The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation

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On January 4, 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act\(^1\) was signed into law. Title I of this Act, dealing exclusively with the law of consumer warranties and service contracts, represents the federal government's latest and perhaps most ambitious attempt to protect consumer interests.

Prior to the enactment of federal legislation, 49 states\(^2\) relied primarily on the applicable sections of the Uniform Commercial Code for their warranty laws.\(^3\) The Code is essentially a codification of the earlier common law of warranties which left the buyer and seller to bargain freely over the terms of the warranty agreement. However, in that bargaining process, the buyer began with certain implied warranties which ran to him by operation of law.\(^4\) With those implied warranties as a starting point, both the buyer and seller were free to negotiate over other


\(^3\) Several of the Code's warranty provisions, pertinent to the scope of Title I of the Act, are discussed briefly. See notes 4 & 6–8 infra & text accompanying. There are several sources offering more extensive treatment of the operation of warranties under the Code. See, e.g., J. White & R. Summers, Uniform Commercial Code 271–396 (1972).

\(^4\) The Code provides for two types of warranties dealing with the quality of goods, which may be implied by law even though the seller has not undertaken to make any express warranties. Uniform Commercial Code § 2–314 provides that goods sold by a "merchant" (defined at Uniform Commercial Code § 2–104) will be "merchantable," i.e., they will be "fit for the ordinary purposes for which such goods are used." Furthermore, Uniform Commercial Code § 2–315 provides that where the seller has reason to know that the buyer needs the goods for a particular purpose and is relying on the seller's skill to select such goods, a warranty is implied that the goods provided will be fit for that particular purpose.
terms which they desired with an implied common goal of attaining the optimal risk allocation.\(^5\)

In practice, optimal risk allocation often results in sellers bargaining for a modification or limitation of the implied warranties or, perhaps, a total disclaimer of all warranties.\(^6\) If the seller is successful in negotiating such terms, he avoids the risk of product non-conformity by placing the risk on the buyer.\(^7\)

The buyer is also free to bargain over the terms of the warranty. Where it fits his needs, e.g., to minimize his risk of loss, the buyer can, theoretically, exact express warranties\(^8\) from the seller in addition to those implied by law. The success of either party in attaining the desired terms rests upon their relative bargaining positions.

This scheme of free bargaining, as embodied in the Code, has been the target of considerable criticism. With the increased industrialization of the nation, accompanied by the more generalized use of "form" contracts, this criticism has increased. The critics contend that consumers are no longer able to bargain with the large and impersonal corporations with which they are forced to do business.\(^9\) Perhaps the critics are

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\(^5\) Cf. G. Calabresi, The Costs of Accidents 21 (1970). The term is used here as a goal to be achieved by placing the risks of non-conformity in the goods, i.e., the possibility of defect or malfunction, on the party who can most cheaply bear the cost of those risks either by spreading the costs or by avoiding them through their own efforts.

\(^6\) See Uniform Commercial Code § 2-316 allowing modification or total exclusion of the implied warranties where the disclaimer provision meets the requirements set forth in the section. Primarily, the section requires that a disclaimer, to be valid, must be conspicuous.

\(^7\) The seller is also free to bargain for terms which would limit his liability for consequential damages in the event of breach of warranty. See Uniform Commercial Code §§ 2-316(4), 2-718, 2-719, providing that the normal contract remedies available in the event of a breach of warranty may be altered by contractual arrangement.

\(^8\) See Uniform Commercial Code § 2-313. Under this section a seller may create an express warranty in three ways if his action becomes a part of the basis of the bargain:

1. by affirmation of fact or promise relating to the goods,
2. by giving a description of the goods, and
3. by displaying a sample or model of the goods.

In each instance the action taken creates an express warranty that the goods will conform to the action.

\(^9\) See, e.g., Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943); Note, Disclaimers of Warranty in Consumer Sales, 77 Harv. L. Rev. 318 (1963); Comment, Consumer Protection and Warranties of Quality: A Proposal for a Statutory Warranty in Sales to Consumers, 34 Albany L. Rev. 339 (1970). The critics generally argue that even if contracts of adhesion, i.e., most "form" contracts, do not foreclose most bargaining opportunities, still, the "unequal bargaining power" which consumers possess in relation to large corporations will effectively deny any meaningful negotiation. On this basis, the Code's warranty provisions are attacked as offering no protection for consumers. To correct the problem, it has been proposed that minimum mandatory warranties be provided, either by prohibiting the use of disclaimers, which would have the effect of creating mandatory warranties with terms equal to the implied warranties of the Code, or by an affirmative mandatory warranty with terms determined by statute. Compare Note supra, at 327-28 with Comment supra, at 371.
right. Two major studies conducted in the late 1960's by the Federal Trade Commission revealed considerable consumer dissatisfaction with warranties as they exist under the Uniform Commercial Code. The reports disclosed a substantial number of consumer complaints concerning manufacturers' performance under warranty provisions and concluded that only legislative action would cure the problem.

