasonable cost of his retailers for servicing the manufacturer's warranty. The consumer has the right to return defective goods to the nearest designated service facility, or retailer (if the manufacturer does not designate service facilities), for free repair or replacement (as the retailer chooses) in accordance with the terms of the warranty. The retailer, in turn, has the right to collect from the manufacturer his full, actual, and reasonable costs in servicing the manufacturer's warranty. Under this chain of legal responsibility, a state statute for the first time comes to grips with the *administration* of express warranties.

In the Song-Beverly Act, California also became the first state to regulate, in a comprehensive way, the contents of written express warranties used in the sale of consumer goods. Such warranties, whether from the manufacturer, the distributor, or the retailer, must use readily understandable language and clearly identify the party or parties extending the warranty.¹⁴⁸ The warrantors who have elected to maintain service and repair facilities in the state must provide the buyer with information concerning these facilities, both at the time of sale and through a current listing at the premises of the retailer.¹⁴⁹ The buyer has the duty to deliver defective goods to the service facility, unless this would be unreasonable because of size, weight, or method of installation.¹⁵⁰ The goods must be serviced or repaired, in conformity with the express warranty, generally within 30 days.¹⁵¹ If the service facility cannot do the job within that time, the manufacturer is obligated either to replace the goods or reimburse the buyer in an amount equal to the purchase price "less that amount directly attributable to use by the buyer prior to the discovery of the non-conformity."¹⁵² The same rules apply to retail sellers who are required to respond under the manufacturer's warranty when the manufacturer does not maintain service and repair facilities in the state.¹⁵³ Soft goods that are sold under a written express warranty may be returned within 30 days of purchase (or longer if the warranty so provides) and the manufacturer may elect either to replace or to refund the purchase price.¹⁵⁴ Soft goods such as clothing are not otherwise covered by the Song-Beverly Act.¹⁵⁵ With respect to *used* goods sold under an express warranty made by the retailer or distributor, the seller has an obligation to maintain service facilities and to replace defective

¹⁴⁸ *Id.* § 1793.1(a) (West Supp. 1975).

¹⁴⁹ *Id.* § 1793.1(b).

¹⁵⁰ *Id.* § 1793.2(c) (West 1973).

¹⁵¹ *Id.* § 1793.2(b).

¹⁵² *Id.* § 1793.2(d).

¹⁵³ *Id.* § 1793.3.

¹⁵⁴ *Id.* § 1793.35.

¹⁵⁵ *Id.* §§ 1791(a), (f).

goods or to refund the purchase price.¹⁵⁶ In summary, the real thrust of the Song-Beverly Act is to prod those in the distributive chain to fulfill their written express warranties. To this end, any buyer of consumer goods who is injured by a willful violation of the act may recover treble damages and attorney's fees in an action other than a class action.¹⁵⁷

If a manufacturer makes written express warranties, he is forbidden under the Song-Beverly Act from disclaiming the implied warranty of merchantability.¹⁵⁸ The act applies to virtually all "hard goods" used for personal, family, or household purposes.¹⁵⁹ Thus, a California consumer buying a new car which carries the typical "12 and 12" warranty is not legally affected by any disclaimer of the UCC section 2-314 implied warranty of merchantability. On the other hand, if no express warranties are used, the goods may be sold "as is" or "with all faults" so long as the goods are tagged with a conspicuous writing that informs the buyer that the entire risk of defective goods is on him.¹⁶⁰ It is unclear whether the mere presence of a disclaimer in a form contract for the sale of new goods triggers any civil penalty under the Act, which simply provides that any buyer "injured" by a "willful violation" can collect treble damages. Since the treble damage recovery is expressly made inapplicable to "a judgment based solely on a breach of [the] implied warranty of merchantability,"¹⁶¹ a good argument could be made that continued use of such a disclaimer will not trigger the civil penalty. On the other hand, attorney's fees *are* recoverable in such a case,¹⁶² if a court is persuaded that continued use of written disclaimers in form contracts constitutes a "willful" violation that "injures" consumers by misleading them as to their legal rights. A closely related question is whether such a disclaimer, which flies in the face of the statutory mandate, constitutes a deceptive trade practice under California law.¹⁶³ Such an argument could certainly be made, since the Song-Beverly Act expressly provides that its remedies are cumulative and not to be construed as restricting any remedy otherwise available.¹⁶⁴

The Song-Beverly Act may in some situations take more from the consumer than it gives. The UCC contains no limit on the duration of the implied warranty of merchantability, except that the statute of limitations is set at four years from the date of sale, and the parties can apparently limit the four-year limitation to one year by agreement.¹⁶⁵ The Song-Beverly Act automatically limits duration of an implied warranty to that of the written express warranty, with a floor of 60 days and a ceiling of one year.¹⁶⁶ In terms of

¹⁵⁶ *Id.* § 1795.5(a) (West Supp. 1975).

¹⁵⁷ *Id.* §§ 1794, 1794.2 (West 1973).

¹⁵⁸ *Id.* § 1793.

¹⁵⁹ *Id.* § 1791(a).

¹⁶⁰ *Id.* §§ 1792.3, 1792.4.

¹⁶¹ *Id.* § 1794.2(b).

¹⁶² *Id.* § 1794(b).

¹⁶³ Deceptive practices are listed in *id.* § 1770 (West 1973).

¹⁶⁴ *Id.* § 1790.4.

¹⁶⁵ UCC § 2-725.

¹⁶⁶ CAL. CIV. CODE § 1791.1(c) (West 1973).

warranty duration, this would appear to be a step backward from the protection afforded by the UCC. The problem should not arise in a personal injury context since California law looks to strict liability in tort rather than to UCC warranty notions in such cases.¹⁶⁷ For a consumer, however, whose product falls apart three months after the date of sale, where a three month express warranty is involved, the statute itself has created a most powerful "disclaimer;" such an aggrieved consumer is presumably precluded from revoking acceptance under UCC section 2-608 or suing for damages under section 2-715. With respect to used goods, the duration of the implied warranty of merchantability is coextensive with the express warranty, if reasonable, with a floor of 30 days and a ceiling of three months.¹⁶⁸

Also, while the Song-Beverly Act prohibits the disclaimer of implied warranties, it nowhere prohibits limitations on remedy for breach. Since the statute's remedies are expressly limited to replacement, repair, or refund, section 2-719 of the California UCC¹⁶⁹ will continue to permit a disclaimer of consequential damage liability for breach of the implied warranty of merchantability. This loophole will not upset personal injury claims that are founded in strict liability in tort outside the UCC in California, but a consumer who suffers *economic* loss in attempting unsuccessfully to get a lemonish car repaired could well be faced with an effective limitation of remedy provision in spite of the Song-Beverly Act. Such a result seems to cut against the purpose of the Act to eliminate "disclaimers" used in connection with express warranties. Similarly, a good argument could be made that the Song-Beverly Act is a backward step insofar as it allows the manufacturer, rather than the consumer, to elect whether the remedy for a hapless lemon owner is to be replacement or refund. A court might well allow the manufacturer to make the election even with respect to the implied warranty, particularly if the contract contains a properly-worded limitation of remedy clause under UCC section 2-719.

A third weakness in the Song-Beverly Act is its failure to recognize oral express warranties. Since the express warranty must be in writing to be covered by the act,¹⁷⁰ there are no disclosure or substantive requirements to force a dealer to stand behind oral assurances made to the consumer at the time of sale. Although such statements constitute express warranties under UCC section 2-313 if they become part of the "basis of the bargain," they typically will conflict with the more limited written express warranty. For example,

¹⁶⁷ See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Greenman v. Yuba Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

¹⁶⁸ CAL. CIV. CODE § 1795.5(c) (West Supp. 1975). The Song-Beverly Act states that its provisions "shall not affect the rights and obligations" of parties determined by reference to the UCC "except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods" under the Song-Beverly Act, the latter controls. *Id.* § 1790.3 (West 1974). A consumer such as the one described in the text would certainly argue that the UCC should preempt the Song-Beverly Act regarding warranty duration insofar as the latter actually limits "rights guaranteed to the buyer." The duration limits in the Song-Beverly Act are so specific, however, that they seem to occupy this field.

¹⁶⁹ CAL. COMM. CODE § 2-719(3) (Supp. 1975).

¹⁷⁰ CAL. CIV. CODE § 1791.2(a)(1) (West 1973).

if the salesman orally assures a prospective buyer that "these tires will last for 50,000 miles" or that "we will give you your money back with no questions asked if you aren't satisfied with this appliance," such express warranties will not be enforced under the Song-Beverly Act. Moreover, the emphasis upon written warranties will probably allow the dealer to hide behind the parol evidence rule of UCC section 2-202 in excluding such oral warranties from the evidence. Since the Song-Beverly Act merely provides that "a manufacturer, distributor, or retailer *making express* warranties may not limit, modify, or disclaim the implied warranties . . ."¹⁷¹ use of the parol evidence rule in this way probably does not amount to an invalid "disclaimer."

If no written express warranties are made at all, the Song-Beverly Act allows the implied warranty of merchantability to be disclaimed, but only if the buyer is informed in plain language that the goods are sold "as is."¹⁷² This disclaimer requirement appears to cover "as is" sales of used goods as well.¹⁷³ Thus, the Song-Beverly Act does not go as far as acts in several other states in eliminating all vestiges of the implied warranty disclaimer. In fact, the disclosure approach of the Song-Beverly Act would appear to block a consumer, who bought a 1,000 dollar used car "as is," from obtaining any relief whatsoever should the car fall apart a block from the lot. This result actually seems to boost the legal standing of disclaimers employed in connection with the sale of second-hand goods that, just like new goods, are otherwise covered by the UCC's implied warranty of merchantability.¹⁷⁴ A California used car dealer would certainly argue that the Song-Beverly Act now occupies this field and eliminates any argument that such a disclaimer is unconscionable under UCC section 2-302, or is otherwise ineffective.

