

# THE UNFULFILLED PROMISE OF THE MAGNUSON-MOSS WARRANTY ACT

by  
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*The Magnuson-Moss Warranty–Federal Trade Improvement Act (MMWA), enacted in 1975, was Congress’s attempt to remedy some of the problems faced by consumers with regard to defective goods and misleading warranties. In particular, Congress provided for four federal causes of action for consumers who have been harmed by a supplier’s violation of the Act or a supplier’s breach of a written warranty, state law implied warranty or service contract. The MMWA sought to ease the way for such consumer suits by providing for an award of attorneys’ fees and costs to a consumer who prevails on one of the four MMWA causes of action; allowing suit against remote sellers (e.g., manufacturers); and providing for federal jurisdiction for high stakes MMWA cases. Through these private redress provisions, Congress hoped to promote greater product reliability by easing the way for consumers to hold the suppliers of defective products accountable. Unfortunately, a significant number of federal and state courts have incorrectly interpreted the language of the MMWA, with many of the interpretations being quite surprising, given the clear language of the Act. The incorrect interpretations would simply be nuisances except that the courts’ holdings have severely limited the consumers’ ability to obtain private redress against the suppliers of defective consumer products. In limiting consumer redress, the courts have undercut one of the MMWA’s main purposes. This article identifies the problematic cases and demonstrates how the courts’ interpretations are contrary to the language and purpose of the MMWA.*

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## INTRODUCTION

The year is 1964.<sup>1</sup> Mr. and Mrs. Sky Masterson travel to Nathan's Motors, Inc. to purchase a brand new automobile. The automobile is a Mother's Day gift for Mrs. Masterson and she is quite excited. On May 9, 1964, Mr. Masterson picks up the new automobile and drives it home. Thereafter, the automobile is used for short trips on paved streets about the town and has no problems until the event of May 19. On that day, as Mrs. Masterson is driving on a paved and smooth highway at 20–22 miles per hour, she suddenly hears a loud noise 'from the bottom, by the hood.' It 'feels as if something cracked.' The steering wheel spins in her hands; the car veers sharply to the right and crashes into a highway sign and a brick wall. A bus operator driving in the left-hand lane testifies that he observed plaintiff's car approaching in normal fashion in the opposite direction; 'all of a sudden it veered at 90 degrees and right into this wall.' As a result of the impact, the front of the car was so badly damaged that it is impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident. The condition is such that the collision insurance carrier, after inspection, declared the vehicle a total loss. It had 468 miles on the odometer at the time.

The insurance carrier's inspector and appraiser of damaged cars, with 11 years of experience, advanced the opinion, based on the history and his examination, that something definitely went 'wrong from the

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<sup>1</sup> Many of the facts of this hypothetical case were based on the case of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). Some facts are identical, in both form and substance, while others were altered for the purpose of the hypothetical.

steering wheel down to the front wheels' and that the untoward happening must have been due to mechanical defect or failure; 'something down there had to drop off or break loose to cause the car' to act in the manner described.

After the accident, the manufacturer indicates that if Mr. Masterson sends to them (postage prepaid) the relevant car parts that he alleges to be defective, it will repair or replace the defective parts if it determines that the steering mechanism was defective. When Mr. Masterson insists that the manufacturer replace the car and pay for all property and personal injury damages, the manufacturer refers Mr. Masterson to the purchase order/warranty that he executed at the time of sale.

The order/warranty document that Mr. Masterson signed is on one form, but has print on the front and the back. The front contains blanks that are filled in with a description of the automobile sold, the various accessories, and the details of the financing. The type used in the printed parts of the form start off in 12-point block type, but becomes smaller in size, different in style, and less readable toward the bottom where the line for the purchaser's signature is placed. The smallest type on the page appears in the last two paragraphs, one of two and one-quarter lines and the second of one and one-half lines, on which great stress is laid by the manufacturer. These two paragraphs are in 6-point script and the print is solid. The paragraphs read as follows:

The front and back of this Order comprise the entire agreement affecting this purchase and no other agreement or understanding of any nature concerning same has been made or entered into, or will be recognized. I hereby certify that no credit has been extended to me for the purchase of this motor vehicle except as appears in writing on the face of this agreement.

I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. I certify that I am 21 years of age, or older, and hereby acknowledge receipt of a copy of this order.

The reverse side of the contract contains eight and one-half inches of fine print. However, it is not as small as the two critical paragraphs described above. The page is headed 'Conditions' and contains 10 separate paragraphs consisting of 65 lines in all. The paragraphs do not have headnotes or margin notes denoting their particular subject. In the seventh paragraph, about two-thirds of the way down the page, the warranty, which is the focal point of the case, is set forth. It is as follows:

#### Warranty

7. The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before

such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.

The problems faced by the Mastersons of unreliable goods and warranties that seem to promise much, but in fact deliver very little, were not unique to the Mastersons.<sup>2</sup> Rather, in concert with the booming market for automobiles and the burgeoning availability of consumer goods such as radios, televisions, and various household appliances,<sup>3</sup> the 1950s and 1960s saw a “rising tide of complaints” concerning defects in motor vehicles,<sup>4</sup> household appliances,<sup>5</sup> and other consumer products. This was coupled with the consumer’s limited access to a remedy for the defective products.<sup>6</sup> The Magnuson-Moss Warranty-Federal Trade Improvement Act (MMWA)<sup>7</sup> was Congress’s attempt to remedy at least some of the problems faced by consumers with regard to defective goods and misleading warranties. The Act was not, however, designed to completely supplant state warranty law; rather, its purpose was to fill in the gaps in consumer warranty protection that existed in the state law warranty scheme.<sup>8</sup>

Enacted in 1975, the MMWA had at least two purposes. Probably the more commonly known purpose was that of curtailing misleading

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<sup>2</sup> See 115 CONG. REC. 31484 (1969) (introducing S. 3074, Senator Magnuson stated that “Senate Commerce Committee correspondence files testify to the high level of consumer frustration generated by unreliable products guaranteed in name, but not in fact”).

<sup>3</sup> See H.R. REP. No. 93-1107, at 22–23 (1974).

<sup>4</sup> Id. at 25 (“Beginning in the late 1950’s a rising tide of complaints was received by Members and committees of the Congress, the Federal Trade Commission, and other officials and agencies of the Federal Government from irate owners of motor vehicles.”).

<sup>5</sup> Id. at 26–28 (reporting on the findings of a presidential task force).

<sup>6</sup> Id. at 24–29.

<sup>7</sup> Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2006)); see H.R. REP. No. 93-1107, at 22–23.

<sup>8</sup> Walsh v. Ford Motor Co., 627 F. Supp. 1519, 1525 (D.D.C. 1986) (quoting Milton R. Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1, 35 (1978)) (refusing to certify a punitive damages class, the District Court stated its understanding that the Act “add[ed] a new layer of federal warranty law to existing state warranty doctrines,” but for the most part did not supplant state law); CAROLYN L. CARTER ET AL., NAT’L CONSUMER LAW CTR., CONSUMER WARRANTY LAW: LEMON LAW, MAGNUSON-MOSS, UCC, MANUFACTURED HOME, AND OTHER WARRANTY STATUTES § 2.1.1 n.2 (4th ed. 2010) (citing Skelton v. Gen. Motors Corp., 500 F. Supp. 1181 (N.D. Ill. 1980), *rev’d on other grounds*, 660 F.2d 311 (7th Cir. 1981)).

warranties.<sup>9</sup> The second, and equally important, purpose was that of promoting greater product reliability by easing the way for consumers to bring breach of warranty cases against the suppliers of defective products.<sup>10</sup> The MMWA sought to ease the way for consumer suits by creating federal causes of action for, *inter alia*, the breach of written warranties, as well as the breach of implied warranties; providing for an award of attorneys' fees and costs to a consumer who prevails on one of the four MMWA causes of action;<sup>11</sup> allowing suit against remote sellers (e.g., manufacturers);<sup>12</sup> and providing for federal jurisdiction for the MMWA causes of action.<sup>13</sup> Unfortunately, a significant number of federal and state courts have incorrectly interpreted the language of the MMWA, with many of the interpretations being quite surprising, given the clear language of the Act. The incorrect interpretations would simply be nuisances except that the courts' holdings have severely limited the consumers' ability to obtain private redress against the suppliers of defective consumer products. In limiting consumer redress, the courts have undercut one of the MMWA's main purposes.