Spurred by the FTC reports, Congress initiated public hearings on several bills designed to revamp the warranty laws and to provide national legislation designed to effectuate the consumer need for more adequate post-sales protection. Representatives from government, business, and consumer organizations were all present at the hearings to urge their views as to the type and extent of protection needed. As each of these groups generally differ in their views on the type and extent of protection desirable, the real issue became not whether consumers would receive protection, but rather in what form and to what extent the protection would be provided.

10 See FTC, REPORT ON AUTOMOBILE WARRANTIES (1970); FTC, STAFF REPORT ON AUTOMOBILE WARRANTIES (1968). A preliminary investigation of automobile warranties was begun in July 1965. Such a large number of complaints were recorded that a full investigation was ordered in July 1966, culminating with the findings of the 1968 STAFF REPORT, supra. The drastic cut back in warranty coverage by automobile manufacturers in 1969 prompted a second study which was finished in 1970.

11 FTC, REPORT ON AUTOMOBILE WARRANTIES 70 (1970). The report concluded:

The Commission will, of course, continue to utilize all process [sic] available to it under existing law to eliminate deception in the automobile warranty area.

Nevertheless, this cannot serve as a substitute for the legislation recommended in this report.

Id.

12 As early as 1967, bills had been introduced which were designed to alleviate the problems commonly associated with automobile warranties. See generally Magnuson, FEDERAL DEVELOPMENTS IN PRODUCT WARRANTY LAW, 4 U.C.C.L.J. 279 (1972). However, it was not until 1970 and later that the congressional hearings began to focus on the bills which were to become the forerunners of the present Magnuson-Moss Act. E.g., see generally HEARINGS ON H.R. 20 AND H.R. 5021 BEFORE THE SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 93d Cong., 1st Sess. (1973); HEARINGS ON H.R. 6313, H.R. 6314, H.R. 621, H.R. 4809, H.R. 5037, H.R. 10673 (AND SIMILAR AND IDENTICAL BILLS) BEFORE THE SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 92d Cong., 1st Sess. (1972); HEARINGS ON S. 3074 BEFORE THE CONSUMER SUBCOMMITTEE OF THE SENATE COMM. ON COMMERCE, 91st Cong., 2d Sess. (1970).

13 Compare D. AAKER & G. DAY, CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST 4 (1971) [hereinafter cited as CONSUMERISM], with Bauer & Greyser, THE DIALOGUE THAT NEVER HAPPENS, 45 HARV. BUS. REV. 2 (NOV.-DEC. 1967), reprinted in CONSUMERISM at 63, and Stern, CONSUMER PROTECTION VIA INCREASED INFORMATION, 31 J. OF MARKETING 48 (APRIL 1967), reprinted in CONSUMERISM at 103. In general, the position of "business" has been that the consumer receives adequate protection from the combination of existing laws and the use of his own judgment of the reputation of the brand or manufacturer. On the other hand, the consumer organizations insist that the consumer be given more detailed information on product performance characteristics as well as minimum mandatory warranties. The minimum mandatory warranties would be derived by either direct regulation of warranty terms or a total prohibition on the use of disclaimers. As in the case of most legislation,
The provisions of Title I of the Magnuson-Moss Act,\(^4\) which became partially effective on July 4, 1975, represent the culmination of those proceedings and the legislative compromise of the competing interests. The purpose of Title I is "to make warranties on consumer products more readily understood and enforceable [and] to provide the Federal Trade Commission (FTC) with means of better protecting consumers . . . ."\(^15\) More specifically, the warranty provisions are designed "to impose the consumer's position" in the marketplace in such a way as to enable him to make more informed product choices, to promote "better product reliability," and to provide more "assurance of warranty performance."\(^6\) In an attempt to effectuate these goals Congress has adopted a threefold approach employing disclosure requirements,\(^17\) regulatory provisions,\(^18\) and new remedial avenues.\(^19\) The result is a welter of compromises which may actually worsen rather than better the consumer's position.\(^20\) The ensuing analysis will illustrate the limited effect.

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16 Magnuson, Federal Development in Product Warranty Law, 4 U.C.C.L.J. 279, 294 (1972). Senator Magnuson's article deals with S. 986, a forerunner of the Magnuson-Moss Act. The similarity between the bills would indicate that the same rationale is applicable to both. See also 15 U.S.C. § 2302(a) (Supp. IV, 1975) which provides in part:

- In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor . . . shall . . . disclose . . . the terms . . . of such warranty.