As the prior examples indicate, the weaknesses of the Song-Beverly Act lie in its failure to eliminate all UCC contractual barriers to full consumer protection based upon the implied warranty of merchantability. To put the matter another way, the *judicial remedy* is not totally liberated by the act. In this regard, the California statute is probably inferior to the Massachusetts and Maryland approaches described above, as well as to the West Virginia and Kansas approaches described below. The strength of the Song-Beverly Act lies in its beefing up of the *institutional remedy* provided by the manufacturer and his distributive chain via his written express warranty.¹⁷⁵

G. *The Minnesota Approach*

In 1973, the Minnesota legislature enacted a special statute dealing with consumer warranty disclaimers.¹⁷⁶ In some respects, the statute is a shortened

¹⁷¹ *Id.* § 1793 (emphasis added).

¹⁷² *Id.* §§ 1793, 1792.4(a).

¹⁷³ *Id.* § 1795.5 (West Supp. 1975).

¹⁷⁴ See UCC § 2-314, Comment 3.

¹⁷⁵ For general discussions of the Song-Beverly Act, see Thornton, *The Song-Beverly Consumer Warranty Act: New Commandments for Manufacturers*, 46 L.A. BAR BULL. 331; Comment, *Consumer Protection: The Effect of the Song-Beverly Consumer Warranty Act*, 4 PAC. L.J. 183 (1973).

¹⁷⁶ MINN. STAT. ANN. §§ 325.951-.954 (Supp. 1974).

version of the Song-Beverly Act in that it provides simply that any manufacturer, distributor, or retailer who makes a written express warranty in connection with a sale of new consumer goods "shall honor the terms of the express warranty."¹⁷⁷ There is no definition of "honor," nor is there any express statutory requirement of maintaining adequate service facilities in the state. Every manufacturer who makes an express warranty and authorizes a retail seller to perform services or repairs under the terms of the warranty, however, must reimburse the retailer for warranty work "in an amount equal to that which is charged by the retail seller for like service or repairs rendered to retail consumers who are not entitled to warranty protection."¹⁷⁸ This latter provision, of course, is aimed at the problem of manufacturers discouraging warranty work by failing adequately to reimburse their service agents who do the work. The obligation of "honoring" an express warranty adds little to the right of an aggrieved consumer to bring an action under UCC section 2-313. Nor does the Minnesota statute preclude imposing conditions precedent to doing warranty work, such as sending in registration cards. The apparent breakthrough made by the new Minnesota law is that failure to "honor" a written express warranty constitutes a deceptive trade practice,¹⁷⁹ although remedy for violation of the Minnesota Deceptive Trade Practices Act¹⁸⁰ is limited to an action for injunction brought by the attorney general.¹⁸¹ Thus the Minnesota approach is a rather pale and toothless reflection of the Song-Beverly Act. As with the Song-Beverly Act, the new Minnesota statute okays "as is" sales of new goods so long as proper disclosures are made.¹⁸² Unlike California, however, the Minnesota act does not apply to used goods, presumably leaving disclaimers in such sales to be handled by UCC sections 2-316 and 2-719. Although the Minnesota statute reflects a conservative approach to warranty protection, it does add another state to the growing list of jurisdictions that have eliminated disclaimers of the implied warranty where written express warranties are used to merchandise a product. Unlike several of the other statutes, however, it fails to contain a parallel provision regarding limitations on remedy for breach.

H. *The West Virginia Approach*

The warranty provisions of the 1974 West Virginia Consumer Credit Act are in some respects the shortest and sweetest state approach to the problem yet devised. They flatly prohibit any exclusion, modification, or limitation of express and implied warranties, and of all remedies for breach of warranty.¹⁸⁸ They also provide that "no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall

¹⁷⁷ *Id.* § 325.953(2).

¹⁷⁸ *Id.* § 325.953(3).

¹⁷⁹ *Id.* §§ 325.954 and 325.79.

¹⁸⁰ *Id.* §§ 325.771-.80.

¹⁸¹ *Id.* § 325.80.

¹⁸² *Id.* § 325.952.

¹⁸³ W. VA. CODE ANN. § 46A-6-107 (Supp. 1974).

fail because of a lack of privity between the consumer and the party against whom the claim is made."¹⁸⁴ With one short chop, the statute destroys the twin citadels of privity and disclaimer. Moreover, since it also covers oral express warranties, it would seem to be a violation of West Virginia law for a dealer to hide behind the parol evidence rule as a means of "excluding" assurances by a salesman that amount to an express warranty under UCC section 2-313. Unlike the California and Minnesota approaches, the West Virginia statute contains parallel provisions covering both disclaimers and limitations of remedy. Violation of the act by a manufacturer or dealer triggers a civil penalty equal to actual damages, or 200 dollars, whichever is greater. Injunctive relief is also available. The only limitation on the 200 dollar minimum civil penalty is that the consumer must suffer an "ascertainable loss of money or property" as a result of the violation.¹⁸⁵ This limitation might make it difficult to enforce the prohibition against disclaimers unless it could be shown that the buyer was misled by the written disclaimer and suffered some economic loss as a result. In any case, the disclaimer or limitation of remedy is rendered void. In short, the West Virginia statute clears the underbrush from the implied warranty of merchantability as effectively as the Song-Beverly Act gives a booster to the standard written express warranty.

I. *The Kansas Approach*

Kansas has recently adopted a consumer protection statute dealing directly with the disclaimer and privity "underbrush" around the implied warranty. Like those in West Virginia, Minnesota, and California, the Kansas statute, which became effective January 1, 1974, is not drafted as an amendment to the UCC, but as part of a totally separate consumer protection act.¹⁸⁶

The separate Kansas statute is parallel to the West Virginia approach in flatly prohibiting any party in the distributive chain from disclaiming implied warranties or limiting remedies for breach.¹⁸⁷ Such contractual barriers to full warranty recovery are rendered void.¹⁸⁸ The original version of the Kansas provision,¹⁸⁹ like the West Virginia provision, also prohibited limita-

¹⁸⁴ *Id.* § 46A-6-108.

¹⁸⁵ *Id.* § 46A-6-106(1).

¹⁸⁶ KAN. STAT. ANN. §§ 50-623 to 43 (Supp. 1974).

Is it wise draftsmanship to deal with warranty disclaimers outside the confines of the UCC? If the warranty statute not only deals with disclaimers and privity, but also follows the California approach of providing criteria for written express warranties, a separate statute clearly seems preferable. In fact, even in a state like West Virginia or Kansas, where the statute only eliminates disclaimers and privity as barriers for a consumer with a defective product, it is probably unwise to draft the provisions as amendments to UCC §§ 2-316, 2-719, and 2-318. In the first place, such variations detract from the uniformity of the UCC, which by its terms defers to special statutes aimed at consumer buyers. UCC § 2-102. More importantly, a complete state warranty protection statute requires its own sanction provisions and internal set of defined terms; incorporating such items into amendments to the UCC is a very ticklish undertaking. On the other hand, if the statute merely provides that warranty disclaimers and remedy limits are void insofar as they are used in consumer sales contracts, consideration might be given simply to amending the UCC.

¹⁸⁷ KAN. STAT. ANN. § 50-639(a) (Supp. 1974).

¹⁸⁸ *Id.* § 50-639(e).

¹⁸⁹ Ch. 217, § 17, [1973] Kan. Sess. Laws 813, as amended KAN. STAT. ANN. § 50-639(a) (Supp. 1974).

tions of *express* warranties. Some Kansas car dealers felt that this language might automatically invalidate written express warranties that were limited in duration or in the remedies afforded an aggrieved consumer. Although there is no evidence that this result was intended, the concept of prohibiting any exclusion, modification, or limitation of an express warranty does appear to be a contradiction in terms. Therefore, the reference to express warranties was eliminated in 1974 as creating a needless ambiguity. The prohibition against limiting express warranties, however, could have been used as a way around the parol evidence rule where the written warranty form contradicts oral assurances made by the seller. This problem will now have to be tackled as a deceptive trade practice under a separate Kansas provision that outlaws "the intentional use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact."¹⁹⁰

The Kansas statute allows a seller to limit his implied warranty of merchantability "with respect to a defect or defects in the goods," but only if the seller "establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties. In neither case shall such limitation apply to liability for personal injury or property damage."¹⁹¹ For example, if a used car dealer lowers his price on the basis of a faulty transmission, and the consumer is willing to buy on this basis, the car may be sold without any implied warranty attaching to the transmission. In a typical "as is" sale, where no specific defects are brought to the consumer's attention, any attempt to disclaim the implied warranty would probably run afoul of the Kansas statute. Since a written "as is" contract, by definition, constitutes a disclaimer of the implied warranty,¹⁹² it now appears to be unenforceable in states like Kansas, West Virginia, Massachusetts, and Maryland. The Kansas Motor Car Dealers Association has responded by redrafting their "as is" form contract for used cars to provide simply that "[t]his vehicle is sold without any express warranty, oral or written."¹⁹³ Such language focuses on the absence of an *express* warranty without purporting to disclaim any *implied* warranty, thus complying with the statute. An aggrieved consumer is freed to sue for breach of implied warranty without worrying about any disclaimer. On the other hand, the consumer still has the burden of proving that the product is substandard, a difficult proposition that becomes more difficult with the age of the product.¹⁹⁴ It seems clear that the typical consumer will look upon a car "sold without any express warranty, oral or written" the

¹⁹⁰ KAN. STAT. ANN. § 50-626(b)(2) (Supp. 1974). As a drafting matter, a state might well consider a provision dealing directly with the parol evidence problem, something along the following lines: "It shall constitute a deceptive practice for a seller to make an oral express warranty which is disclaimed in a written sales contract."

¹⁹¹ *Id.* § 50-639(c).

¹⁹² See UCC § 2-316(3)(a).

¹⁹³ Copy on file with author.