This Article will identify the problematic cases and demonstrate how the courts' interpretations are contrary to the language and purpose of the MMWA. Part I of the Article will examine the history and purpose of the MMWA as exemplified by the language of the Act and its legislative

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<sup>9</sup> 120 CONG. REC. 40711 (1974) (statement of Sen. Moss) ("By making warranties of consumer products clear and understandable through creating a uniform terminology of warranty coverage, consumers will for the first time have a clear and concise understanding of the terms of warranties of products they are considering purchasing."); *see also* H.R. REP. NO. 93-1107, at 20 (stating a need to make warranties "more readily understood"); S. REP. NO. 93-151, at 6 (1973) (indicating the Act was intended to further a larger purpose of "promot[ing] consumer understanding" of written warranties).

<sup>10</sup> S. REP. NO. 93-151, at 2 ("[T]his bill aims to increase the ability of the consumer to make more informed product choices and to enable him to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation."). The report also stated that in order to ensure warrantor performance there was a need to monetarily penalize a warrantor for non-performance and award that penalty to the consumer. *Id.* at 7. *See also* 120 CONG. REC. 40711 (1974) (statement of Senator Moss) ("Not only will the consumer understand his warranty rights, but for the first time he will have assurance that those rights may be meaningfully enforced. This legislation spells out with specificity precisely what rights and duties will flow from warranties and it provides a number of public and private means of consumer redress for breach of warranty obligations.").

<sup>11</sup> 15 U.S.C. § 2310(d)(2) ("If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover . . . a sum equal to the aggregate amount of cost and expenses (including attorneys' fees."); *see also* S. REP. NO. 93-151, at 3 (consumer's pursuit of legal remedies for breach of warranty in a court of competent jurisdiction "is made economically feasible by the provision in the bill which awards reasonable attorneys fees . . . and court costs to any successful consumer litigant").

<sup>12</sup> S. REP. NO. 93-151, at 21.

<sup>13</sup> *Id.* at 2-3.

history. Part II will then explain the provisions of the Act that relate to the content and labeling of warranties (the “Truth-in-Warranty” provisions). This explanation will help the reader to put the private redress provisions of the Act into context. Part III will then examine the provisions of the Act that enhance the ability of a consumer to seek private redress for losses caused by defective products. This examination will show how these provisions, when interpreted correctly, protect consumers from misleading warranties and the proliferation of shoddy goods. In addition, Part III will examine the problematic cases that have interpreted the Act’s private redress provisions so as to severely limit the ability of consumers to bring breach of warranty claims under the MMWA. The section’s exploration of the cases’ reasoning will concentrate on the cases that have had the most severe impact upon consumer actions: limitations on the remedies available under the MMWA for breach of warranty and the concomitant restriction on access to the federal courts; and limitations on the types of warranty actions that may be brought under the MMWA.<sup>14</sup>

## I. HISTORY AND PURPOSE OF THE MMWA

To understand the fallacy in the reasoning of some of the court decisions in this area, one needs a basic understanding of the purposes of the MMWA as well as an understanding of the MMWA’s basic provisions. The MMWA seeks to effectuate four purposes: to curtail misleading warranties by promoting greater consumer understanding of warranties;<sup>15</sup> to “insure consumers certain basic protections when they purchase consumer products which have written warranties”;<sup>16</sup> to allow the consumer “to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation”;<sup>17</sup> and to “improve the position of the consumer in the marketplace by making the Federal agency responsible for his economic well being (the F.T.C.) more effective.”<sup>18</sup> This Article will focus on the first three purposes as the fourth purpose is the subject of a second Article.

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<sup>14</sup> There is a fourth problematic category of cases that allow a warrantor to include a binding arbitration agreement in a written warranty in contravention of the MMWA. However, as discussed *infra* (see text accompanying note 120), the arbitration discussion is too complex to be thoroughly examined in this Article. Further, other commentators have written extensively on the subject. See *infra* note 120.

<sup>15</sup> S. REP. No. 93-151, at 6-7; see H.R. REP. No. 93-1107, at 29 (1974).

<sup>16</sup> S. REP. No. 93-151, at 7.

<sup>17</sup> *Id.* at 2 (“[T]his bill aims to increase the ability of the consumer to make more informed product choices and to enable him to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation.”). The report also stated that in order to ensure warrantor performance there was a need to monetarily penalize a warrantor for non-performance and award that penalty to the consumer. *Id.* at 7.

<sup>18</sup> *Id.* at 2.

The MMWA was enacted in 1975, a time in which there was no federal regulation in the area of warranties. Instead, the regulation was left to the states, all of which (except Louisiana) had adopted the Uniform Commercial Code (UCC).<sup>19</sup> The UCC seemingly provided strong warranty protection to buyers through its implied warranty of merchantability and its implied warranty of fitness for a particular purpose. In the consumer goods arena, however, manufacturers and retail sellers quickly learned that they could bypass the UCC warranties by providing written warranties that seemed to promise much, but actually provided little and that, at the same time, disclaimed the UCC implied warranties.<sup>20</sup>

As the above discussion suggests, the problems that the pre-1975 written warranties created can only be understood if one has a basic understanding of the warranty provisions of the UCC. First, unlike the MMWA, the UCC does not discuss, create, or regulate written warranties specifically. Rather, it provides for the creation of express warranties,<sup>21</sup> both oral and written, and for the creation of implied warranties.<sup>22</sup> A seller makes an express warranty under UCC § 2-313 whenever it makes a promise, affirmation of fact, description of goods, and/or provides a model or sample of goods, any one of which becomes the basis of the bargain that the seller has with the buyer.<sup>23</sup>

Conversely, the UCC implied warranties are created by law rather than through any action by the seller. The UCC provides for three implied warranties: the implied warranty of merchantability;<sup>24</sup> the implied warranty of fitness for a particular purpose,<sup>25</sup> and the implied warranty of title.<sup>26</sup> The two that are relevant for purposes of this Article are the implied warranty of merchantability (IWM) and the implied warranty of fitness for a particular purpose (IWF). The IWM is created whenever a seller enters into a contract for the sale of goods if that seller deals in goods of the kind being sold.<sup>27</sup> It provides that “the goods shall be merchantable.”<sup>28</sup> A good is merchantable if, *inter alia*, it would “pass without objection in the trade under the contract description” and it is “fit for the ordinary purpose for which such goods are used.”<sup>29</sup> By

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<sup>19</sup> H.R. REP. NO. 93-1107, at 24.

<sup>20</sup> *Id.* (“[I]n many cases where a warranty or guarantee was ostensibly given the old saying applied ‘The bold print giveth and the fine print taketh away.’ For the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.”).

<sup>21</sup> U.C.C. § 2-313 (2012).

<sup>22</sup> *Id.* §§ 2-312, 2-314, 2-315.

<sup>23</sup> *Id.* § 2-313.

<sup>24</sup> *Id.* § 2-314.

<sup>25</sup> *Id.* § 2-315.

<sup>26</sup> *Id.* § 2-312.

<sup>27</sup> *Id.* § 2-314.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

contrast, the IWF is a more particular warranty that provides that the goods are fit for the particular purpose that the buyer has at the time of contracting.<sup>30</sup> This IWF arises only when the seller has reason to know, at the time of contracting, “any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.”<sup>31</sup>

Both the IWM and the IWF can provide powerful protection for a buyer, however, the UCC allows the seller to fairly easily disclaim the warranties, i.e., exclude the warranties from the contract of sale. The seller can disclaim both warranties by using language such as “As Is” or “With All Faults.”<sup>32</sup> Further, the seller can disclaim the IWM by simply mentioning “merchantability” in its exclusionary language.<sup>33</sup> The seller can disclaim the IWM either orally or in writing, but if the disclaimer is in writing it must be conspicuous.<sup>34</sup> Conversely, the seller can only disclaim the IWF in writing.<sup>35</sup> Similar to the IWM, the disclaiming language must be conspicuous, but unlike the IWM, the IWF disclaimer language does not need to have any specific language.<sup>36</sup> Thus, a seller may exclude the IWF by stating conspicuously in writing that “SELLER DISCLAIMS ALL IMPLIED WARRANTIES.” The language to disclaim the IWM must be more specific, but the following is sufficient, “SELLER DISCLAIMS THE IMPLIED WARRANTY OF MERCHANTABILITY.”