17 See, e.g., 15 U.S.C. §§ 2302-03-06 (Supp. IV, 1975). Section 2302 is the basic disclosure provision of the Act. All of the disclosure provisions and the FTC's final rules implementing them are discussed in detail at notes 30-50 infra & text accompanying.


Congress expressly encouraged warrantors to implement informal dispute settlement mechanisms to handle consumer complaints. As long as the mechanism is incorporated into the warranty, so that the consumer is aware of its existence and operation, and meets the rules promulgated by the FTC on the implementation and operation of such mechanisms, the consumer, whether acting individually or as a class, will generally be required to initially pursue his remedy through that mechanism prior to instituting other legal action available under the Act's provisions. The Act does not appear to foreclose consumer action under other laws prior to resorting to the informal mechanism established by the warrantor. 40 Fed. Reg. 60190 (1975).

Federal district courts have jurisdiction under the Act in actions brought by the U.S. Attorney General or the FTC to restrain any warrantor from making a deceptive warranty or any person from violating the provisions of Title I of the Act. Consumers are able to bring suit under Title I in any state court. In addition, they may resort to suit in federal district court if (1) all individual claims exceed $25, (2) the aggregate amount in controversy is in excess of $50,000, and (3) in the case of class actions, there are in excess of 100 plaintiffs involved. Consumers prevailing in any action brought under Title I may, in the court's discretion, be allowed to recover costs and expenses, including attorney fees.

20 A common assumption which government, business, and consumers all apparently share is that society will best be served if its limited resources are allocated in the most efficient manner possible within our economic system. The same assumption is evident...
tiveness of the disclosure requirements and regulatory provisions of the Act in achieving the stated goals. The third approach, new remedial avenues, is dealt with only as it relates to the other two.

**REQUIRED INFORMATION IN SELECTING WARRANTY TERMS: A THEORETICAL MODEL**

Our market system has been appropriately described as a "system of mutual coercion based on power" where coercion is defined as the effect one market segment's choices have on other segments, and power is defined as the means to exercise those choices.\(^2\)

Information is one item which can effect the relation of power and coercion among the various market segments by making some choices appear more or less desirable than they would have without the information. Thus, adequate information is an important source of power for consumers, and without such information, consumers are unable to make informed and intelligent purchase decisions.\(^2\)

A simple purchase decision, broken down into its separate elements, should reveal the type of information needed in order to insure that an intelligent decision is made. For example, suppose that a consumer decides that he needs a gadget. Few consumers have such infinite resources that they can afford to rush out and purchase the first gadget they can find. Initially, it will be necessary for the consumer to determine exactly what needs the gadget is to fulfill, and on that basis the consumer will determine what characteristics the gadget must possess throughout this note. The controversy turns, instead, on who is to determine what constitutes efficient allocation of resources, and once that is determined, how the allocation is to be effected.

This note accepts the assumption implied by the **Uniform Commercial Code** that within our economic system, the most efficient manner of allocation will be realized by allowing individuals to bargain freely. By allowing individuals, who presumably best know their own needs and the resources available to satisfy those needs, to bargain freely, the bargaining will be conducted in a manner calculated to best satisfy those needs with the least possible expenditure of resources. One result of such bargaining in connection with warranties (or other forms of post-sales protection such as service contracts) is to place the risk of non-conformity, which is inherent in nearly all bargaining transactions, on the party who can most cheaply bear or avoid the risk, i.e., optimal risk allocation would be effected.

Before this free bargaining process will operate as theorized, however, the bargaining parties must possess equal knowledge of the alternatives available to them. Without the necessary information the bargaining system does not work properly. In order to achieve the efficiency desired either the needed information must be made available or some other method of allocation must be adopted. See Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 Ind. L.J. 8, 56 (1974). The issue is whether the Magnuson-Moss Act accomplishes either of these objectives.

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in order to fulfill those needs. Suppose the following characteristics are
demed to be essential in this case:

1) a square design,
2) a blue and white finish,
3) one moveable part constructed of solid steel, and
4) a useful life of at least two years.

Given these desired characteristics, the consumer enters the gadget mar-
et to find the cheapest gadget available which meets all of these criteria.

Suppose the consumer finds that three gadgets are on the market all of which have a square design, a blue and white finish, and one movable part constructed of solid steel. Gadget A is priced at $80 and bears a disclaimer of all warranties. Gadget B, priced at $100, is covered only by the warranties of merchantability and fitness implied by the Uniform Commercial Code. Gadget C is priced at $120 and has an express warranty covering all defects for two years from the date of purchase.