¹⁹⁴ Although UCC § 2-314 extends the implied warranty of merchantability to used goods, Comment 3 to that section warns that "[a] contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."

same way he would look upon a car sold with the straight "as is" language. If the contract gets into the hands of his lawyer, however, the difference could be significant.¹⁹⁵

The Kansas handling of two related areas—the definition of "merchantability" and the treatment of privity—gives broader protection than other state schemes. Basically following the NCA and Massachusetts approaches, the Kansas statute defines "merchantable" also to mean that the goods "conform in all material respects to applicable state and federal statutes and regulations establishing standards of quality and safety of goods . . . and . . . in the case of goods with mechanical, electrical, or thermal components, [that] the goods are in good working order and will operate properly in normal usage for a reasonable period of time."¹⁹⁶ Although this provision incorporates by reference product standards such as those found in the Consumer Product Safety Act, a court would presumably find such a statute "inapplicable" to products manufactured prior to the promulgation of the relevant standards. It is, as yet, too early to measure the effect of the broadened definition of "merchantability" in the Kansas act.

The Kansas statute also appears to eliminate all privity barriers between those in the distributive chain and "the claimant," who could presumably include the buyer, his family, or anyone else who might reasonably be expected to use, consume, or be affected by the goods, and who is injured by breach of the warranty. So construed, the Kansas statute actually broadens the class of third-party beneficiaries who are otherwise protected from a breach of warranty under the Kansas UCC.¹⁹⁷

The Kansas statute also has sharp teeth, in that violation of the warranty provision triggers a civil penalty of up to 2,000 dollars, in the discretion of the court.¹⁹⁸ Such an action may be maintained by either an aggrieved consumer or the attorney general. A civil penalty can be recovered irrespective of whether a warranty disclaimer is invoked by the seller; its mere presence in the contract is a violation of the Act. It is unclear, however, whether a

¹⁹⁵ A related problem in states like Kansas, which flatly prohibit all disclaimers or remedy limits on implied warranties, is whether a limited *express* warranty constitutes such a disclaimer. As stated above, this is probably precisely the effect in the mind of the consumer. It thus carries with it the kind of deception that the court felt in *Henningsen*. On the other hand, it seems extreme to require a seller to state affirmatively in his written contract that "irrespective of any limitation on the express warranty we have given to you, we hereby advise you that the implied warranty of merchantability under UCC § 2-314 remains in full flower. If you feel you've got a lemon, see your lawyer for your remedies thereunder." Nonetheless, it might be wise draftsmanship to provide in the applicable state statute that "the making of a limited express warranty does not in itself constitute a disclaimer of any implied warranty."

¹⁹⁶ KAN. STAT. ANN. § 50-624(f) (Supp. 1974).

¹⁹⁷ The Kansas version of UCC § 2-318 extends warranties "to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." KAN. STAT. ANN. § 84-2-318 (Supp. 1974) (The Kansas version is the same as Alternative B suggested in AMERICAN LAW INSTITUTE, REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE CONSUMER COMMERCIAL CODE at 13 (1967)). Since the purpose of the Kansas Consumer Protection Act is to eliminate any remaining privity barrier, the effect on UCC § 2-318 is arguably to eliminate the necessity of showing injury "in person." For example, a bystander whose car is injured by another car with a defective handbrake might not have recovered under the Kansas UCC, but might recover under the new Kansas Consumer Protection Act.

¹⁹⁸ KAN. STAT. ANN. § 50-636(a) (Supp. 1974).

consumer can recover any civil penalty against a dealer who was not responsible for the manufacturer's contract form that contained a disclaimer. Since only the "violator" is responsible,¹⁹⁹ such a dealer might be exculpated. Even if the dealer were liable, however, he would presumably have recourse over against the manufacturer who caused the trouble in the first place. If a consumer prevails in an action based upon breach of warranty and the written contract contains an illegal disclaimer, the court may also award reasonable attorney's fees, to be paid by the manufacturer or other party who caused the improper disclaimer to be written.²⁰⁰

The Kansas approach to warranty protection is basically the same as that taken by Massachusetts, Maryland, and West Virginia, *i.e.* get rid of the disclaimer and privity "underbrush" so that the implied warranty is liberated as a viable tool to protect consumers from defective products. The Kansas statute does not impose affirmative standards on written express warranties *a la* the Song-Beverly Act.²⁰¹ The Kansas statutory scheme, however, does create a comprehensive system of product liability law under the UCC that renders it unnecessary for the courts to adopt strict liability in tort. A detailed description of this development is the subject of the next section.

IV. EXCURSUS: STRICT LIABILITY UNDER THE KANSAS UCC

A. *Kansas Has Adopted Strict Liability*

Since January 1, 1974, when the Consumer Protection Act described above became effective, strict liability has been the law of Kansas. When most attorneys and commentators speak of "strict liability," they mean something akin to section 402A of the *Restatement of Torts*. While the Kansas Supreme Court has never adopted section 402A, the legislature has provided a vehicle for plaintiffs aggrieved by defective products that is more potent and comprehensive than strict liability in tort. It is called the implied warranty of merchantability! Now that the Consumer Protection Act has eliminated "contractual" defenses such as disclaimer and privity, the UCC provides an ideal vehicle for product liability recovery. In spite of this fact, many plaintiff's attorneys in Kansas never bother to cite UCC section 2-314, and it goes ignored in most of the judicial decisions involving defective products. One of the most recent examples is *Symons v. Mueller Company*,²⁰² in which the Tenth Circuit indicated that Kansas probably had adopted strict liability but never

¹⁹⁹ *Id.*

²⁰⁰ *Id.* § 50-639(e).

²⁰¹ The only foray into this area involves a special statute covering mobile homes, which does require the manufacturer to include a written express warranty that the vehicle has been manufactured in conformity with an industry-wide code, that it is free from any defects in design, materials, or workmanship, and that the manufacturer will take appropriate action at the site of the mobile home to correct defects that become evident within one year from the date of delivery. KAN. STAT. ANN. § 75-1221 (Supp. 1974). This mandatory express warranty covering mobile homes, which carries a criminal penalty for violation, *id.* § 75-1223, is in addition to any other rights under § 2-314 of the UCC and the Kansas Consumer Protection Act.

²⁰² 493 F.2d 972, 976-77 (10th Cir. 1974).

mentioned the UCC. How does the Kansas version of strict liability under section 2-314 compare with that of those states that have judicially adopted section 402A of the *Restatement of Torts*? As the following discussion indicates, the Kansas consumer is better off.

Section 402A of the *Restatement (Second) of Torts* provides as follows:

§ 402A *Special Liability of Sellers of Products for Physical Harm to User or Consumer*

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

- (1) to harm to persons other than users or consumers;
- (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
- (3) to the seller of a component part of a product to be assembled.²⁰³

The policy behind strict liability in tort as embodied in section 402A is that a manufacturer who is engaged in an activity that creates a predictable risk of harm to the public is in the best position to bear the initial cost of that harm and then to spread that cost to all consumers in the form of higher prices. This is the concept of "enterprise liability," under which the manufacturer who produced the defective product will be encouraged to promote better quality control. The point that is so often forgotten by promoters of strict liability is that section 2-314 of the UCC, when stripped of its disclaimer and privity luggage, can be the statutory basis for implementing the policy behind strict liability. This is precisely what has happened in Kansas. As the following comparative analysis will indicate, the implied warranty of merchantability is an even more useful tool than strict liability in tort.

B. Comparative Analysis of Section 402A and UCC Section 2-314 in Kansas

1. *Defect in the Product.* Recovery by a consumer under either section 402A or UCC section 2-314 requires proof that the product is defective. The language in section 402A speaks of a product "in a defective condition," whereas the UCC refers to products that are not "fit for the ordinary purposes" for

²⁰³ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

which they are normally used. Although the language varies slightly, the idea is the same; the manufacturer cannot be made an insurer of what happens to the product once it leaves the factory. On the other hand, both approaches allow an aggrieved plaintiff to recover without having to allege or prove negligence, with or without the aid of *res ipsa loquitur*. The need to prove a defect is of course nothing new to Kansas product law.²⁰⁴ On the other hand, section 402A would require a showing that the product was "unreasonably dangerous," whereas section 2-314 only requires that it be substandard when compared to other goods of the same kind. In this regard, a plaintiff might feel a bit safer by proceeding under the UCC. Neither theory is limited to certain kinds of goods, such as food and drink. Although early Kansas product law focused almost entirely upon items ingested by the consumer,²⁰⁵ later cases extended a form of strict liability to personal injury caused by defective tires²⁰⁶ and to property loss caused by a defective animal serum.²⁰⁷ It is now clear that section 2-314 draws no lines according to the type of goods involved, and, in this sense, it is every bit as potent as strict liability in tort.

In one important respect the potential coverage of UCC section 2-314 is much broader than that of section 402A. As discussed above,²⁰⁸ the new Kansas Consumer Protection Act broadens the definition of "merchantable" to mean that the product must "conform in all material respects to applicable state and federal statutes and regulations establishing standards of quality and safety of goods."²⁰⁹ For example, this provision would incorporate by reference into section 2-314 any safety or other product standards promulgated by the Consumer Products Safety Commission. In short, a "state of the art" test would apply to product liability actions brought under the UCC. Such a result is not at all certain under section 402A, which merely speaks of products sold in a "defective condition unreasonably dangerous" to the user. At least with respect to new products manufactured after promulgation of federal or state standards, the implied warranty of merchantability appears to be the better vehicle for a plaintiff with a defective product. In fact, the warranty approach under the UCC might include recovery for defective *design* insofar as the design is out of phase with government standards. By comparison, it is difficult to use section 402A in a defective design case, since the *Restatement* focuses only upon the defective "condition" of the product.²¹⁰ In sum, the implied warranty of merchantability is better than section 402A of the *Restatement* when it comes to the issue of whether a "defect" is present.

²⁰⁴ See, e.g., *Jacobson v. Ford Motor Co.*, 199 Kan. 64, 427 P.2d 621 (1967).

²⁰⁵ *Simmons v. Wichita Coca-Cola Bottling Co.*, 181 Kan. 35, 309 P.2d 633 (1957) (beverage); *Parks v. G. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202 (1914) (food); cf. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954) (cosmetics); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953) (explosion of bottle).

²⁰⁶ *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959).

²⁰⁷ *Chandler v. Anchor Serum Co.*, 198 Kan. 571, 426 P.2d 82 (1967).

²⁰⁸ See text at notes 186-201 *supra*.

²⁰⁹ KAN. STAT. ANN. § 50-624(f) (Supp. 1974).