Given the ease with which the implied warranties could be disclaimed, it is not surprising that the majority of warranties prior to the enactment of the MMWA contained a disclaimer of implied warranties.<sup>37</sup> Further, the written warranty that was ostensibly given in place of the implied warranties was often not worth the paper on which it was

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<sup>30</sup> U.C.C. § 2-315.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § 2-316.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> In 1974, 55% of the pre-Act warranties carried disclaimers of the implied warranties of merchantability and fitness. JACQUELINE SCHMITT ET AL., BUREAU OF CONSUMER PROT., FED. TRADE COMM’N, IMPACT REPORT ON THE MAGNUSON-MOSS WARRANTY ACT: A COMPARISON OF 40 MAJOR CONSUMER PRODUCT WARRANTIES FROM BEFORE AND AFTER THE ACT 24 (1980); *see* H.R. REP No. 93-1107, at 24 (1974) (“Many of the so-called warranties and guarantees now given on consumer products disclaim or negate [the] implied warranties of merchantability and fitness.”); S. REP. No. 93-151, at 7 (1973) (“The issuance of a limited express warranty while simultaneously disclaiming implied warranties has become an increasingly common practice which results in many cases in a document which could be more accurately described as a limitation on liability rather than a warranty.”); *see also* 113 CONG. REC. 35291 (1967) (discussing how auto lawyers take advantage of how easy it is to disclaim implied warranties under art. 2 of the UCC).

printed.<sup>38</sup> Unfortunately, the written warranties often used complex language to hide this lack of any real warranty protection.<sup>39</sup> The problem of misleading warranties, coupled with other problems, led to a rising tide of complaints in the 1950s and the 1960s concerning motor vehicles,<sup>40</sup> household appliances,<sup>41</sup> and other consumer products.<sup>42</sup> Consumers directed many of their complaints about manufacturers and their warranties to the FTC.

The first major source of many of the consumer complaints came from the owners of motor vehicles who began to inundate the Commission beginning in the late 1950s.<sup>43</sup> The complaints indicated that manufacturers or dealers were not living up to the terms of their warranties, that the automobiles were “unsafe, poorly designed, [and] noisy,”<sup>44</sup> and that the manufacturers or dealers did not cure the defects.<sup>45</sup> The second major source of complaints emanated from owners of major appliances. In a study of warranties for major appliances, President Johnson’s 1968 Task Force<sup>46</sup> reported that manufacturers had not lived up to their obligations, and almost all major appliance warranties disclaimed any liability under the implied warranties of the UCC; the majority of major appliance warranties contained “exceptions and exclusions which are unfair to the purchaser and which are unnecessary from the standpoint of protecting the manufacturer from unjustified claims or excessive liability.”<sup>47</sup> The report went on to note that consumers

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<sup>38</sup> H.R. REP. NO. 93-1107, at 24 (“Another growing source of resentment has been . . . the developing awareness that the paper with the filigree border bearing the bold caption ‘Warranty’ or ‘Guarantee’ was often of no greater worth than the paper it was printed on.”).

<sup>39</sup> S. REP. NO. 93-151, at 6–7 (“Far too frequently, suppliers of consumer products fail to communicate to the consumer what, in fact, they are offering him in that small piece of paper proudly labeled ‘warranty.’”).

<sup>40</sup> H.R. REP. NO. 93-1107, at 25 (“Beginning in the late 1950’s a rising tide of complaints was received by Members and committees of the Congress, the Federal Trade Commission, and other officials and agencies of the Federal Government from irate owners of motor vehicles.”).

<sup>41</sup> *Id.* at 26–28 (reporting on the findings of a presidential task force).

<sup>42</sup> See 115 CONG. REC. 31484 (1969) (introducing S. 3074, Senator Magnuson stated that “Senate Commerce Committee correspondence files testify to the high level of consumer frustration generated by unreliable products guaranteed in name, but not in fact”).

<sup>43</sup> H.R. REP. NO. 93-1107, at 25 (“During this period as many letters were received by the FTC on this subject as on any other since the Commission was established in 1914.”).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 24. In his February 6, 1968 message to the Congress, President Johnson established a Task Force on Appliance Warranties and Service that was comprised of the Special Assistant to the President for Consumer Affairs, the Chairman of the FTC, the Secretary of Commerce, and the Secretary of Labor. *Id.*

<sup>47</sup> *Id.* at 27–28 (referring to the Task Force’s February 6, 1968 report). The report was based on a study conducted by the FTC of “over 200 warranties used by 50 manufacturers of major appliances.” *Id.* at 27.

lacked the ability to compel manufacturers or retailers to perform their warranty obligations, and they did not understand the warranties due, in part, to the content and terminology of the warranty.<sup>48</sup> Further, a number of warranties were deceptively captioned.<sup>49</sup>

In response to the complaints, for at least 13 years the President and Congress pushed to enact legislation to address the consumers' concerns.<sup>50</sup> Congress was finally successful in 1975 with the MMWA. As previously outlined, the Act sought to improve consumer understanding, ensure basic warranty protections, allow for private redress for the consumer, and make the FTC more effective.<sup>51</sup> The erroneous case law that is the main focus of this Article impacts the second and the third purposes of the Act.

The second strategic purpose of the MMWA, as stated in the Senate Report, was to provide basic consumer protections on goods with written warranties.<sup>52</sup> The Act intended to achieve this purpose by "defin[ing] the minimum Federal content standards for such warranties"<sup>53</sup> and by prohibiting a supplier from disclaiming the implied warranties when that supplier gave a written warranty.<sup>54</sup> As the House Report stated:

[I]n many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper [on which the warranty was written] operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.<sup>55</sup>

In addition to ensuring basic warranty protection, the MMWA sought to increase the reliability of consumer products by "[monetarily] penalizing the warrantor for non-performance . . . and awarding that

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<sup>48</sup> H.R. REP. NO. 93-1107, at 27.

<sup>49</sup> *Id.* at 28.

<sup>50</sup> President Kennedy sent the first Presidential Message on consumer interests to Congress on March 15, 1962. *Id.* at 24. In addition, the author's research revealed that Congress attempted to pass consumer protection legislation for eight years. The first introduced bills covering consumer protection were three initial Senate bills in 1967. From that time, until the final law, there were over a dozen versions of consumer warranty protection bills created, discussed, and debated in both chambers of Congress. *See, e.g.*, S. 2626, 90th Cong. (1967); S. 3074, 91st Cong. (1969); H.R. 261, 92d Cong. (1971); S. 986, 92d Cong. (1971); S. 356, 93d Cong. (1973); H.R. 20, 92d Cong. (1971). Note that this represents a very incomplete list. Most of these bills were also the subject of hearings and written testimony.

<sup>51</sup> See *supra* text accompanying notes 15–18.

<sup>52</sup> S. REP. NO. 93-151, at 7 (1973).

<sup>53</sup> Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2006)).

<sup>54</sup> S. REP. NO. 93-151, at 7; H.R. REP. NO. 93-1107, at 29 (stating a need for "safeguards against the disclaimer or modification of the implied warranties of merchantability and fitness on consumer products where a written warranty is given with respect thereto").

<sup>55</sup> H.R. REP. NO. 93-1107, at 24.

penalty to the consumer.”<sup>56</sup> Congress was concerned with the reliability of consumer products because “[p]aralleling the growth of acquisition of consumer products [had] been a growing concern of the American consumer with the quality and durability of many of those products.”<sup>57</sup> Specifically, with regard to automobiles, the FTC’s 1968 staff report on automobile warranties found that manufacturers were not performing up to their warranted standards in the manufacture and preparation of cars.<sup>58</sup> In addition to purchasing unreliable products, the consumer was faced with the lack of readily available or practical means to compel the manufacturer, the retailer, or the servicing agency to perform their warranty obligations.<sup>59</sup> This inability to compel performance was thought to be due in part to the fact that “enforcement of the warranty through the courts [was] prohibitively expensive.”<sup>60</sup> Thus, the MMWA aimed to ease the way for the consumer to obtain redress for warranty violations.

## II. THE TRUTH-IN-WARRANTY PROVISIONS OF THE MMWA

As previously outlined, the MMWA was enacted in an attempt to provide greater protection for the consumer who has purchased a defective product. In keeping with its consumer protection goal, the MMWA governs implied and written warranties on consumer products that “actually cost[] the consumer more than \$5.”<sup>61</sup> With regard to these consumer products, the provisions of the MMWA seek to curb the harm to consumers that the misleading warranties and defective products cause.<sup>62</sup>

Towards that end, the MMWA has three types of provisions designed to effectuate the four purposes outlined in Part I. First, Title I of the Act contains Truth-in-Warranty provisions that are designed to effectuate the

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<sup>56</sup> S. REP. No. 93-151, at 7.

<sup>57</sup> H.R. REP. No. 93-1107, 23–24.

<sup>58</sup> *Id.* at 26.

<sup>59</sup> *Id.* at 27.

<sup>60</sup> S. REP. No. 93-151, at 7.

<sup>61</sup> Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2187 (1975) (codified at 15 U.S.C. § 2302(e) (2006)); *see* 15 U.S.C. § 2302 (governing contents of warranties on consumer products), § 2303 (governing written warranties on consumer products), § 2304 (governing standards for written warranties on consumer products), § 2305 (governing full and limited warranties on consumer products), § 2306 (governing service contracts on consumer products), § 2307 (governing warrantors, i.e., suppliers who give warranties on a consumer product), § 2308 (governing implied warranties on consumer products), § 2310 (remedies for consumer disputes involving warranties on consumer products).