The consumer's problem is evident. While he desires to purchase the cheapest gadget available, it is essential that the gadget purchased possess the necessary characteristics to satisfy his needs—that is, the gadget must satisfy the four criteria stated above. The options are clear but the appropriate choice is far more difficult to ascertain.

The consumer's dilemma is not a lack of bargaining power but simply a lack of information. What he really needs is pertinent information concerning the risk of defect in all three of the gadgets for the two year period of anticipated use. Thus, the following information would allow the consumer to make a completely informed decision as to which of the gadgets would fulfill all of his needs at the lowest possible price:

1) the probability that a defect will occur within the next two years,
2) the probable cost of the damage a defect would cause,
3) the charge the seller would impose for bearing the risk,
4) the cost of avoiding the risk through his own efforts (if possible), and
5) the cost of shifting the risk to some third party.

By way of illustration, assume that the following information is available on gadget A:

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23 See note 4 supra.
24 See note 8 supra.
25 Schwartz, supra note 20, at 12–13 & n.n.10–11.
1) The probability of a defect occurring over the two-year period is thirty percent.

2) The probable cost of damage is $50.

3) The seller will bear the risk for a cost of $40 (i.e., $15 for the actual cost of the risk (30% of $50) plus $25 for transaction costs\(^{26}\) and profits).

4) The cost of avoiding the risk through his own efforts is $10. For example, $10 could be the cost of a special lubricant which if applied to the gadget regularly over the two year period will reduce the probability of a defect occurring to zero.

5) The cost of shifting the risk to a third party is $20. For example, a local repair shop will sell a service contract at that price since they know that the cost of the risk is $15 and that they can cover their transaction costs and profits with the additional five dollars.

Given this information, the consumer knows that he has four alternatives all of which will have the same effect:\(^{27}\)

1) pay the seller $40 to bear the risk for a total cost of $120, or

2) pay the third party $20 for a two year service contract for a total cost of $100, or

3) pay $10 for the special lubricant and avoid the risk by his own efforts for a total cost of $90, or

4) accept the risk himself at a cost of $80 out of pocket and the 30 percent chance that it will cost another $50 sometime during the next two years—thus, a total cost of $95.

Given this same information on the other two products the consumer would have all of the information necessary to make a fully informed decision. With this information the consumer gains the power\(^{28}\) to choose among alternatives which were otherwise unknown to him. Furthermore, if enough buyers exercise their choice, sellers will be coerced\(^{29}\) into giving them what they want, thus maximizing consumer satisfaction and providing for the most efficient allocation of consumer resources. Furthermore, sellers, if they are to maintain a competitive

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26 In altering the terms of the sale so that the seller will bear the risks, it is assumed that the seller will incur costs which would otherwise be unnecessary. This may result, e.g., from additional administrative or operating costs. The sum of these additional costs are referred to as transaction costs. See also G. Calabresi, The Costs of Accidents 135–38 (1970).

27 Any one of the four alternatives will produce the same results in that the buyer will be protected against a non-conformity in the gadget for two years of anticipated use. Thus the buyer would choose the cheapest method—in this case the third alternative.

28 See note 21 supra.

29 See note 21 supra & text accompanying.
standing, will be “coerced” into offering high quality merchandise, i.e., merchandise which exposes the manufacturer to the lowest net potential liability and/or the consumer to the lowest net costs attributable to the non-conformity. This enhanced “quality” will be effected either by reducing the rate of non-conformity or by reducing the costs which result when a non-conformity is found to exist. Thus, information disclosure elevates the importance of product quality and efficient resource allocation in sales transactions.

INFORMATION DISCLOSURE UNDER THE MAGNUSON-MOSS ACT

The preceding section dealt with the type of information which a consumer must have in order to make an informed and intelligent decision when bargaining for warranty terms or in determining which warranty offer best fulfills his needs. Since it is one of the stated goals of the Magnuson-Moss Act to enable consumers to make informed purchase decisions, it seems logical that the Act’s disclosure provisions would require warrantors to make that information available to consumers. However, while the Act does insure that more information is made available, it falls short of requiring all of the information necessary for a fully informed decision.

Section 102 of the Act provides that “any warrantor warranting a consumer product . . . by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty.” The Act delineates 13 items as illustrative of the type of information which the Federal Trade Commission might

30 A consumer is defined by the Magnuson-Moss Act as a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and 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).


31 A warrantor is defined by the Act as any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.


32 A supplier is defined by the Act as any person engaged in the business of making a consumer product directly or indirectly available to consumers.