²¹⁰ For a significant recent Kansas case in which the court found the evidence insufficient to submit to the jury a defective design case based upon negligence, see *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971).

2. *Range of Suppliers Covered.* Under either strict liability theory, the seller of the defective product must be a merchant with respect to that product. Since both section 402A and UCC section 2-314 are based on a policy of enterprise liability, and since each is intended to protect the individual consumer from harm caused by those who are in the business of selling goods for profit, neither theory covers an isolated sale from one consumer to another. With respect to merchant suppliers, however, which theory offers a better chance of judicial extension beyond sales transactions? Section 402A is captioned as applying only to "sellers," and yet some courts have not hesitated to apply strict liability in tort to other commercial suppliers, such as lessors.²¹¹ Similarly, the implied warranty of merchantability has been extended by analogy to non-sales cases.²¹² The best indication of the Kansas Supreme Court's willingness to use UCC Article 2 as an analogical take-off point for implying warranties of quality in non-sale situations is a pre-UCC case in which a warranty action was allowed by the user of a hair preparation in an action against the manufacturer and the beauty shop that applied the product.²¹³ This case arguably involved a "service" rather than a sale of "goods," although the court refused to draw such a line.²¹⁴ In any case, Article 2 of the UCC *can* be used by a court as a pattern to follow where the case involves the sale of subdivision homes, the rental of apartments, the leasing of goods, bailments, or perhaps even the delivery of services. So long as the policy of enterprise liability is involved, section 2-314 can be judicially extended beyond the technical scope of UCC Article 2.

3. *Range of Remedies Available.* Both section 402A and UCC section 2-314 require that the plaintiff be damaged and that the damage be caused by the defect in the product. Section 402A is available, however, only for "physical harm" to the consumer or his property. In California, where strict liability in tort is highly developed, an action for economic damage such as lost profits is unavailable under section 402A.²¹⁵ Only one case decided to date suggests that strict liability in tort will support an action for pure economic loss, and this decision appears to be something of an anomaly.²¹⁶ It is with respect to the range of remedies available to a consumer aggrieved by a defective product that the UCC really shines. A breach of the implied warranty of merchantability under section 2-314 unleashes a whole stable of remedies: personal injury damages are recoverable under UCC section 2-715(a)(1); property damage is recoverable under the same section; lost profits or other consequential damages of a commercial nature are recoverable under UCC section 2-715(a)(2); a consumer who bought a lemon can recover under

²¹¹ See *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal Rptr. 178 (1970).

²¹² See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

²¹³ *Patterson v. Weyer, Inc.*, 189 Kan. 501, 370 P.2d 116 (1962).

²¹⁴ See also *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974), where the Kansas Supreme Court recognized for the first time an implied warranty of habitability in connection with leased real estate.

²¹⁵ *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

²¹⁶ *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). See also *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965).

2-714(2) the difference between the value of the goods as they are and their value had they been as warranted; and, perhaps most important in the "lemon" situation, a buyer may cancel and get his money back under section 2-608 if the breach of warranty "substantially impairs" the value of the product to him.²¹⁷ In short, virtually every remedy that might be invoked by a consumer with a defective product is authorized under Article 2 of the UCC. In this regard, the warranty approach is far superior to strict liability in tort under section 402A, which focuses only on personal injury. The beauty of the implied warranty of merchantability is that it provides a clear statutory basis for a comprehensive range of remedies to cover every kind of injury caused by defective products.

4. *Supervening Fault.* Both section 402A and UCC section 2-314 contemplate consumer misuse or assumption of risk as defenses to an action brought on a defective product. A product will not be considered "unreasonably dangerous to the user" under the *Restatement* if injury is caused by the supervening fault of the user. Similarly, under UCC section 2-314 the product must be only "reasonably fit" for the intended use, language sufficiently flexible to exclude cases of consumer misuse. Another route to the same result under the UCC is section 2-715, which allows recovery only for injury "proximately resulting from any breach of warranty."²¹⁸ For example, when a Boston Brahmin sues a restaurant for damages caused by an errant bone in a cup of fish chowder, a court would have plenty of room under either section 402A or section 2-314 to deny recovery on the basis of assumption of risk, even though that defense is not found expressly in either provision.²¹⁹ Similarly, a consumer who willingly puffs cancer sticks despite the FTC warning on the package will be hard-pressed to avoid assumption of risk under the UCC. Moreover, an "allergic reaction" defense presumably will be tested by approximately the same criteria, whether the issue is framed in terms of "defective condition unreasonably dangerous" under section 402A or "not reasonably fit" under UCC section 2-314. Continued use of a product despite knowledge of a defect is a defense under the *Restatement*,²²⁰ just as it would be under UCC section 2-314.²²¹ Either theory would be consistent with Kansas case law, which holds that unreasonable use of a product after discovery of a defect is a defense akin to assumption of risk.²²² In sum, the two theories are quite similar with respect to supervening cause as a defense to be raised by the seller.

5. *Disclaimers.* Since strict tort liability under section 402A is not based

²¹⁷ The UCC remedies of revocation of acceptance under § 2-608 and recovery of diminution of value under § 2-714 would appear to be mutually exclusive, and thus consistent with prior Kansas case law. See *Fox v. R.D. McKay Motor Co.*, 188 Kan. 756, 758, 366 P.2d 297, 299 (1961). On the other hand, there is nothing in the UCC that prohibits a consumer who cancels under § 2-608 from also collecting consequential damages under § 2-714.

²¹⁸ KAN. STAT. ANN. § 84-2-715(2)(b) (1965).

²¹⁹ See *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964) (recovery denied without articulation of products liability theory or assumption of risk defense).

²²⁰ See RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

²²¹ KAN. STAT. ANN. § 84-2-715, Official Comment 5 (1965).

²²² *Bereman v. Burdolski*, 204 Kan. 162, 460 P.2d 567 (1969).

upon notions of contract, neither limits on remedies nor outright disclaimers have ever been accepted as a defense. With the Kansas Consumer Protection Act now law, the same result obtains under an implied warranty theory, irrespective of whether personal injury or economic loss is involved.²²³ This elimination of the disclaimer as a defense to revocation of acceptance under UCC section 2-608 or consequential damages under section 2-715 is a real groundbreaker for consumer protection. Although courts in product cases involving personal injury have normally brushed aside any disclaimer, this is not the case where the right to cancel or collect economic damages is involved.²²⁴ Since most consumers never have the disclaimer explained to them through advertising or during sale negotiations, it seems proper to strike it down by statute irrespective of the injury involved. It should be added that under the Kansas Consumer Protection Act the disclaimer is rendered void even where the buyer is a sole proprietor using the product in his business.²²⁵ Now that disclaimers and remedy limits are ineffective under Kansas law, one of the prime arguments against using the UCC as a vehicle for product liability claims has been removed.²²⁶

6. *Vertical and Horizontal Privity.* Section 402A of the *Restatement of Torts* extends its protection to the ultimate "user or consumer," thus dispensing with both "vertical" privity (insulating from liability the manufacturer who had no direct dealings with the aggrieved consumer) and "horizontal" privity (limiting potential plaintiffs to the immediate buyer of the defective product). Thus, the class of potential plaintiffs under section 402A would include members of the buyer's family, his friends who might use the product, and perhaps even bystanders. With respect to the class of potential defendants, the whole thrust of section 402A is to fix liability on the manufacturer who set the defective product afloat. On the other hand, it is not so clear that section 402A liability should be imposed upon a distributor or retailer who probably had nothing to do with creating the defect. At least one state that has adopted strict liability in tort has imposed such liability upon a retailer.²²⁷ This result, however, is by no means assured by the reference to "seller" in section 402A.

What is the status of "privity" under Kansas warranty law? With respect to remote sellers, Kansas case law is crystal clear in extending liability to any seller in the distributive chain. In *Chandler v. Anchor Serum Co.*²²⁸ the Kansas Supreme Court held the manufacturer, the distributor, and the dealer of defective animal vaccine serum jointly and severally liable to a rancher whose cattle herd had been decimated by blackleg as a result of injections of the

²²³ KAN. STAT. ANN. § 50-639 (Supp. 1974).

²²⁴ See the empirical study by Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 135-41.

²²⁵ KAN. STAT. ANN. §§ 50-639 and 50-624(b), (c) (Supp. 1974).

²²⁶ The Consumer Protection Act is perhaps not such a radical departure from Kansas law as might first appear. In *Steele v. J.I. Case Co.*, 197 Kan. 554, 419 P.2d 902 (1966), the Kansas Supreme Court invalidated as against public policy a manufacturer's limitation on consequential damages in connection with the sale of a farm implement.

²²⁷ *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 169, 27 Cal. Rptr. 896 (1964).

²²⁸ 198 Kan. 571, 426 P.2d 82 (1967).

defective serum. Although the court referred to an "implied warranty of fitness" rather than the implied warranty of merchantability under UCC section 2-314, the result would be the same in either case. *Anchor Serum* destroyed the last vestiges of "vertical privity" as a defense to a products liability case in Kansas. As discussed above, the Kansas legislature amended UCC section 2-318 to extend the class of third party beneficiaries of the UCC implied warranty from members of the buyer's immediate family and house-guests, to "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty."²²⁹ This broadened language would include personal injury sustained by any individual who foreseeably would be affected by a defective product, including permissive users and bystanders.²³⁰ Moreover, the new Kansas Consumer Protection Act provides that "no action for breach of warranty with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made."²³¹ Thus, under present law, a natural person can clearly recover against the retailer, distributor, or manufacturer for whatever personal injury he sustains from a defective product. The only limit to the class of potential plaintiffs under a Kansas UCC warranty theory is one of foreseeability,²³² just as it would be for strict liability in tort under section 402A.²³³ Privity, like the disclaimer, is dead in Kansas.