<sup>62</sup> As Judge Breithaupt in the Oregon Tax Court stated: “The requirements of the Magnuson-Moss Warranty Act may be analogized to a sand trap or water hazard on a golf course. The federal warranty statute is simply a feature that the player must accept in playing the game—and in this case the game is played in Oregon.” *Ann Sacks Tile & Stone, Inc. v. Dep’t of Revenue*, No. TC 4879, 2011 WL 5967187, at \*5 (Or. T.C. Nov. 29, 2011) (citation omitted) (case was a fairly unrelated tax matter).

purpose of curtailing misleading warranties. Title I also contains the second type of provision that effectuates the basic warranty protection and private redress purposes. Finally, in pursuit of the fourth purpose, Title II of the Act (the “Federal Trade Improvement” portion) expands the powers of the FTC.<sup>63</sup> To enable the reader to contextualize the discussion in Part III pertaining to the consumer private redress provisions, this section will examine the Truth-in-Warranty provisions of the Act.

Before diving into the specific MMWA provisions, it is important to recognize that the majority of the provisions apply to suppliers and/or warrantors and thus cover all players who have a role in placing consumer products into the stream of commerce. Specifically, the Act’s Truth-in-Warranty provisions generally apply only to warrantors,<sup>64</sup> with a warrantor defined 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.”<sup>65</sup> Conversely, the sections that provide private redress for defective products apply to both suppliers *and* warrantors alike<sup>66</sup> and the definition of supplier encompasses all persons who are in the chain of production and distribution of a consumer product.<sup>67</sup> Thus, the Act’s private redress provisions apply to producers, manufacturers, component suppliers, wholesalers, distributors, and retailers.<sup>68</sup>

The Truth-in-Warranty provisions of the MMWA are designed to eliminate the misleading warranties<sup>69</sup> that prompted, in part, the legislation in this area.<sup>70</sup> As stated in the Act, the provisions “improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.”<sup>71</sup> Towards that end, the MMWA does not require a supplier of a consumer product

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<sup>63</sup> See 88 Stat. at 2193–98.

<sup>64</sup> See *infra* Part II.

<sup>65</sup> 15 U.S.C. § 2301(5).

<sup>66</sup> See 15 U.S.C. § 2308 (prohibiting a supplier who gives a written warranty or enters into a service contract from disclaiming or modifying the state law implied warranties); 15 U.S.C. § 2310(d)(1) (providing a federal cause of action against suppliers, warrantors and service contractors for breach of written warranties, implied warranties, or service contracts).

<sup>67</sup> 15 U.S.C. § 2301(4) (“The term ‘supplier’ means any person engaged in the business of making a consumer product directly or indirectly available to consumers.”).

<sup>68</sup> H.R. REP. NO. 93-1107, at 35 (1974).

<sup>69</sup> Along with written warranties, the MMWA covers service contracts. See 15 U.S.C. § 2306. Such contracts are not, however, a major concern of this Article.

<sup>70</sup> MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 14:16 (2011) (“[T]he primary issue addressed by Magnuson-Moss was the problem of warranties that offer substantially less protection [than] they first appear to provide. For example, warranties that appear to protect everything, but include numerous restrictions and limitations in the fine print. As noted earlier, instead of requiring specific warranty protection, Magnuson-Moss relies on full disclosure, and competition to determine the extent of warranty protection consumers receive.”).

<sup>71</sup> 15 U.S.C. § 2302(a).

to provide a warranty,<sup>72</sup> but rather mandates that if a supplier does issue a written warranty, it abide by the labeling requirements contained in § 2302, the content requirements contained in § 2303, and the Federal Trade Commission regulations.<sup>73</sup>

The labeling and content requirements of the MMWA are fairly extensive. The impact of the requirements is limited, however, by the fact that they only apply to a narrow<sup>74</sup> category of writings deemed to be written warranties. Although written warranties can come from a variety of sources, including manufacturers as well as retailers,<sup>75</sup> the definition encompasses only two types of writings. First, it encompasses a “written affirmation of fact or written promise made in connection with the sale of a consumer product” which both “relates to the nature of the material or workmanship [of the product] 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.”<sup>76</sup> Thus, this first part of the definition encompasses the classic written warranty that is usually given by a manufacturer of the product.

In addition, however, the definition of written warranty also encompasses an “undertaking . . . to refund, repair, replace, or take other remedial action with respect to [a consumer] product in the event that such product fails to meet the specifications set forth in the undertaking.”<sup>77</sup> With this second part of the definition the MMWA broadens the definition of a written warranty beyond the express warranty of the UCC. Thus, even when a supplier (a dealer for example) has not made its own warranty and attempts to disclaim all warranties, if the supplier agrees in writing to make repairs and to correct defects pursuant to the manufacturer’s warranty, that supplier has made a written warranty under the MMWA.<sup>78</sup>

The written undertakings and the written affirmations outlined above will, however, constitute a “written warranty” only if they are given

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<sup>72</sup> *Id.* § 2302(b)(2).

<sup>73</sup> 15 U.S.C. § 2302(b).

<sup>74</sup> The author is contrasting the written warranty with the express warranty under the UCC Sale of Goods which encompasses all affirmations of facts, promises, descriptions of goods, samples, and models that are made part of the basis of the bargain by a seller of goods. U.C.C. § 2-313 (2012).

<sup>75</sup> The written warranty is made by a supplier to a buyer, 15 U.S.C. § 2301(6), and a supplier is “any person engaged in the business of making a consumer product directly or indirectly available to consumers.” *Id.* § 2301(4).

<sup>76</sup> *Id.* § 2301(6).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; Hoff v. Mercedes-Benz USA, LLC, No. 04 836 NZ, 2005 WL 3723201, at \*9 (Mich. Cir. Ct. Dec. 30, 2005); Gen. Motors Acceptance Corp. v. Jankowitz, 523 A.2d 695, 701 (N.J. Super. Ct. App. Div. 1987); see 16 C.F.R. § 700.4 (2013) (“[O]ther actions and written and oral representations of . . . a supplier in connection with the offer or sale of a warranted product may obligate that supplier under the Act. If under State law the supplier is deemed to have ‘adopted’ the written affirmation of fact, promise, or undertaking, the supplier is also obligated under the Act.”).

by a supplier to a buyer and become “part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.”<sup>79</sup> Further, § 2303(b) makes it clear that the labeling and content requirements of §§ 2302 and 2303 do not govern statements that one generally thinks of as puffery or opinion. Specifically, § 2303(b) states that the labeling and content requirements do not apply to general guarantees of customer satisfaction.<sup>80</sup>

Once a supplier provides a “written warranty” to a buyer (or is obligated under a state-created implied warranty) that supplier becomes a warrantor.<sup>81</sup> As a warrantor, the MMWA requires it to clearly and conspicuously label the warranty as either a “full” warranty or a “limited” warranty.<sup>82</sup> Further, if the warranty is to be a full warranty,<sup>83</sup> then the duration of the warranty must also be included in the label.<sup>84</sup> Thus, if a warrantor is providing a one-year full warranty, the label could appear as follows: “Full One-Year Warranty.” The content requirements of the MMWA are contained in the FTC regulations that § 2302 authorizes.<sup>85</sup> The regulations basically require that products costing \$15.00 or more clearly and conspicuously disclose, in simple and readily understood language, to whom the warranty extends, a description of what is warranted and what the warrantor will or will not do, how the warrantee should obtain warranty performance, and any limitations on relief.<sup>86</sup>

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<sup>79</sup> 15 U.S.C. § 2301(6).

<sup>80</sup> *Id.* § 2303(b) (provision does “not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations”).

<sup>81</sup> 15 U.S.C. § 2301(5) (“The term ‘warrantor’ means 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.”).

<sup>82</sup> *Id.* § 2303(a).