33 The items are examples only and are not meant to limit the power granted to the FTC under the Act to determine what information will finally be required. The Act provided the following items:
want to require that warrantors disclose when offering written warranties on consumer products. Note, however, that none of the 13 items listed requires more than that the consumer be informed of the type of warranty being offered. No disclosure of information is recommended which would enable a consumer to make an informed decision on whether

(1) The clear identification of the names and addresses of the warrantors.
(2) The identity of the party or parties to whom the warranty is extended.
(3) The products or parts covered.
(4) 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.
(5) A statement of what the consumer must do and expenses he must bear.
(6) Exceptions and exclusions from the terms of the warranty.
(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.
(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.
(9) A brief, general description of the legal remedies available to the consumer.
(10) The time at which the warrantor will perform any obligations under the warranty.
(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.
(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.
(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.


The Act defines a written warranty as

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


A consumer product is defined as

any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

to accept the risk himself, *i.e.*, either to bear it or avoid it through his own efforts or to seek to shift the risks to the seller or other third party.\(^3\)

The Federal Trade Commission recently published the final rules which will govern the disclosure of information under the Act.\(^3\) The Commission has determined that all written warranties offered on con-

\(^{35}\) See note 25 supra & text accompanying.

\(^{36}\) See 40 Fed. Reg. 60188 (1975) (the rules will be codified at 16 C.F.R. \textsection 701 et seq.). The final rules promulgated by the FTC provide that as of December 31, 1976, the following items of information will be required:

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

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

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

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

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

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

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

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

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

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

(9) A statement in the following language:

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

(b) Paragraph (a)(1)—(9) of this Section shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (1) the disclosures required by para-
consumer products costing more than $15\textsuperscript{37} must include the required information and that the information must be made available to the consumer prior to the sale of the product.\textsuperscript{38} The FTC rules indicate that the information required will closely parallel the illustrations set forth in the Act and thus will be directed solely to the conventional terms of the warranty offered rather than to information concerning the risks of non-conformity.

In addition to the disclosure requirements of Section 102, Section 103 of the Act requires that all written warranties given on consumer products costing more than $10 shall be clearly labeled as either “full” or “limited” warranties.\textsuperscript{39} A “full” warranty will have to meet the minimum requirements set forth in Section 104\textsuperscript{40} of the Act. All warranties not meeting this minimum standard must be labeled “limited,” and any warrantor using the “full” warranty designation will be re-
garded, for purposes of legal action, as having incorporated the provisions of the minimum warranty.\textsuperscript{41}

The information provided by the disclosure and labeling provisions of the Act have the potential to aid the consumer in determining exactly what type of warranty the warrantor is offering and what the terms of the warranty are. To that extent consumers will be able to make more reliable comparisons between similar products which have differing warranty terms. Still, maximum efficiency under a free bargaining process will not be achieved until warrantors either voluntarily or by statute are required to divulge the information necessary for consumers to be able to ascertain and compare the risks associated with each product.\textsuperscript{42}


\textsuperscript{42} In some cases maximum efficiency may not be achieved by requiring the disclosure of the necessary risk information. If the transaction costs, see note 26 \textsuperscript{supra}, involved in gathering and disclosing the necessary risk information are unreasonably large, they may offset the gains in efficiency derived by the free bargaining process. In those cases an alternative method of allocation will be necessary to achieve maximum efficiency. Of the four most obvious alternatives, the first three would require direct government regulation or judicial decision. But cf. Schwartz, Products Liability and Judicial Wealth Redistribution, 51 Ind. L.J. — (1976) [forthcoming] opposing wealth redistributions by judicial decision. The four alternatives are:

(1) Provide by government regulation that warrantors must disclose the information despite the costs involved. Warrantors would then pass the costs on to users of the product through increased product prices where possible. By definition this alternative is grossly inefficient because the savings to be gained by disclosure will be less than the cost of disclosing.

(2) Provide by regulation that the government will collect and disseminate the necessary information. See, e.g., Motor Vehicle Information and Cost Savings Act § 201, 15 U.S.C. § 1941 (Supp. 1973). In this case the government would pass the costs through to all consumers through taxation. This alternative is perceived to be more inefficient than the previous alternative for two reasons. First, the savings provided by the information are still, by definition, less than the cost. Secondly, passing the cost on by general taxation would result in externalizing the costs through a universe of cost bearers which is likely to be much broader than the anticipated universe of product users. See generally G. Calabresi, The Cost of Accidents 144–50 (1970).