7. *Statute of Limitations.* Which theory gives an aggrieved plaintiff the better statute of limitations in a products liability case, section 402A or UCC section 2-314? If suit were brought in tort under section 402A, it seems clear that the court would be bound by the tort statute of limitations, which provides a two-year limitation on actions governing "injury to the rights of another, not arising on contract . . .,"²³⁴ with the cause of action accruing on the *date of injury*. In an action based upon UCC section 2-314, however, the period of limitation is a full four years from the *date of sale*.²³⁵ In most cases, a Kansas plaintiff thus will be better off by framing his action as one based upon warranty under the UCC.²³⁶ On the other hand, weird cases have arisen

²²⁹ KAN. STAT. ANN. § 84-2-318 (Supp. 1974).

²³⁰ See Statutory Note, *Caveat Venditor—Strict Products Liability under the Uniform Commercial Code*, 16 KAN. L. REV. 285, 287-93 (1968).

²³¹ KAN. STAT. ANN. § 50-639(b) (Supp. 1974).

²³² For the leading case on foreseeability in a contractual context, see *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. 145 (1854).

²³³ For the leading case on foreseeability in a tort context, see *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1938).

²³⁴ KAN. STAT. ANN. § 60-513 (Supp. 1974).

²³⁵ *Id.* § 84-2-725 (1965). Section 84-2-725(1) arguably allows a seller of goods to reduce the duration of the implied warranty to one year from the date of sale. In a consumer context, this provision has now been altered by the Kansas Consumer Protection Act, which prohibits any modification or limitation of the implied warranty of merchantability. KAN. STAT. ANN. § 50-639(a) (Supp. 1974).

²³⁶ UCC § 2-725 provides that the basic four-year limitation may not be extended by the parties to a sales contract. At first glance it might appear that this provision precludes an express warranty with a duration of more than four years. Such a warranty, however, would appear to be covered by § 2-725(2), which provides that a cause of action for breach of warranty does not accrue upon date of delivery "where a warranty explicitly extends to future performance." In such a case, the cause of action accrues when the breach is or should have been discovered. An express warranty with a duration of more than four

where a plaintiff suing on a warranty theory has been barred by the four-year statute when he was injured by a defect that did not appear until long after the sale; in such a case, the plaintiff would be barred even before injury!²³⁷ To avoid such anomalies, and to eliminate unnecessary traps where a product case might be won or lost depending upon whether the petition sounds in "warranty" or "tort," the Kansas legislature should consider amending the UCC statute of limitations to provide that a warranty action involving personal injury is governed by the Kansas tort limitation.²³⁸

8. *Notice of Breach.* Many advocates of strict liability in tort stress that section 402A does not impose any duty on an injured consumer to notify the retailer or manufacturer of the injury. By contrast, they argue, UCC section 2-607(3)(a) bars a buyer from any remedy if he fails to notify the seller of the breach "within a reasonable time after he discovers or should have discovered" the breach. Thus, they conclude, section 402A is a superior vehicle for product liability claims. Review of the case law under section 2-607, however, reveals that this is just a tempest in a teapot. In fact, no cases have been reported in which a non-business consumer was thrown out of court for failing to give the statutory notice. Perhaps the closest case is *Leeper v. Banks*,²³⁹ where a consumer who purchased a defective can of starch was barred from suing the retailer when no notice had been given until the filing of the warranty suit nearly a year after the alleged injury. The court went out of its way, however, to note that the consumer had notified the manufacturer within four months of the injury, thus suggesting that the action could have been brought against the manufacturer. The only cases in which the plaintiff is barred from any remedy appear to be those involving commercial buyers.²⁴⁰ Furthermore, the courts have been highly protective in their reading of section 2-607(3)(a), emphasizing that the notice need not take any special form and that it can be oral rather than written.²⁴¹ Finally, the courts have held the notice requirement inapplicable to situations in which the plaintiff is not the

years seems precisely the kind of situation the draftsmen had in mind. See WHITE & SUMMERS, *supra* note 12, at 341-42. In such a case, the statute would not begin to run until discovery of the defect, or expiration of the express warranty, whichever occurred first. Thus, UCC § 2-725 imposes no limit on the duration of express warranties. See *Mittasch v. Seal Lock Burial Vault, Inc.*, 12 UCC REP. SERV. 665 (N.Y. Sup. Ct. 1973) (lifetime guarantee on vault extends to future performance under § 2-725, so that cause of action accrues when breach is or should have been discovered). On the other hand, the cases make it clear that the implied warranty of merchantability cannot "explicitly extend to future performance" and is thus limited to four years' duration. *General Motors Corp. v. Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974); *Wilson v. Massey-Ferguson, Inc.*, Ill. App., 315 N.E.2d 580 (1974).

²³⁷ See *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), where a man was injured when a glass door to the bank he was entering exploded. Although the case was not decided under the UCC, the court barred the plaintiff, who was injured seven years after the sale of the door to the bank. The six-year contract limitation ran from the date of sale under New York law.

²³⁸ KAN. STAT. ANN. § 84-2-725 (1965) should be amended by adding the following new subsection (5): "(5) Notwithstanding subsections (1) and (2), a cause of action for injury to person or property proximately resulting from a breach of warranty shall be brought within the time provided in K.S.A. 60-513(4)."

²³⁹ 487 S.W.2d 58 (Ky. Ct. App. 1972).

²⁴⁰ See, e.g., *KLPR TV, Inc. v. Visual Electronics Corp.*, 465 F.2d 1382 (8th Cir. 1972); *Lynx, Inc. v. Ordnance Products, Inc.*, Md. App., 327 A.2d 502 (1974).

²⁴¹ *Page v. Camper City & Mobile Home Sales*, Ala., 297 So. 2d 810 (1974).

immediate purchaser.²⁴² In short, the courts appear to be following the Official Comment to section 2-607, which provides: " 'A reasonable time' for notification from a retail consumer is to be judged by different standards [than the commercial standards applicable to a merchant buyer] so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."²⁴³ A strong argument can be made, however, that some notice requirement, if imposed with judicial flexibility, is a good idea. Otherwise, the potential defendants in a product liability case will be unable to examine the defective product, to prepare their case based upon lack of defect or the presence of supervening fault, or to recall from the market other defective products of the same class. Without any notice, the manufacturer is working under a significant handicap.²⁴⁴ Therefore, the notice requirement of the UCC appears to be a valuable tool that protects a dealer or manufacturer from a bad faith consumer who refuses to allow inspection of the damaged goods before the evidence disappears. So long as the courts pay attention to the Comment to section 2-607, as they have thus far, the notice requirement will not bar a good faith consumer from recovery.

C. The Kansas UCC Has Now Preempted the Products Liability Field

The prior comparative analysis has attempted to show that the implied warranty of merchantability in Kansas is a vehicle for products liability that is superior to section 402A of the *Restatement of Torts*. Given this conclusion, and in light of the fact that the Kansas legislature has consciously expanded the UCC to give consumers a full range of remedies under section 2-314 unburdened by disclaimers, limits on remedy, privity, or unreasonable notice requirements, it has become totally unnecessary for Kansas to adopt section 402A. The implied warranty of merchantability gives Kansas consumers strict liability in tort under a different name. As a policy matter, it seems far preferable to use the UCC as the primary source of products liability law in Kansas without creating a confusing, bifurcated system by also adopting section 402A or some similar rule. In this way, the source of law remains the same regardless of the injury involved. In a state like California, by comparison, the courts must play Jeckyl and Hyde, using section 402A where personal injury is involved and using the UCC where commercial loss results.²⁴⁵ In Kansas, since the UCC as altered by the Consumer Protection Act covers

²⁴² See, e.g., *Tomczuk v. Town of Cheshire*, 26 Conn. Sup. 219, 217 A.2d 71 (1965); *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 11 UCC REP. SERV. 478 (Ga. Ct. App. 1972); KAN. STAT. ANN. § 84-2-607, Official Comment 5 (1965).

²⁴³ KAN. STAT. ANN. § 84-2-607, Official Comment 4 (1965). See also *Hickman v. Bross*, 58 Pa. D. & C.2d 137, 12 UCC REP. SERV. 480 (Pa. Ct. C.P. 1972), where a purchaser notified the dealer but not the manufacturer. The court held that he could sue the manufacturer for breach of warranty under § 2-607(3)(a) in spite of the lack of notice, since the duty to notify does not extend to remote sellers.

²⁴⁴ See Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 118.

²⁴⁵ See Justice Traynor's opinion in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

both situations, such schizophrenia is avoidable. Moreover, problems of pleading are certain to be reduced by a unified approach to products liability under the UCC.

In fact, it might well be argued that the UCC now occupies the field as a matter of law in Kansas. There is no doubt that the implied warranty is intended to protect against defective goods of all kinds. Recovery for personal injury certainly is contemplated by the draftsmen in the UCC remedies sections²⁴⁶ and the provisions dealing with privity.²⁴⁷ The Comments to the notice section clearly contemplate traditional products liability cases brought within the purview of the UCC,²⁴⁸ and the Kansas Consumer Protection Act expressly refers to the implied warranty of merchantability under section 2-314.²⁴⁹ There appears to be no room left for any other theory of products liability. Any "tidying up" that needs to be done, as with the statute of limitation problem, can easily be accomplished through fine-tuning of the UCC. In sum, the comprehensive system of consumer protection that has now developed under the Kansas UCC appears to have preempted the field.²⁵⁰ This conclusion is directly in line with prior Kansas case law, which has traditionally based product cases on an "implied warranty of fitness."²⁵¹ Since the UCC is now law in Kansas, it may be hoped that the courts will begin to frame their products liability opinions in terms of the implied warranty of merchantability.

V. THE NEW FEDERAL WARRANTY ACT

A. Purpose and Scope

On July 4, 1975, the Magnuson-Moss Warranty-Federal Trade Commission

²⁴⁶ KAN. STAT. ANN. § 84-2-715(2)(b) (1965).

²⁴⁷ *Id.* § 84-2-318 (Supp. 1974).

²⁴⁸ *See id.* § 84-2-607, Official Comment 4 (1965).

²⁴⁹ *Id.* § 50-624(f) (Supp. 1974).

²⁵⁰ For arguments that even less consumer-oriented versions of the UCC occupy the products liability field, see Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 W. RES. L. REV. 5 (1965); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965). *See also* the opinion of Chief Justice O'Connell in *Markle v. Mulholland's, Inc.*, 509 P.2d 529 (Ore. 1973).