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* § 2302(a) (providing that any warrantor warranting a consumer product via 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 provision then lays out 13 possible items that the regulations may require to be included in the written warranty. *Id.*

<sup>85</sup> 16 C.F.R. §§ 701.2–701.3(a) (2013). The regulation requires nine items of information: (1) the identity of the warranty recipient, i.e., whether the warranty extends to only the original purchaser or to all owners within the warranty period; (2) the description of exactly what is and is not warranted; (3) a statement of what the warrantor will and will not do in the event of a defect, malfunction, or failure to conform to the written warranty; (4) a statement of when the warranty begins and how long it lasts; (5) an explanation of the process the consumer should use to obtain warranty performance, including the identity of, and contact info for, the warrantor(s); (6) information regarding any informal dispute resolution elected by the warrantor; (7) a statement on the face of the warranty of any limitations on the duration of implied warranties; (8) any exclusions of or limitations on relief such as consequential or incidental damages; and (9) a specific statement that additional legal rights may be available to the consumer under state law and that some states do not allow limitations on the duration of implied warranties and/or the exclusion or limitation of incidental or consequential damages. *Id.*

### III. THE UNWARRANTED LIMITATION BY THE COURTS OF THE CONSUMER'S PRIVATE REDRESS RIGHT

Although the provisions of the MMWA were drafted so as to allow for the fulfillment of the MMWA's purposes, many courts have interpreted the statutory provisions in a way that severely limits the reach of the MMWA in the private redress realm. The discussion below will outline the warranty protection provisions of the Act, along with the private redress provisions. The discussion will also examine case law that relates to particular provisions and demonstrate the flawed nature of the courts' interpretation. It will then explain how an alternative interpretation is more consistent with the MMWA's purposes.

#### A. *The Duties and Restrictions Imposed upon Warrantors*

As previously explained, the second type of MMWA provisions are the "Redress for Defective Products" provisions. This type of provision encompasses the duties that the Act imposes on warrantors; the restrictions that the MMWA imposes on the ability of warrantors and suppliers to limit a consumer's redress for defective products; and the private causes of action available to consumers who are harmed by defective products. The nature of the duties and restrictions depends upon whether the written warranty is designated as "full" or "limited."

##### 1. *Duties of a Warrantor or Seller*

If a supplier designates a written warranty as "limited," then the FTC regulations mandate that the supplier make the written warranties readily available to the consumers.<sup>86</sup> The exact manner in which the supplier is to do so is laid out for the seller in 16 C.F.R. § 702.3(a) and for the warrantor in 16 C.F.R. § 702.3(b). The regulations also proscribe the mechanisms for making written warranties available in catalog and mail

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Examples of violations are as follows: *In re Tiger Direct, Inc.*, 128 F.T.C. 517, 529–30 (1999) (accepting Tiger Direct's agreement to cease representing that it provides on-site warranty service without disclosing all applicable limitations and conditions, and also to comply with all relevant warranty disclosure rules, as well as the pre-sale availability rule); *In re Gateway 2000, Inc.*, 126 F.T.C. 888, 905 (1998) (enforcing computer manufacturer's agreement to pay almost \$300,000 as part of an FTC settlement that alleged the company had failed to make some of the required disclosures summarized above); *Lawhorn v. Joseph Toyota, Inc.*, 750 N.E.2d 610, 613–14 (Ohio Ct. App. 2001) (car dealer was held to have violated the disclosure provisions of the Act by combining a sales contract containing a disclaimer of all implied warranties, while stating on the FTC required window sticker that "Under state law, 'implied warranties' may give you even more rights," from which the court concluded that a "reasonable, average consumer" would likely be misled as to the "nature or scope of the warranty" upon reading the documents provided by the dealership) (internal quotation marks omitted).

<sup>86</sup> 16 C.F.R. § 702.3 (written warranties on consumer products costing \$15 or more must be made readily available to the consumer).

order sales<sup>87</sup> as well as in door-to-door sales.<sup>88</sup> Although the regulations do not make any specific provision for online sales, the provisions concerning catalog and mail order sales are readily applicable to online sales.<sup>89</sup>

If the written warranty is designated as “full,” then a warrantor must comply with the duties outlined in the preceding paragraph, as well as two additional duties.<sup>90</sup> First, if the consumer product contains a defect, malfunction, or fails to conform to the written warranty, then the warrantor must remedy such product within a reasonable time and without charge.<sup>91</sup> Second, if the warrantor is unable to fix the defect or malfunction after a reasonable number of attempts, then the warrantor must permit the consumer to choose either a refund for, or a replacement without charge of, the product (or the defective part if only a component part is problematic).<sup>92</sup> Further, if the warrantor replaces a component part, then it must install the part without charge.<sup>93</sup>

## *2. Restrictions on Warrantors and Suppliers*

Of equal, if not greater, significance than content and labeling provisions are the provisions that restrict the ability of a warrantor or supplier to limit certain remedies and rights that a consumer would ordinarily have under the law. Those restrictions encompass four items: conditions that warrantors/suppliers try to place on warranties; limitations that warrantors/suppliers place on a consumer’s remedy for breach of warranty; limitations on consumer access to the courts; and disclaimers or modifications of state-created implied warranties. Most of the restrictions only apply to warrantors; however, the restriction regarding implied warranties applies to the broader category of suppliers.

### *a. Conditions to Warranty Coverage*

Prior to the enactment of the MMWA, sellers commonly curtailed warranty coverage by requiring buyers to register their products in order to obtain warranty protection, and/or by conditioning warranty coverage on the buyers’ exclusive use of the sellers’ products.<sup>94</sup> Thus, a buyer would believe that she had coverage, only to have the seller deny coverage because the buyer had failed to fulfill a condition of which she was more than likely unaware. The MMWA prohibits these practices, although some of the prohibitions only apply to “full” warranties.<sup>95</sup>

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<sup>87</sup> 16 C.F.R. § 702.3(c).

<sup>88</sup> *Id.* § 702.3(d).

<sup>89</sup> *Id.* § 702.3(c).

<sup>90</sup> 15 U.S.C. § 2303.

<sup>91</sup> *Id.* § 2304(a)(1).

<sup>92</sup> *Id.* § 2304(a)(4).

<sup>93</sup> *Id.*

<sup>94</sup> 16 C.F.R. § 700.7(a).

<sup>95</sup> Specifically, § 2304, with some limited exceptions, prohibits a full warrantor from imposing “any duty other than notification upon any consumer as a condition of

*b. Limitations on Remedies*

In addition to imposing conditions on coverage, warrantors routinely limited the remedies that were available to a consumer in the event of a breach. The MMWA places some minimal limits on this practice. A warrantor is required to clearly and conspicuously disclose in the written warranty document any limitation on, or exclusion of, relief. Further, the warrantor must include a statement indicating that some states do not allow the exclusion of or limitation on incidental or consequential damages and thus the exclusion or limitation might not apply.<sup>96</sup> With regard to full warranties, an additional requirement is added that any limitation on or exclusion of consequential damages must clearly and conspicuously appear on the face of the warranty.<sup>97</sup>

*c. Restricting Suppliers' Abilities to Limit Consumer Access to the Courts*

A more meaningful restriction than the remedy restriction is the MMWA's restriction relating to informal dispute settlement mechanisms. The Act encourages such mechanisms,<sup>98</sup> but mandates that the FTC prescribe rules for any informal dispute settlement procedure, with "[s]uch rules [providing] for participation in such procedure by independent or governmental entities."<sup>99</sup> This latter provision is designed to ensure that the entities involved are completely impartial.<sup>100</sup> In addition, Congress was concerned with the ability of the consumer to resort to legal action if dissatisfied with the results reached in the informal process.<sup>101</sup> Accordingly, the Act and the FTC regulations

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securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty." 15 U.S.C. § 2304(b)(1). In addition, FTC regulations at 16 C.F.R. § 700.7(a) reiterate that a requirement that the consumer return a warranty registrations card or a similar notice as a condition of performance under a full warranty is an unreasonable duty. Further, a full warrantor may not make an express or implied statement that "This warranty is void unless the warranty registration card is returned to the warrantor." *Id.* Finally, § 2302 prohibits all warrantors, full and limited, from conditioning coverage under a written or implied warranty on the consumer's using "any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade or corporate name." 15 U.S.C. § 2302(c). This prohibition may be waived by the FTC, after public comment, if the FTC finds that the consumer product in question will only work properly if the identified article or service is used. *Id.* Although the use of registration cards is allowed with limited warranties, conditioning warranty service upon the return of the card must be disclosed in the written warranty. 16 C.F.R. § 701.4.

<sup>96</sup> 16 C.F.R. § 701.3(8).

<sup>97</sup> 15 U.S.C. § 2304(a)(3).

<sup>98</sup> H.R. REP. NO. 93-1107, at 40 (1974) ("Congress declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.").

<sup>99</sup> 15 U.S.C. § 2310(a)(2).

<sup>100</sup> H.R. REP. NO. 93-1107, at 40.