(3) Provide no information but require all warrantors to bear the risks of non-conformity in consumer sales transactions. This alternative avoids the inefficiencies of the first two methods—i.e., neither warrantors nor government will be spending more dollars to discover and disclose risk information than the risk information will save. Furthermore, unlike an alternative where the government would become an insurer, bearing all the actual costs of non-conformity, this alternative would require warrantors to internalize the costs of non-conformity, spreading them only to actual users of the product. Thus, the price of the product should more truly reflect its actual cost because the price will not be subsidized by an overly broad cost bearing class. See Calabresi, supra. Given a lack of necessary risk information at a reasonable cost, this alternative is perceived to be the most efficient method of allocating the risks involved. This approach seemingly is partially utilized by the regulatory provisions of the Magnuson-Moss Act, see notes 51–59 \textsuperscript{supra} & text accompanying, but apparently its use is based on a different reasoning which may explain why the Act falls short of achieving its stated goals. See note 56 \textsuperscript{supra}.

(4) The fourth alternative is to provide no information and to allow the risks to be disclaimed, thus, causing the buyer to bear all risks in many sales transac-
With all of the necessary information available, it would be possible to create a separate market dealing solely in post-sales protection. Several businesses have already approximated this approach by offering service contracts through which, for a given price, they will undertake all risks of defect or malfunction in the product over the period of time covered by the agreement.\textsuperscript{43} If the information on which these businesses determine their prices for the service contracts was generally available, entry into the market by other businesses would be facilitated and competing service arrangements would result. As a result, the forces of competition should produce better post-sales protection at the lowest cost possible. In addition, consumers, because they would have the information available to them, would be able to join in this risk shifting market, accepting the risk themselves where it would be less expensive for them to either bear or avoid the risk through their own efforts. The advantage, then, of creating a separate market for post-sales protection would be the accomplishment of those goals listed previously as the reasons for the enactment of the Magnuson-Moss Act.\textsuperscript{44} The availability of information would enable consumers to make more informed purchase decisions, and the forces of a competitive market would require that more reliable products be manufactured and better performance by warrantors be given.

In order for such a market to operate efficiently, it must have a number of members vying to bear the risks involved. But, of course, before consumers or third parties could enter such a market, it would be necessary for them to be privy to the information which only the warrantors currently have. Although many businesses are showing a propensity toward creation of a separate post-sales protection market, it is highly doubtful that they will divulge the information necessary for others to enter the market until they are required to do so by statute. By retaining the information without disclosure they can effectively maintain a monopoly on the post-sales protection market of their products to the detriment of the consumer.\textsuperscript{45}

\textsuperscript{43} Of course, present service contracts would not cover the consequential damages resulting from accidents due to non-conformity.

\textsuperscript{44} See notes 15–16 supra.

\textsuperscript{45} See Rhoades, Reducing Consumer Ignorance: An Approach and Its Effect, 20 ANTI-TRUST BULL. 309, 310 (1975). It could be argued that if the present businesses offering service contracts truly have a monopoly on the post-sales protection market for their products, they will charge monopoly prices and enjoy monopoly profits. The monopoly profits would in turn attract other businesses which would enter the market by obtaining the necessary information through means other than disclosure by the original warrantor. The problem with this argument is the high entry cost involved in entering the market.
It is also doubtful whether the Federal Trade Commission would, granting that they have the power, force the disclosure of the needed information. However, such power is vested in the Congress and should be employed to amend the Act so as to require disclosure of this information. It is conceivable that requiring warrantors to make this information available would entail some additional costs to them. In

Before an independent business could enter the market, it would be necessary to conduct extensive and possibly lengthy tests to determine the risks of defect and probable damage involved. It would seem that few businesses, except possibly the very largest, would be able to make such large initial investments. A second consideration bearing on the likelihood of businesses entering the market under present circumstances is the absence of monopoly profits. Even monopolists must face the problem of elastic market demand. In an elastic market demand and profits drop sharply as the price of a product or service (such as post-sales protection) rises past a given level.

Even putting these arguments aside, unless the present warrantors and service contractors are required to disclose the necessary information, consumers will not be able to obtain it. Once it is made available to consumers, the information would, naturally, also be available to third parties which might wish to use it to enter the market.

For a detailed look at the different forms of monopolistic markets and how they often operate to misallocate resources see, e.g., W. Albrecht, Jr., Economics 508, 533 (1974); P. Asch, Economic Theory and the Antitrust Dilemma 102 (1970).