The authors of the new Pattern Instructions for Kansas, PIK (Civil) 13.21 (Supp. 1975), set forth a variation of § 402A as the law of Kansas. They state that "a careful analysis of the decisions of the Kansas Supreme Court must lead one to the conclusion that strict liability in tort of a manufacturer or seller for injury caused by a defective product is already the law of Kansas and that where appropriate a products liability action may be submitted to the jury on the theory of strict liability." Comment, PIK (Civil) 13.21 (Supp. 1975). This statement seems accurate as far as it goes. The authors conclude, however, that "[t]he value of strict tort liability is that the courts can reach the same result in a more direct and simple manner than under the theory of breach of warranty," without addressing the pre-emption issue or explaining how strict tort liability is "more direct and simple" than use of the UCC. We submit that the new PIK instruction was drafted without adequate awareness that a UCC warranty theory is every bit as "direct and simple" as strict liability in tort, while avoiding the bifurcation that must occur when the courts use § 402A for personal injury and the UCC for economic loss. For a discussion of the older Kansas cases, see Nugent, *Manufacturer's Strict Liability in Kansas—Coming or Already Here*, 39 J.B.A.K. 219 (1970).

²⁵¹ *See, e.g.*, *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959); *Jacobson v. Ford Motor Co.*, 199 Kan. 64, 427 P.2d 621 (1967); *Chandler v. Anchor Serum Co.*, 198 Kan. 571, 426 P.2d 82 (1967); *Rupp v. Norton Coca-Cola Bottling Co.*, 187 Kan. 390, 357 P.2d 802 (1960).

Improvement Act²⁵² became effective. This statute is the first *federal* entry into the law governing express and implied warranty. It incorporates many of the ideas expressed in the state statutes described above, particularly California's Song-Beverly Act. In some respects, it does not afford as much consumer protection as existing state laws, such as the Kansas Consumer Protection Act. In general, it mandates certain guidelines in connection with written express warranties, with the apparent goal of making such warranties more understandable and enforceable. In many cases, the statute invalidates attempts to disclaim the implied warranty of merchantability under UCC section 2-314. The scope is, in general, limited to written express warranties given in connection with "consumer products" made available by "suppliers."²⁵³ The term "consumer product" means any tangible personal property "normally used" for personal, family, or household purposes, including personalty that is affixed to real estate, such as air conditioning units and water heaters.²⁵⁴ This definition makes no distinction between new and used goods; both are covered. Furthermore, unlike the UCC's "primary use test,"²⁵⁵ a product may be covered if it is "normally" sold to consumers, even though the aggrieved party happens to be a commercial buyer. For example, the sale of a typewriter or an automobile to a business concern would appear to be covered since such items are also "normally" sold to consumers for non-commercial purposes. It is unclear whether the FTC, which has broad rule-making authority under the statute, could by rule exempt business transactions altogether. In any case, manufacturers will probably read the Federal Act broadly and treat both classes of transactions the same way. On the other hand, a transaction that involves the sale of capital equipment is clearly outside the scope of the Federal Act.²⁵⁶

The Federal Act is based on the premise that suppliers of consumer goods vigorously use written express warranties as advertising and merchandising devices. If they are to be used in this manner, the warranties must meet federal standards in terms of disclosure and the remedies provided to an aggrieved consumer. No seller is forced under the Federal Act to give a written express warranty, but if one is offered, it must comply with the standards set forth

²⁵² Pub. L. No. 93-637, §§ 101-12 (Jan. 4, 1975), 88 Stat. 2183, 15 U.S.C.A. §§ 2301-12 (Supp. 1975) [hereinafter referred to as Federal Act]. Although consumer advocates may tout the Federal Act as a revolutionary step in consumer protection, the effective date is quite coincidental.

²⁵³ The term "supplier" is not limited to sellers. Presumably, the Federal Act would also cover non-sales transactions such as leases, if written warranties are provided by the lessor. 15 U.S.C.A. § 2301(4).

²⁵⁴ *Id.* § 2301(1).

²⁵⁵ UCC § 9-109(1).

²⁵⁶ The argument that a corporate purchaser of goods that are also routinely sold to consumers is protected by the Federal Act is buttressed by 15 U.S.C.A. § 2301(3), which defines "consumer" to mean any ultimate "buyer" as well as any person to whom such product is transferred during the duration of the express or implied warranties. The terms "buyer" and "person" are not defined, but would presumably include corporate or other business entities so long as the product is one that is "normally used" by consumers as well as commercial enterprises. In an earlier version of the bill, the term "consumer" included the first buyer at retail and "any person to whom such product is transferred for use for personal, family, or household purposes . . ." during the effective period of the warranty. See S. 356, 93rd Cong., 1st Sess. § 101(3) (1973). The deletion of the last phrase in the final version supports the view that the beneficiary need not be a consumer.

in the statute. If a written express warranty is given, the supplier is free to limit its duration without any interference from the FTC.²⁵⁷ Like the Song-Beverly Act, the focus of the Federal Act is upon written express warranties. In this area, it breaks new ground in terms of disclosure and institutional remedies for breach. As will be discussed below, however, the statute's weakest aspect is its failure to deal adequately with the implied warranty of merchantability.

B. *General Disclosure Guidelines*

Under the Federal Act, any supplier using a written warranty in connection with the sale of a product costing more than five dollars²⁵⁸ must, to the extent required by rules of the FTC, "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty."²⁵⁹ At the present writing, the FTC has not promulgated rules to trigger the disclosure requirements of the statute. Under the Federal Act, those FTC guidelines may (and undoubtedly will) require at least the following: (1) a clear identification of the names and addresses of the warrantors and the parties to whom the warranty is extended; (2) a clear description of the products or parts covered; (3) a statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty, at whose expense, and for what period of time; (4) a statement of what the consumer must do and the expenses he must bear; (5) exceptions and exclusions from the terms of the warranty; (6) the step-by-step procedure that the consumer should take in remedying a product problem, including the identification of any person or class of persons authorized to perform warranty work; (7) information regarding any informal dispute-settlement procedure offered by the warrantor and a recital that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts; (8) a brief, general description of the legal remedies available to the consumer; (9) the time at which the warrantor will perform any obligations under the warranty and the period of time within which, after notice of a defect or malfunction, the warrantor will perform; and (10) the characteristics or properties of the product, or parts thereof, that are *not* covered by the warranty.²⁶⁰ The ingredients of the warranty must be expressed in words or phrases that would not mislead a reasonable, average consumer as to the nature and scope of the warranty, and the FTC may prescribe rules to see that this is accomplished.²⁶¹ In addition, the FTC must prescribe rules requiring that the terms of any written warranty be made available to the consumer prior to the sale.²⁶² The purpose of this general disclosure approach is to improve

²⁵⁷ 15 U.S.C.A. § 2302(b)(2), (3).

²⁵⁸ *Id.* § 2302(e).

²⁵⁹ *Id.* § 2302(a).

²⁶⁰ *Id.*

²⁶¹ *Id.* § 2302(b)(1)(B).

²⁶² *Id.* § 2302(b)(1)(A).

the adequacy of information available to consumers regarding their rights under written express warranties. Written "service contracts," frequently offered by retailers in connection with durable "big ticket" goods, are treated as a species of express warranties;²⁶³ the FTC is given power to prescribe separate rules governing the elements of service contracts.²⁶⁴

C. Designation of Warranties as "Full" or "Limited"

If a consumer product costs more than ten dollars,²⁶⁵ its written warranty may be conspicuously designated as "Full" *only* if it meets substantive federal standards.²⁶⁶ A "Full" warrantor must stand behind his product more firmly than a "Limited" warrantor. For example, an appliance merchandised as having a "Full One-Year Warranty" must meet additional substantive standards assuring the consumer that any defect will be taken care of; otherwise, as with a "Parts Only" guarantee, the product must be designated as carrying only a "Limited" warranty.²⁶⁷ The theory behind this distinction is that a written warranty is basically a merchandising tool and therefore the seller will have a strong incentive to label his warranty as "Full."

If a warranty is labeled "Full," it must assure the consumer that: (1) in case of a defect, malfunction, or failure of the product to conform with the written warranty, the manufacturer will remedy the problem within a reasonable time and without charge to the consumer;²⁶⁸ and (2) if the product (or a component part) continues to be defective or to malfunction after a reasonable number of attempts by the warrantor to remedy the problem, the warrantor will permit the consumer to elect either a refund for or replacement without charge of such product or part.²⁶⁹ The refund remedy is similar to revocation of acceptance under the UCC,²⁷⁰ although the option of obtaining a replacement without charge is not expressly provided by the UCC. If the warrantor replaces a component part, the Federal Act provides that the replacement and installation must be free of charge.²⁷¹ The FTC may specify by rule what constitutes a reasonable number of attempts to remedy a defect after which the consumer is given his election of refund or replacement.²⁷²

²⁶³ *Id.* § 2301(6)(B), (8).

²⁶⁴ *Id.* § 2306(a). In the interest of promoting competition, the Federal Act prohibits a manufacturer from conditioning its warranty on the consumer's using any brand-name article or service unless the FTC is satisfied that the product will not otherwise function properly and that such a waiver is in the public interest. *Id.* § 2302(c).

²⁶⁵ *Id.* § 2303(d).

²⁶⁶ *Id.* § 2303(a)(1).

²⁶⁷ *Id.* § 2303(a)(2).

²⁶⁸ *Id.* § 2304(a)(1).

²⁶⁹ *Id.* § 2304(a)(4). A reduction of any refund to reflect reasonable depreciation based on actual use may be permitted by FTC rule. *Id.* § 2301(12).

²⁷⁰ UCC §§ 2-608, 2-711.

²⁷¹ 15 U.S.C.A. § 2304(a)(4).