<sup>101</sup> *Id.* at 41 ("An adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding.").

prohibit binding arbitration.<sup>102</sup> Specifically, FTC Rule 703 states that “[d]ecisions of the [informal dispute settlement m]echanism shall not be legally binding on any person.”<sup>103</sup> In addition, the regulation requires that if a warrantor elects to require a consumer to pursue informal dispute resolution procedures, it must inform consumers that if they are dissatisfied with the outcome of the procedures, they may pursue legal remedies.<sup>104</sup> Finally, the regulations prohibit a supplier from charging a fee for the use of the informal dispute settlement procedure.<sup>105</sup>

Thus, although Congress wanted to encourage informal dispute settlement,<sup>106</sup> it recognized that suppliers would be encouraged to develop workable informal dispute settlement procedures only if consumer resort to the courts was feasible.<sup>107</sup> Further, preapproval of such informal dispute settlement mechanisms could forestall the abuse of such mechanisms to the detriment of consumers. A recent example of such abuse is the arbitration agreement that the Gateway computer company had in its terms and conditions in the 1990s for its computers.<sup>108</sup> The agreement provided as follows:

Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.<sup>109</sup>

Although the agreement appeared fairly innocuous, facts in the case against Gateway demonstrated that the ICC headquarters were in France, and “it was particularly difficult to locate the organization and its rules.”<sup>110</sup> Specifically, the ICC was not registered with the Secretary of State, efforts to locate and contact the ICC had been unsuccessful, and “apparently the only way to attempt to contact the ICC was through the United States Council for International Business, with which the ICC maintained some

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<sup>102</sup> 15 U.S.C. § 2310(a)(3) and 15 U.S.C. § 2310(d)(1) (requiring a consumer to resort to any established informal dispute settlement mechanism prior to commencing a legal action).

<sup>103</sup> 16 C.F.R. § 703.5(j) (2013).

<sup>104</sup> *Id.* § 703.5(g).

<sup>105</sup> *Id.* § 703.3(a).

<sup>106</sup> H.R. REP. No. 93-1107, at 40 (“Congress declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.”).

<sup>107</sup> S. REP. NO. 93-151, at 8 (1973).

<sup>108</sup> See Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 570 (N.Y. App. Div. 1998) (outlining the specific provisions of the Gateway arbitration clause).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 571 (finding the arbitration agreement to be unconscionable).

sort of relationship.”<sup>111</sup> In addition, a copy of the ICC’s Rules of Conciliation and Arbitration showed that for a claim of less than \$50,000, advance fees of \$4,000 were required, \$2,000 of which was nonrefundable even if the consumer prevailed at the arbitration. Finally, under ICC rules, the losing party was required to pay the other party’s attorneys’ fees.<sup>112</sup>

At least one commentator has argued that Rule 703 does not apply to binding arbitration because it speaks only to “informal dispute settlement procedure[s].”<sup>113</sup> However, the FTC has stated unequivocally that:

“reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act.” . . . Therefore, the Commission has determined not to amend § 703.5(j) to allow for binding arbitration. Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.<sup>114</sup>

The FTC’s position on binding non-judicial mechanisms is supported by the Act’s legislative history which states that if a supplier has provided a bona fide informal dispute settlement mechanism, then the consumer is to use that mechanism to resolve her dispute.<sup>115</sup> It goes on to state, however, that “if the consumer is not satisfied with the results obtained in any informal dispute settlement proceeding, the consumer can pursue his legal remedies in a court of competent jurisdiction, provided that he has afforded the supplier a reasonable opportunity to cure the breach.”<sup>116</sup>

In today’s current climate where businesses increasingly attempt to impose binding arbitration on unsuspecting consumers,<sup>117</sup> the

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<sup>111</sup> *Brower*, 676 N.Y.S.2d at 571.

<sup>112</sup> *Id.*

<sup>113</sup> Cf. Katie Wiechens, Comment, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1460 n.12, 1472 (2001) (stating that arbitration is not an informal dispute mechanism).

<sup>114</sup> Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg. 19700, 19708–09 (Apr. 22, 1999) (footnotes omitted) (quoting Pre-sale Availability of Written Warranty Terms, 40 Fed. Reg. 60168, 60211 (Dec. 31, 1975)).

<sup>115</sup> S. REP. NO. 93-151, at 2-3 (1973).

<sup>116</sup> *Id.* at 3.

<sup>117</sup> See generally Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It’s All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 151 (2009) (discussing the “recent movement to impose binding pre-dispute mandatory arbitration in an increasingly large number of consumer contracts”) (footnote omitted); Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-SIGN Notwithstanding*, 57 CATH. U. L. REV. 377, 378 (2008) (terms of online contracts “frequently include an arbitration provision that deprives the consumer of the right to sue if a dispute arises”); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627

prohibition of binding arbitration is a very important protection for consumers.<sup>118</sup> Recognizing this need for consumer protection, several state courts have upheld the FTC's position that the MMWA prohibits warrantors from imposing binding arbitration on consumers.<sup>119</sup> Unfortunately, two federal circuit and several state courts have found that the MMWA does *not* prohibit binding arbitration.<sup>120</sup> Although resolution of this conflict is a particularly pressing matter for consumers, the discussion of the arbitration issue is fairly complex and thus beyond the scope of this Article. Luckily, several articles have tackled the issue and support the author's contention that the courts should uphold the MMWA's and the FTC's preclusion on binding arbitration.<sup>121</sup>

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(2008) ("Un-negotiated form arbitration provisions have become accepted reality in consumer contracts in the United States.").

<sup>118</sup> Cf. Schmitz, *supra* note 117, at 631–32 ("This Article concludes with suggestions for reforms that allow for beneficial use of consumer arbitration, but seek to preserve consumers' warranty remedies and quell the rising tide of litigation and skepticism toward consumer arbitration."). See generally Alderman, *supra* note 117, at 151–52 ("This article . . . suggests that as consumer access to the civil justice system and juries is reduced or eliminated, consumer protection similarly decreases. The article concludes with a bit of optimism that the Arbitration Fairness Act, prohibiting pre-dispute binding arbitration, must be, and in fact may be, enacted by Congress.") (footnotes omitted).

<sup>119</sup> See, e.g., Koons Ford of Baltimore, Inc. v. Lobach, 919 A.2d 722, 723–24 (Md. 2007) ("[U]nder the MMWA, claimants may not be forced to resolve their claims through binding arbitration because Congress expressed an intent to preclude binding arbitration when it enacted the MMWA. The FAA does not supersede the MMWA."); *In re Van Blarcum*, 19 S.W.3d 484, 496 (Tex. App. 2000), *vacated*, *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001) (because the agreement compels arbitration of written warranty claims in violation of the MMWA, the agreement is invalid and unenforceable in its entirety).

<sup>120</sup> *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 476–77 (5th Cir. 2002); *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1325 (11th Cir. 2001); accord *Palm Harbor Homes, Inc. v. Turner*, 796 So. 2d 295, 296–97 (Ala. 2001); *S. Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000); *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 81 (Ga. Ct. App. 2000), *aff'd*, 548 S.E.2d 342 (Ga. 2001); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 492 (Tex. 2001).

<sup>121</sup> Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act vs. the Magnuson-Moss Warranty Act. Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4 (2001); Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 175 (2003); Jonathan D. Grossberg, Note, *The Magnuson-Moss Warranty Act, the Federal Arbitration Act, and the Future of Consumer Protection*, 93 CORNELL L. REV. 659, 684–85 (2008); Mace E. Gunter, Note, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1485 (2000). But see Wiechens, *supra* note 113, at 1470 (arguing that the FTC ban on arbitration is not entitled to *Chevron* deference); *Arbitration—Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation—Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002), 116 HARV. L. REV. 1201, 1202 (2003) (arguing that the FTC interpretation is not entitled to *Chevron* deference). It should be noted, however, that *Arbitration* incorrectly states that "legislative history specifically states that binding arbitration is a favored method of resolving warranty disputes." *Id.* at 1207. The "legislative history" used to support

*d. Prohibits the Disclaimer of Implied Warranties*

One of the important mechanisms by which the MMWA intended to ensure that consumers received basic warranty protection is the restriction on implied warranty disclaimers contained in § 2308.<sup>122</sup> Under § 2308, even if a supplier gives a bare bones written warranty or service contract, § 2308 protects the buyer from any attempt by the supplier to exclude or negate the existence of the state implied warranty.<sup>123</sup> Specifically, § 2308 prohibits all suppliers from disclaiming the state implied warranties whenever the supplier gives a written warranty<sup>124</sup> or

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this assertion was contained in “separate views on” the H.R. bill that became the MMWA. The remarks were *not* part of the official report which specifically favored nonbinding informal dispute settlement procedures, not binding arbitration. *See H.R. REP. NO. 93-1107*, at 41 (1974) (indicating that the bill encourages warrantors to establish informal dispute settlement procedures, but indicating that an adverse decision would not be a bar to a civil action); *S. REP. NO. 93-151*, at 2–3. For a neutral summation of the some of the major cases on both sides of the debate, see PRIDGEN, *supra* note 70, at § 14:18.