47 See U.S. Const. art. I, § 8. The individual states have also been left the opening to require the dissemination of this information. The Magnuson-Moss Act was not intended to pre-empt state laws which provide the consumer with rights and remedies not included in the Act. States have been only partially pre-empted in areas concerning labeling and disclosure requirements which are different from those provisions of the Act. See 15 U.S.C. § 2311 (Supp. IV, 1975) which provides in part:

(b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this title (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c)(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of sections 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

48 Some companies may have to bear added costs in verifying and disclosing the information. In that case a higher minimum may be necessary so that low cost, low profit items are not forced from the market.
that event, it might be necessary to raise the minimum dollar amount on which such requirements apply, so that only products costing in excess of $50 or $100 are affected. This would still cover the major purchases which consumers make, and it is the major purchases which appear to be the primary source of the greatest consumer dissatisfaction.49

Another problem which might be encountered in creating this new market is the possibility that such information is simply not available or at least not available on some products at a cost which is not prohibitive. In those instances, a minimum warranty established by direct government regulation may be the most attractive alternative if we are to finally achieve maximum efficiency in our resource allocation.60 Such regulation would also require action by Congress since the regulatory provisions of the Magnuson-Moss Act fall far short of requiring anything close to a minimum warranty.

REGULATION OF WARRANTIES BY THE MAGNUSON-MOSS ACT

The Act also uses a variety of regulatory provisions in its attempt to provide consumers with better warranty protection. In addition to the disclosure and labeling requirements discussed previously, the Act requires that all warranties which are labeled “full” warranties must comply with the minimum standards set forth in Section 104 of the Act.61 A further requirement imposed upon “full” warranties provides that warrantors cannot require more than mere notification by the consumer as a prerequisite to securing a remedy in the event of defect, unless the warrantor can demonstrate that any additional duty imposed on the consumer is reasonable.62 A warrantor is also relieved of his responsibility if he can show that the failure of the product was the result of damage or unreasonable use in the hands of the consumer.63 In addition, the Act also prohibits warrantors from tying the benefits of any warranty to the use of other products which are identified by brand, trade, or corporate name.64

Without question, the most significant regulatory provision of the Act is the limitation on the disclaimer of implied warranties.65 Section

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49 Cf. note 10 supra as to consumer dissatisfaction with automobile warranties.
50 See note 42 supra.
51 See note 40 supra.
52 See 15 U.S.C. § 2304(b) (Supp. IV, 1975). The warrantor has a variety of forums within which to prove that the duties are reasonable. These include rulemaking proceedings, administrative or judicial enforcement proceedings (including private enforcement), and informal dispute settlement proceedings.
55 See 15 U.S.C. § 2308 (Supp. IV, 1975) which provides that:
   (a) No supplier may disclaim or modify (except as provided in subsection
108 of the Act provides that warrantors making written warranties or offering service contracts may not disclaim or modify any of the implied warranties. Warrantors offering only a "limited" warranty may, however, limit the duration of the implied warranties to the same duration as that of the "limited" written warranty provided that it would be reasonable to do so. Any limitation would have to be effectively disclosed to the consumer.

It is important to note that the Act does not totally ban the use of disclaimers. They are banned or limited only when used in connection with the offering of written warranties or service contracts. A warrantor who offers a product without a written warranty would evidently still be free to disclaim any liability resulting from non-conformity which he might otherwise have by operation of the implied warranties. The only apparent reason for this form of regulation of disclaimers is the Congressional belief that warrantors were using disclaimers in such a way as to deceive consumers. Sellers were offering written warranties on their products which appeared to be giving increased protection to consumers when in fact the written provisions of the warranty provided that it was in lieu of all other warranties implied or expressed. The

(b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

56 See Staff of House Interstate and Foreign Commerce Comm., Subcomm. on Commerce and Finance, 93d Cong., 2d Sess., Report on Consumer Product Warranties 30 (1974), reprinted in 40 Fed. Reg. 60169 (1975). The report was to study warranties then being used by business and to compare them with past warranties. The staff concluded that there had been no change over the past 10 years designed to improve consumer satisfaction. The report concluded that:

(A)ny actions taken on the part of manufacturers and trade associations to clean up these guarantees during the past five years appear to have had minimal results. These certificates, often marked 'WARRANTY' and printed on good quality paper with a fancy filigree border, in many cases serve primarily to limit obligations otherwise owed to the buyer as a matter of law. This is done by disclaimers and exemptions and by ambiguous phrases and terms. All too often the warranties shroud and effectively cover-up the obligations of the seller

Id. at 30, reprinted in 40 Fed. Reg. at 60169.

Congressman Moss, a co-sponsor of the Act, reportedly declared that:

It is all but fraud when a guarantee declares in large print that the manufacturer is giving protection to the buyer and in the fine print attempts to take away common-law buyer protection.

other provisions of the written warranty actually provided less protection than the implied warranties would have, and the disclaimer provision took away the benefits of the implied warranties. Congress evidently believed the problem to be serious enough to warrant action and through the disclaimer provisions has attempted to foreclose such practices.