²⁷² *Id.* The term "without charge" is defined in § 2304(d) to mean that the warrantor may not assess the consumer for any costs incurred in connection with a required remedy. For example, the warrantor could not require the purchaser to return a consumer product by mail if the consumer had to pay postage. Similarly, if a repair facility were located at an unreasonable distance, the supplier would be expected to bear the cost of transporting the product to the facility. Although § 2304(d) suggests that "incidental expenses" may in some cases be borne by the consumer, this is not the case when the warrantor imposes an unreasonable duty upon the consumer as a condition of securing a remedy.

In fulfilling its duty to provide an effective remedy, the "Full" warrantor is forbidden from imposing any condition other than prior notification unless it can demonstrate in an administrative, judicial, or informal dispute settlement proceeding that such a condition is reasonable.²⁷³ This important provision would seem to preclude conditions precedent like sending in a "registration card" buried in the box. On the other hand, a reasonable requirement of periodic maintenance at authorized dealers might well pass muster, although the burden is on the warrantor to prove the reasonableness of such a condition. On the other hand, a warrantor may require, as a condition precedent of replacement or refund, that the defective product be returned free and clear of liens and other encumbrances.²⁷⁴

In a somewhat related provision, a warrantor is off the hook under the Federal Act if he can show that the defect, malfunction, or failure of the product was caused by consumer misuse, including failure to provide reasonable maintenance.²⁷⁵ The Federal Act does not prevent a warrantor from designating representatives, such as authorized dealers, to perform warranty work, although no such delegation can relieve the manufacturer of his ultimate responsibility or make the dealer a co-warrantor.²⁷⁶ Moreover, the Federal Act does not dictate the method of compensation to dealers for performing warranty work, so long as any arrangements are "reasonable." For example, a manufacturer could build into the wholesale price the cost of warranty service and then compensate authorized dealers by direct payment for services performed. Alternatively, the manufacturer could establish a low wholesale price that excludes the cost of warranty service, so that a dealer who fixes the product under warranty could receive his compensation out of the differential between wholesale and retail price.

D. *Disclaimer of Implied Warranty*

Following the lead set by the state legislation discussed above, the Federal Act provides that a supplier offering a "Full" warranty or service contract may not disclaim, modify, or limit the scope or duration of the implied warranty of merchantability under UCC section 2-314.²⁷⁷ In other words, the Federal Act takes away the power of a seller to use a written express warranty in combination with a disclaimer of implied warranties under the UCC, the kind of shenanigans that bothered the court in *Henningsen*. No longer will "the fine print taketh away what the bold print giveth." Any attempted dis-

²⁷³ *Id.* § 2304(b)(1).

²⁷⁴ *Id.* § 2304(b)(2). This exception could present real problems for an aggrieved consumer involved in a secured sale. It is for this reason that the FTC can eliminate this condition by rule if the condition proves to be "impracticable." Under this rulemaking authority, the FTC should not allow a consumer who has given a purchase money security interest covering a defective product to lose the benefit of the Federal Act simply because the financing bank is unwilling to release its lien. Such a result would be a real Catch-22. At the very least, the rule should assure that the bank will be encouraged to release the lien by obtaining an immediate substitute lien on the replacement product.

²⁷⁵ *Id.* § 2304(c).

²⁷⁶ *Id.* § 2307.

²⁷⁷ *Id.* § 2308.

claimer, modification, or limitation is deemed void and ineffective as a matter of federal law, thus effectively amending the UCC in most states.²⁷⁸ The elimination of disclaimers under the Federal Act applies to both "Full" and "Limited" warrantors. On the other hand, the Federal Act's provisions regarding disclaimers are not as strong as those in states such as Massachusetts, Maryland, West Virginia, and Kansas, where a disclaimer of implied warranty is void even where no written express warranty is given. For example, the Federal Act would not preclude an "as is" sale, whereas the new state statutes would keep the implied warranty alive in such a situation. The Federal Act, however, clearly allows the more protective state legislation to control; it does not purport to occupy the field.²⁷⁹ Thus, state statutes outlawing all attempts to disclaim the implied warranty will continue in full flower.²⁸⁰

The Federal Act contains two provisions that arguably constitute a step backward for consumer protection. First, a written express warranty designated as "Limited" can limit the *duration* of the implied warranty of merchantability to that of the express warranty, if the limitation is conscionable and clearly disclosed on the face of the writing.²⁸¹ For example, if a warranty is designated as a "Limited Six-Month Warranty," and contains language also limiting the implied warranty to six months duration, the rights of the consumer are cut down from what they would be under the UCC, which prohibits the parties to a sales contract from reducing the period of limitation of an implied warranty to less than one year.²⁸² Furthermore, the UCC provision might not control as being more protective, since the warranty could have been disclaimed entirely under UCC section 2-316. As a practical matter, most sellers under a "Limited" warranty will probably limit the duration of the implied warranty after the Federal Act becomes effective, thus undercutting to some extent the purpose of the Act in doing away with disclaimers of the implied warranty. In states such as Massachusetts, Maryland, West Virginia, and Kansas, however, statutes that prohibit *any limitation* on the implied warranty will remain in force and close this loophole.²⁸³ In such states, the duration of the implied warranty will continue to be four years from the date of sale.²⁸⁴ In the case of a "Full" written warranty, the four-year limit on duration of the implied warranty under the UCC presumably will continue to be the rule.

A second possible step backward, and a problem that involves a serious

²⁷⁸ *Id.* § 2308(c).

²⁷⁹ *Id.* § 2311(b)(1) states unequivocally that "Nothing [in the Federal Act] shall invalidate or restrict any right or remedy of any consumer under State law . . ."

²⁸⁰ The Federal Act contains a provision that requires the FTC to promulgate rules governing warranties given in connection with the sale of used cars. *Id.* § 2309(b). Although the FTC presumably is not empowered to prohibit the disclaimer of implied warranties in "as is" sales of used cars, it probably will require that such sales make it crystal-clear to the buyer that the vehicle is sold without any warranty, much as the Song-Beverly Act provides.

²⁸¹ *Id.* § 2308(b).

²⁸² UCC § 2-725(1).

²⁸³ 15 U.S.C.A. § 2311(b)(1).

²⁸⁴ UCC § 2-725.

question of construction of the Federal Act, is found in the provision that a "Full" warrantor "may not exclude or limit consequential damages for breach of any written *or implied* warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty" ²⁸⁵ Under this provision, a manufacturer could give the following: "This is a Full One Year Warranty—Remedy Limited to Free Repair or Replacement Within A Reasonable Time, Without Charge." If this language appears conspicuously on the face of the warranty, the warrantor may be off the hook for consequential economic loss if a breach occurs. Although a genuine case of consequential economic loss will be rare in a consumer context, food lost as the result of a defective freezer is one of a number of possibilities. The provision raises the question of why such a limitation of remedy is allowed when outright disclaimers are banned entirely for "Full" warrantors. It appears that the draftsmen of the Federal Act have perpetuated the lack of parallel treatment of disclaimers and remedy limits in the UCC. Moreover, since the UCC defines "consequential damages" to include personal injury, ²⁸⁶ it might be argued that a manufacturer can disclaim responsibility for personal injury due to a defective product under the Federal Act. This result is in direct conflict with UCC section 2-719(3), which makes limitation of consequential damages for personal injury *prima facie* unconscionable. Did the draftsmen of the Federal Act intend to take a step backward from the UCC on this point? The Federal Act expressly states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law" ²⁸⁷ Does this include the right to be free from such remedy limitations under the UCC? If so, why did the draftsmen insert such a provision in the section dealing with minimum standards? The only answer appears to be that when the Federal Act uses the term "consequential damages" it means "economic loss" and not personal injury. This construction is supported by the distinction that apparently is drawn between "liability for personal injury" and "consequential damages for injury to the person" in the section dealing with preemption of state law. ²⁸⁸ If this is the proper construction, any attempt to disclaim liability for personal injury is void under the Federal Act whereas a disclaimer of liability for consequential economic loss would be valid if done conspicuously on the front of the written warranty. This approach is consistent with section 2-719(3) of the UCC, which authorizes disclaimers of remedy extending to consequential economic loss. Again, state legislation that prohibits *any* limitation on remedy for breach of the implied warranty will continue to control because the Federal Act expressly defers to the more protective state legislation. Both the remedy limit problem and the duration problem show that the provision of the Federal Act that defers to such state statutes is critical to the overall purpose of the Act.

²⁸⁵ 15 U.S.C.A. § 2304(a)(3) (emphasis added).

²⁸⁶ UCC § 2-715(2)(b).

²⁸⁷ 15 U.S.C.A. § 2311(b)(1).

²⁸⁸ *Id.* § 2311(b)(2).

E. Beneficiaries

The remedy obligations imposed upon a "Full" warrantor extend to each person who is a "consumer" with respect to the product, not just the first buyer.²⁸⁹ This would include second purchasers or bailees who take possession of the product while the written express warranty is still alive. Moreover, the Federal Act also defines "consumer" to include "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)."²⁹⁰ Thus if a state's version of UCC section 2-318 extends warranty protection to "any person who may reasonably be expected to use, consume or be affected by the goods,"²⁹¹ federal protection would follow along to include any third party who, under a foreseeability test, could take advantage of the provisions of the Federal Act. This protection may be narrower than first meets the eye, however, since the federal remedies are limited to repair, replacement, and refund, remedies that are inappropriate for some third party beneficiaries. For example, if a defective automobile crashes into and damages another automobile, can the owner of the second automobile obtain any relief under the Federal Act? Since the remedies provided in the Federal Act only involve repair and replacement of the defective product itself, the bystander would have to rely on recovery for "consequential damages." As discussed above, however, the warrantor is given power under the Federal Act to avoid consequential damages for breach of any express or implied warranty if the limitation conspicuously appears on the face of the warranty.²⁹² The bystander would thus be precluded from collecting consequential property damage based upon breach of the written warranty. In short, except in states like Kansas, the broadened definition of "consumer" in the Federal Act is useful only for those consumers, such as second purchasers, who would be seeking repair and replacement-type remedies.²⁹³

In a state that has adopted anti-privity legislation under which a pure foreseeability test is used to determine proper third-party beneficiaries of

²⁸⁹ *Id.* § 2304(b)(4).

²⁹⁰ *Id.* § 2301(3) (emphasis added).