<sup>122</sup> *See S. REP. NO. 93-151*, at 2 (“Title I would prohibit a supplier offering a warranty in writing from disclaiming his implied warranties. Thus, the present misleading practice of using very limited express warranties to reduce consumer rights which would have been available but for the disclaimer of implied warranties is prohibited by title I.”). The report also states, “This subsection is designed to eliminate the practice of giving an express warranty while simultaneously disclaiming implied warranties. This practice has often had the effect of limiting the rights of the consumer rather than expanding them, as he might be led to believe.” *Id.* at 21.

<sup>123</sup> 15 U.S.C. § 2308 (2006); *see U.C.C. § 2-316* (2012) (indicating that a disclaimer is a mechanism by which a seller excludes or negates the existence of the implied warranties that state law would otherwise create via the UCC).

<sup>124</sup> 15 U.S.C. § 2308(a); *see Crowe v. Joliet Dodge*, No. 00 C 8131, 2001 WL 811655, at \*10 (N.D. Ill. July 18, 2001) (disclaimer not allowed because supplier gave a written warranty); *FTC v. Va. Homes Mfg. Corp.*, 509 F. Supp. 51, 57 (D. Md. 1981), *aff'd*, 661 F.2d 920 (4th Cir. 1981) (warrantors may not disclaim the implied warranties; a limited warranty may limit the duration of implied warranties, but duration must be reasonable in length, conscionable, and prominently displayed on the face of the warranty); *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 49 (Ala. 2001) (even though the manufacturer attempted to exclude implied warranties in the “Limited One-Year Warranty,” the manufacturer gave a written warranty through its “Certificates of Quality Assurance” and thus § 2308 precluded the manufacturer from disclaiming the implied warranties); *Hoff v. Mercedes-Benz USA, LLC*, No. 04-836 NZ, 2005 WL 3723201, at \*9 (Mich. Cir. Ct. Dec. 30, 2005) (where dealer passed on the manufacturer’s warranty it gave a written warranty and its disclaimer of implied warranties was therefore ineffective under § 2308); *Ventura v. Ford Motor Corp.*, 433 A.2d 801, 810 (N.J. Super. Ct. App. Div. 1981) (although the dealer had disclaimed all warranties, express or implied, intending simply to pass on the manufacturer’s warranty, because the dealer had promised in writing to perform necessary repairs, the court concluded it had given a written warranty as defined by the Magnuson-Moss Act, and thus its disclaimers were ineffective); *see also In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1100–01 (S.D. Cal. 2010); *Felde v. Chrysler Credit Corp.*, 580 N.E.2d 191, 197 (Ill. App. Ct. 1991) (where dealer incorporated the manufacturer’s warranty by reference on the invoice, its attempt to disclaim the implied warranty of merchantability was invalid); *Gen. Motors Acceptance Corp. v. Jankowitz*, 523 A.2d 695, 701–02 (N.J. Super. Ct. App. Div. 1987) (car dealer’s written undertaking to perform repairs was a written

enters into a service contract covering the consumer product purchased.<sup>125</sup> Further, even if a supplier disclaims the implied warranties in violation of the MMWA, such disclaimer is ineffective with regard to the MMWA implied warranties and with regard to the state implied warranties.<sup>126</sup>

### 3. Private Causes of Action and Case Law Limitations

As will be demonstrated below, § 2310(d)(1) allows a consumer to bring a breach of warranty claim based upon a written warranty or based upon an implied warranty. Although Congress was concerned with misleading written warranties, it was also concerned with suppliers who put defective products into the stream of commerce. Such suppliers are to be held accountable through private warranty actions, both written and implied. Courts have, however, erroneously found that consumers cannot bring a bare implied breach of warranty claim, that is, a claim for breach of an implied warranty where the defendant has not provided a written warranty. They have also found that the Act does not obviate the state horizontal or vertical privity requirements for implied warranty

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warranty, so that attempted disclaimer of implied warranty was ineffective); *Marine Midland Bank v. Carroll*, 471 N.Y.S.2d 409, 410–11 (N.Y. App. Div. 1984) (motor home dealer's inspection form was a Magnuson-Moss written warranty, and hence, the implied warranty disclaimer was ineffective); *In re Tiger Direct, Inc.*, 128 F.T.C. 517, 530 (1999); *In re Gateway 2000, Inc.*, 126 F.T.C. 888, 904 (1998). Cf. *HRL Land or Sea Yachts v. Travel Supreme, Inc.*, No. 1:07-cv-945, 2009 WL 427375, at \*6–7 (W.D. Mich. Feb. 20, 2009) (disclaimer of implied warranties was effective where dealer did not give a written warranty or enter into a service contract and disclaimer complied with U.C.C. § 2-316); *Semitekol v. Monaco Coach Corp.*, 582 F. Supp. 2d 1009, 1026–29 (N.D. Ill. 2008) (disclaimer allowed because no written warranty was given); *Computer Network, Inc. v. AM Gen. Corp.*, 696 N.W.2d 49, 57–58 (Mich. Ct. App. 2005) (allowing disclaimer because no written warranty given; noting, however, that even if a seller has not made its own warranty and disclaims all warranties, if the seller agrees in writing to make repairs and to correct defects pursuant to the manufacturer's warranties, then seller has made a written warranty and cannot disclaim the implied warranties).

<sup>125</sup> 15 U.S.C. § 2308(a)(2); see *Auburn Ford, Lincoln Mercury, Inc. v. Norred*, 541 So. 2d 1077, 1080 (Ala. 1989) (where plaintiff purchased a service contract from defendant, § 2308 prohibited the defendant from disclaiming the implied warranties, thus, although the “as is” clause was an effective disclaimer of implied warranties under U.C.C. § 2-316, it is ineffective under MMWA); *Lockhart v. Cnty. Auto Plaza, Inc.*, 55 U.C.C. Rep. Serv. (West) 533, 536 (Iowa Ct. App. 2004) (although Community “did not issue [the service contract] and was not obligated under it . . . . Community ‘provided’ the service contract, as that term is ordinarily understood: (1) Community recommended the purchase of this particular service contract; (2) Community was acting as agent for Heritage; (3) Community earned a profit of \$341.00 on the sale of the contract; and (4) the service contract was listed as a term of sale on the automobile purchase agreement”); *Shuldman v. DaimlerChrysler Corp.*, 768 N.Y.S.2d 214, 216 (N.Y. App. Div. 2003) (holding that an implied warranty may not be disclaimed where dealer has sold a service contract to buyer).

<sup>126</sup> 15 U.S.C. § 2308(c) (“A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.”).

claims. This section will explain the MMWA's causes of action, the problematic case holdings, and the error in the courts' reasoning.

*a. The Act's Causes of Action and Related Provisions*

Section 2310(d) is one of the most important provisions of the MMWA for a consumer who has been harmed by a defective consumer product. It is also the provision that the courts have most commonly misinterpreted. Through § 2310(d), “[t]he Magnuson-Moss Act created a federal remedy for breach of written and implied warranties falling within the statute.”<sup>127</sup> As outlined below, the provision has three basic components. First, it allows any consumer (defined as the purchaser or transferee of a consumer product)<sup>128</sup> to sue a broad class of persons for damages, and other legal and equitable relief, caused by a defective consumer product. This class of persons includes remote manufacturers who are not in privity with the consumer and who might not be subject to suit under state law. The provision specifically states:

Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—(A) in any court of competent jurisdiction in any State or the District of Columbia; or (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.<sup>129</sup>

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<sup>127</sup> *Hyler v. Garner*, 548 N.W.2d 864, 874 (Iowa 1996) (citing *Alberti v. Gen. Motors Corp.*, 600 F. Supp. 1026, 1027 (D.D.C. 1985)); *see Milicevic v. Fletcher Jones Imps., Ltd.*, 402 F.3d 912, 918 (9th Cir. 2005) (quoting *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1325 (11th Cir. 2001)) (MMWA provides “a federal remedy for breach of written and implied warranties”); *Rentas v. DaimlerChrysler Corp.*, 936 So. 2d 747, 750 (Fla. Dist. Ct. App. 2006) (MMWA “provide[s] an independent federal cause of action for breach of warranty”); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1026 (Miss. 1982) (MMWA “creates a new federal cause of action for the breach of warranties”); S. REP. No. 93-151, 2-3 (1973) (“If a supplier fails to honor his warranty or service contract promises, the consumer can avail himself of certain specified remedies. . . . [I]f the consumer is not satisfied with the results obtained in any informal dispute settlement proceeding, the consumer can pursue his legal remedies in a court of competent jurisdiction.”); Christopher Smith, *Private Rights of Action Under the Magnuson-Moss Warranty Act*, in PRACTICING LAW INST., COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 223, 225 (1985) (Magnuson-Moss creates four separate federal causes of action: breach of written warranty, implied warranty, service contract, or Magnuson-Moss provisions). Although a few courts have found that the MMWA only applies to written warranties, the clear language of 15 U.S.C. § 2310 demonstrates that these courts are in error. *See, e.g.*, *Thomas v. Micro Ctr. Inc.*, 875 N.E.2d 108, 112 (Ohio Ct. App. 2007).