The regulatory provisions of the Act, like the labeling and disclosure requirements, may provide some relief to consumers in that they too will aid consumers in determining what the terms of the warranty are and, therefore, work to eliminate some of the deceptive practices of the past. However, like the labeling and disclosure requirements, the regulatory provisions simply do not go far enough.

First, the problems associated with the use of disclaimers could have been eliminated by requiring that the information discussed previously be provided to the public. Once adequate information has been provided to the public, the creation of the post-sales protection market should become a reality. With its creation, consumers could either purchase warranty protection from the seller, bear or avoid the risks through their own efforts, or try to seek out some third party who would be willing to bear the risk for them. There would be no need for warrantors to disclaim because they would have no liability unless the consumer purchased a service agreement. Implied warranties would no longer be needed as they would be replaced by the post-sales protection market.

57 See text accompanying notes 43-45 supra. Even if third parties did not offer competing service arrangements, consumers would still be able to bargain with warrantors with full knowledge of the alternatives available to them.

58 The primary focus of this discussion has been upon the risks of loss engendered by a non-conformity in a consumer product, i.e., the direct monetary damage a consumer suffers because a product contains a defect. There also exists the possibility that a non-conformity will cause consequential loss such as personal injuries. The most efficient allocation of risks of consequential loss also requires availability of adequate risk bearing and avoidance information. Since both the probability of consequential loss and the probable extent of the resulting damage would generally be dependent on the individual circumstances of the consumer, the risk of consequential loss in any given sale would probably not be readily ascertainable by warrantors at a reasonable cost. Since the savings produced by avoidance techniques are a product of the risk and the effectiveness of the avoidance technique, the value of avoidance information would similarly not be readily ascertainable for any given sale. However, warrantors should be able to determine the probability of consequential loss and probable damage involved for the whole class of consumers using its products. These costs would probably be most efficiently allocated by requiring the warrantor to internalize them spreading the risk over the entire class of consumers. Since a warrantor, other factors being equal, will sell more products if the price of the product is lowered, it would be advantageous for him to disclose to the entire class any known avoidance techniques, thereby reducing the risk of consequential loss. This scheme is not as efficient as providing risk information, but where the information is not available at a reasonable cost, minimizing concentrated losses would require that the best cost spreader, in this case probably the warrantor, bear the risk. The strict products lia-
Secondly, all disclaimers should be prohibited where adequate information is not available at a reasonable cost. Since an informed decision is not possible without adequate information, one must focus on the accomplishment of alternative goals. Achieving the goals of efficient resource allocation, minimized concentrated losses, and improved product quality requires that all disclaimers be prohibited. Without disclaimers, a minimum level of warranty protection would exist for all consumer products equal to the level of protection provided by the present implied warranties of the Uniform Commercial Code. Warrantors would find it cheaper to improve their product quality than to face certain liabilities under a mandatory warranty, and since warrantors as a class are usually best able to spread to all of the product users the costs of damages which do occur, a minimum of concentrated loss would result. The accomplishment of these two goals would in itself serve as a more efficient allocation of resources.

CONCLUSION

The goals stated by Congress in writing the Magnuson-Moss Act are commendable and few could debate their value to society. Unfortunately, the Act falls far short of effectively implementing these goals. If Congress is sincere in its desire to (1) aid consumers in making more informed purchase decisions, (2) increase the quality of products, and (3) improve the standard of warranty performance, it must assure public access to the information necessary to effectuate such goals. The creation of a new and separate market dealing solely in post-sales protection would be the most efficient way to achieve these results, but the creation of such a market depends initially on the availability of the required information.

If for any reason such information will not or can not be made available, the favored alternative is a complete ban on disclaimers. Such a ban would at least provide a minimum level of protection to all consumers even though imposing a significant restriction on contractual freedom. But by establishing a minimum warranty through the abolition of disclaimers, the goals delineated would be aided, albeit at some


See note 42 supra. If consumer protection, i.e., minimized concentrated losses, efficient resource allocation, and improved product quality, is to be achieved, the application of the regulatory provisions of the Magnuson-Moss Act should not be dependent on the giving of a written warranty or service contract. Instead, the provisions must apply to all consumer sales transactions in which adequate risk information is not available.
cost to efficiency. Whether the minimum warranty should consist only of the terms now provided by the implied warranties or should incorporate more extensive terms such as those set out in Section 104 of the Act is a question for Congressional resolution. A balance must be drawn somewhere between the benefits which would be gained from such a minimum mandatory warranty and the increased cost which consumers would be forced to pay in order to have sellers bear the risks.

Freedom of choice based on full knowledge would appear to be preferable to the leaden hand of Congressional regulation. But if the information is not to be made available, at least effective regulation would aid in achieving those goals necessary to an efficient society.

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