²⁹¹ UCC § 2-318, Alternative C, as suggested in AMERICAN LAW INSTITUTE, REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE at 13 (1967).

²⁹² 15 U.S.C.A. § 2304(3).

²⁹³ What of a repossessing bank or subrogated co-maker who takes possession of a defective product still under warranty and seeks to recover from the manufacturer under the Federal Act? Since the definition of "consumer" includes "any person to whom such product is transferred during the duration of an implied or written warranty," such third parties would appear to be protected. Courts have differed as to whether repossessing financiers or co-makers are appropriate third party beneficiaries of sellers' warranties. As to the rights of financing agencies, compare *Public Fin. Corp. v. Furnitureland, Inc.*, 17 Ohio App. 2d 213, 245 N.E.2d 740 (1969) (recovery by finance company allowed) with *General Electric Credit Corp. v. Hoey*, 7 UCC REP. SERV. 157 (N.Y. Sup. 1970) (recovery not allowed). With respect to the co-maker's rights, it could be argued that a breach of warranty by the seller discharges the co-maker as an "unjustifiable impairment of collateral" under UCC § 3-606(1)(b), at least where the note has not been discounted by the dealer. No reported decision deals directly with the question of whether a responding surety who, through subrogation, takes possession of the defective product, is a third party beneficiary of sellers' warranties under one of the liberal versions of UCC § 2-318.

sellers' express warranties, the Federal Act would incorporate this broadened class of "consumer" under its protective wing, subject to limits on consequential damages. States such as Massachusetts, Maryland, West Virginia, and Kansas can thus offer the protections of the Federal Act to a wider range of aggrieved third parties. This broadened federal protection also appears to cover the implied warranty of merchantability. Since the implied warranty cannot be disclaimed, and since "consumer" is defined to include second purchasers and other persons to whom the product is "transferred" within the duration of the implied warranty, the Federal Act may in some cases expand upon UCC section 2-318. This expanded protection could be significant if the remedy involved is repair or replacement of the defective product or refund, but the warrantor can still avoid consequential damages such as loss of profits, except under a state statute prohibiting any limitation of remedy.²⁹⁴

F. *Enforcement*

In order to encourage warrantors to set up informal dispute-settlement machinery for consumers with defective products,²⁹⁵ the Federal Act provides that the FTC establish rules governing such procedures to be included in the terms of any written warranty.²⁹⁶ Informal dispute-settlement procedures, however, may not be used as an additional hurdle for the consumer to jump through before he gets satisfaction.²⁹⁷ Prior to seeking judicial redress, the consumer must first exhaust the informal settlement procedures that are available to him *if* they are reasonable.²⁹⁸ This is a variation of the seller's right, under the UCC,²⁹⁹ to cure where tender of delivery is rejected due to defective goods. If, after exhausting his informal remedies, a consumer is still dissatisfied, he may bring a civil action in either federal district court or the appropriate state court.³⁰⁰ Proper jurisdiction is found in federal court if the amount in controversy of an individual claim is a paltry 25 dollars,³⁰¹ a far cry from the 10,000 dollar jurisdictional limit that would otherwise apply to actions brought in a federal forum.³⁰² An aggrieved consumer may sue for "damages and other legal and equitable relief."³⁰³ Although the quoted language does not specify, the term "other relief" presumably includes replacement or refund, remedies that are at the heart of the Federal Act when a defective product is involved. If the consumer wins his suit, he may also recover his costs and his reasonable attorney's fees, unless the court in its discretion determines that attorney's fees should not be awarded.³⁰⁴ Although

²⁹⁴ 15 U.S.C.A. § 2311(b)(1).

²⁹⁵ *Id.* § 2310(a)(1).

²⁹⁶ *Id.* § 2310(a)(2).

²⁹⁷ *Id.* § 2310(a)(4), (5).

²⁹⁸ *Id.* § 2310(a)(3).

²⁹⁹ UCC § 2-508.

³⁰⁰ 15 U.S.C.A. § 2310(d)(1).

³⁰¹ *Id.* § 2310(d)(3).

³⁰² 28 U.S.C. § 1331 (1970).

³⁰³ 15 U.S.C.A. § 2310(d)(1).

³⁰⁴ *Id.* § 2310(d)(2).

the Federal Act does not provide for minimum civil penalties, recovery of attorney's fees should encourage enforcement. Class actions are also available, after the warrantor has had a reasonable opportunity to cure, when at least 100 consumers with at least 25 dollars each at stake are involved, and where the total amount in controversy is at least 50,000 dollars.³⁰⁵

Under the new Federal Trade Commission Improvements Act,³⁰⁶ the FTC is given power to bring actions in federal district court to recover civil penalties up to 10,000 dollars against those who commit deceptive trade practices; no longer will it be necessary to await violation of a cease and desist order.³⁰⁷ In addition, the FTC is given power to go into federal or state court to seek refunds, damages, or rescission for aggrieved consumers.³⁰⁸ Such "consumer redress" actions serve as a class action substitute and could presumably be brought against any warrantor who had violated the provisions of the Federal Act. The FTC Act, with its cease-and-desist procedures as a remedy against "any unfair or deceptive acts or practices," is the only federal law until now that could be invoked against practices such as the unwritten warranty.³⁰⁹ If the FTC feels that a seller is using a "deceptive warranty,"³¹⁰ the FTC (or the Attorney General) may seek injunctive relief in federal district court. Such injunctive relief, coupled with broadened powers under the newly amended FTC Act, provides a good measure of public enforcement to go with the private remedies that are available.

In addition to the private and public remedies described above, the Federal Act helps to liberate the remedies available under the UCC for breach of implied and express warranties. The Act does this primarily by its limitations on disclaimers, but it also strengthens the UCC by providing that failure to comply with any *implied* warranty constitutes a cause of action under the Federal Act.³¹¹ For example, if a manufacturer under a "Full 6-Month Warranty" refused to fix a lemonish appliance that fell apart 10 months after purchase, the consumer could sue under the Federal Act for a breach of the implied warranty of merchantability under section 2-314 of the UCC. Since the six-month duration would not apply to the implied warranty, a successful consumer plaintiff could recover any damages (such as his purchase price) plus his reasonable attorney's fees in either state or federal court. In this respect, the Federal Act adds a significant new dimension to implied warranty actions under the UCC. Even if no written warranty is involved, a seller's breach of the implied warranty of merchantability still gives rise to a cause of action under the Federal Act,³¹² so long as it has not been effectively dis-

³⁰⁵ *Id.* § 2310(d).

³⁰⁶ 15 U.S.C.A. § 45 *et seq.* (Supp. 1975).

³⁰⁷ *Id.* § 45.

³⁰⁸ *Id.* § 576(b).

³⁰⁹ *Id.* § 45(a)(1).

³¹⁰ The term "deceptive warranty" is defined in 15 U.S.C.A. § 2310(c)(2).

³¹¹ *Id.* § 2310(d)(1).

³¹² *Id.* § 2301(5) defines the term "warrantor" to include any supplier "who is or may be obligated under an implied warranty."

claimed. After July 4, 1975, consumers suddenly have a federal forum, as well as the prospect of recovering their attorney's fees, for a violation of UCC section 2-314! In many respects, this "muscling up" of the UCC could be one of the most important aspects of the Federal Act.

VI. CONCLUSION

There is no doubt that the Federal Act is a giant step forward for the protection of consumers against defective products. Its weaknesses, which have been highlighted above, boil down to the following: (1) It allows express warrantors to limit the duration of the implied warranty of merchantability where the written warranty is designated as "Limited." This weakness can be overcome only in those states, such as Massachusetts, Maryland, West Virginia, and Kansas, that preclude any limitation on the implied warranty. (2) It authorizes a limitation on consequential economic loss due to a breach of warranty. This weakness also can be overcome in those states that prohibit such limitations by state statute. (3) The Federal Act fails to deal with the problem of a salesman's oral express warranties that contradict the written contract. Such oral assurances might well be inadmissible in court under the parol evidence rule of the UCC. Although the Federal Act perhaps should have covered this problem, however, the FTC could still move against misleading oral warranties as deceptive trade practices under section 5 of the FTC Act. Similarly, such practices might well violate deceptive trade statutes in the various states.

Mention of these three weaknesses in the Federal Act underscores the importance of the more protective state legislation to close these loopholes. Since the Federal Act does not purport to preempt state statutory handling of such matters, the two systems can fit well together. The Kansas Consumer Protection Act, for example, nicely plugs all three loopholes in the Federal Act. The two statutes thus complement each other to provide a complete system of consumer protection against defective products. Other states should consider similar legislation prohibiting disclaimer of the implied warranty in all cases destroying the last vestiges of privity.

The real strength of the Federal Act lies in its emphasis on the written warranty as a prime merchandising tool to encourage the sale of consumer products. Its encouragement of informal dispute-settlement procedures, backed up by the triple remedies of repair, replacement, and refund, should greatly aid consumers plagued by defective merchandise. Opening up the federal courts to consumers who are unable to obtain relief within the distributive chain, and providing them with an incentive, by awarding attorney's fees, to enforce their rights privately, should give the Federal Act some sharp teeth. With its new powers under the same statute, the FTC will be able to play a more vigorous public-enforcement role in policing deceptive warranty practices. It seems probable that the Song-Beverly Act, which is the source of many

of the ideas in the Federal Act, will have to be amended substantially insofar as the two statutes conflict in their detailed provisions.³¹³ On the other hand, states such as Massachusetts, Maryland, West Virginia, and Kansas, whose statutes focus upon the "lawyerly remedy" provided by the implied warranty of merchantability under the UCC, will find that the Federal Act meshes well and fills a vital gap without preempting their own efforts at consumer protection.

³¹³ The Federal Act would require the appropriate California authorities to make special application to keep alive the "disclosure" requirements of the Song-Beverly Act. If the FTC determines that the California statute affords consumers "greater protection" than that provided under the Federal Act, the Song-Beverly Act can be kept alive. *Id.* § 2311(c). If the applicable state legislation only deals with the disclaimer of implied warranty, however, no such application would be required because the state law does not deal with "disclosure." *Id.*