<sup>128</sup> In addition to the buyer and the transferee of a consumer product, the MMWA also defines a consumer as “any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).” 15 U.S.C. § 2301(3).

<sup>129</sup> *Id.* § 2310(d)(1).

From the above language, one can see that four independent causes of action are authorized: failure to comply with any obligation under the MMWA; failure to comply with (or breach of) a written warranty; failure to comply with (or breach of) an implied warranty;<sup>130</sup> and failure to comply with (or breach of) a service contract. The requirements for creating written warranties and service contracts are found in the provisions of the MMWA,<sup>131</sup> but the requirements for creating an implied warranty are found in state law.<sup>132</sup> Only a consumer can bring these actions; however, the actions may be brought against three types of entities: suppliers, warrantors, and service contractors.

Coupled with the federal causes of action is the attorneys' fees provision that provides the means by which such suits may be brought. Together the four federal causes of action and the availability of attorneys' fees cast a net wide enough to monetarily penalize all suppliers of defective products. In the attorneys' fees area, § 2310(d) allows a finally prevailing consumer to receive reasonable costs and expenses, including attorneys' fees. As the Senate report explained, the attorneys' fees provision is a key component to the Act's goal of forcing suppliers to live up to the promises made in the warranty.<sup>133</sup> The report contended that warrantors who did not perform as promised needed to suffer direct economic detriment in order to have a strong enough incentive to perform.<sup>134</sup> However, the damages sought for many breach of warranty cases would be relatively small because the price of the consumer product is not high. If one couples this fact with the often-expensive nature of litigation,<sup>135</sup> it is easy to see how the majority of consumers would elect not to pursue a breach of warranty case.<sup>136</sup> The attorneys' fees provision sought to encourage consumers to pursue private redress.

Finally, as the statutory language above demonstrates, suit under § 2310(d) may be brought in federal district court, albeit in fairly limited circumstances. The jurisdictional prerequisite for an individual claim is that the amount in controversy be \$50,000 or more (exclusive of interest

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<sup>130</sup> See *Chase v. Kawasaki Motors Corp., U.S.A.*, 140 F. Supp. 2d 1280, 1291 (M.D. Ala. 2001) ("[S]ection 2310(d) essentially provides a federal cause of action for breach of an implied warranty which arises under state law."); *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1522 (D.D.C. 1986) (the MMWA creates a private cause of action for breach of warranty).

<sup>131</sup> See 15 U.S.C. § 2301(6), (8) (definitions of written warranty and service contract).

<sup>132</sup> *Id.* § 2301(7) (an implied warranty means one arising under state law).

<sup>133</sup> S. REP. NO. 93-151, at 24 (1973) (The attorneys' fees provision "would make economically feasible the pursuit of remedies by consumers in State and Federal courts. It should be noted that an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery. This requirement is designed to make the pursuit of consumer rights involving inexpensive consumer products economically feasible.").

<sup>134</sup> *Id.* at 7.

<sup>135</sup> *Id.*

<sup>136</sup> Gunter, *supra* note 121, at 1512-13.

and costs).<sup>137</sup> If the claim is a class action, the total of the claims must be \$50,000 or more (exclusive of interest and costs); all individual claims must be \$25 or more; and there must be at least 100 named plaintiffs.<sup>138</sup>

The consumer's right to bring private federal causes of action is limited in two ways. First, as discussed above, § 2310(a)(3) encourages warrantors to establish procedures to allow for the fair and expeditious settlement of consumer disputes through informal dispute settlement mechanisms. When a warrantor has established such a procedure, then a consumer may not commence suit under § 2310(d) unless the consumer initially resorts to such procedure if the warrantor's procedure meets the FTC's regulations, and has required in the warranty that a consumer resort to such procedure prior to pursuing any legal remedy under § 2310.<sup>139</sup> The second limitation on the consumer's ability to bring suit under § 2310(d) is contained in subsection (e) of the same provision. Specifically, subsection (e) generally disallows suit unless the consumer affords the warrantor or service contractor a reasonable opportunity to cure the warrantor/contractor's failure to comply with its obligation under a warranty or service contract.<sup>140</sup>

#### *b. Limitations Placed by Courts on the Act's Causes of Action*

The broad language of § 2310(d)(1), coupled with the definitions of consumer, supplier, warrantor, and service contractor, allows suit for a bare implied warranty and obviates the horizontal and vertical privity requirements in some situations where state law would require adherence to the requirements. The courts that have found to the contrary have done so in contravention of the Act's plain language and the MMWA's purpose of providing accessible private redress to consumers against the suppliers of defective products.

##### *i. Bare Implied Warranty Actions*

The language of § 2310(d)(1) reads as follows: "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit."<sup>141</sup> Thus, under the plain language of the MMWA, even if a manufacturer, retail dealer, or other supplier has not given a written warranty, the consumer can still sue under the MMWA for breach of a state created implied warranty.<sup>142</sup> In spite of this language, there are three federal district court

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<sup>137</sup> 15 U.S.C. § 2310(d)(1)(B), (d)(3)(B).

<sup>138</sup> 15 U.S.C. § 2310(d)(1)(B), (d)(3)(A)–(C).

<sup>139</sup> *Id.* § 2310(a)(3).

<sup>140</sup> *Id.* § 2310(e).

<sup>141</sup> *Id.* § 2310(d)(1) (emphasis added).

<sup>142</sup> Remember that the definition of an implied warranty is one "arising under State law." *Id.* § 2301(7).

judges who have held that a consumer cannot bring a bare implied warranty claim under the Act.<sup>143</sup>

To understand how § 2310(d) works, suppose a buyer purchases an automobile from a car dealer. The manufacturer provides a written warranty to the buyer; however, the dealer provides no warranty.<sup>144</sup> The dealer does not, however, disclaim the implied warranty of merchantability that applies to it under the Uniform Commercial Code. As previously discussed, this warranty is implied in any contract of sale where the seller is a merchant in goods of the kind, and the car dealer is such a merchant.<sup>145</sup> Under the language of the MMWA, if there is a defect in the car that is not cured, the buyer can sue not only the manufacturer under the MMWA, but also the dealer.<sup>146</sup> The suit against the manufacturer would be for breach of the written warranty and breach of the state created implied warranty, while the suit against the dealer would be for breach of the state created implied warranty.<sup>147</sup>

The lead case in the trio of cases denying the availability of a bare implied warranty claim is *McNamara v. Nomeco*,<sup>148</sup> decided by Magistrate Judge Raymond L. Erickson in the district of Minnesota. Judge Paul A. Magnuson, also in the district of Minnesota, adopted *McNamara* without explanation in *Anderson v. Newmar Corp.*<sup>149</sup> Chief Judge Paul Barbadoro in the district of New Hampshire also adopted *McNamara*'s holding without explanation in *Gross v. Shep Brown's Boat Basin*.<sup>150</sup> Thus, in the example

<sup>143</sup> *Anderson v. Newmar Corp.*, 319 F. Supp. 2d 943, 948 (D. Minn. 2004); *Gross v. Shep Brown's Boat Basin*, No. Civ. 99-140-B, 2000 WL 1480373, at \*2 (D.N.H. Feb 28, 2000); *McNamara v. Nomeco Bldg. Specialties, Inc.*, 26 F. Supp. 2d 1168, 1175 (D. Minn. 1998). Some might argue that there are four district court judges rather than three. These persons would cite to *Skelton v. Gen. Motors Corp.*, 500 F. Supp. 1181 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981). However, although *Skelton* did state that “[f]ederal jurisdiction [under the MMWA] requires a sales transaction which includes a written warranty within the express statutory terms,” the case involved federal jurisdiction over a written warranty, not federal jurisdiction over an implied warranty. *Id.* at 1183. Further, “[i]n reversing the District Court’s decision, the Seventh Circuit did not address the lower Court’s assumption that the issuance of a written warranty was a prerequisite to a Federal claim . . . . As a consequence, the District Court’s construction of Magnuson-Moss is well short of controlling.” *McNamara*, 26 F. Supp. 2d at 1172–73 (citation omitted).

<sup>144</sup> See, e.g., *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1025 (Miss. 1982) (in which buyer purchased a Ford automobile and received a limited written warranty from Ford, but no warranty from the dealer, Royal).

<sup>145</sup> U.C.C. § 2-314 (2012).

<sup>146</sup> See, e.g., *Wallace*, 415 So. 2d at 1025–28 (court upheld suit under the MMWA by buyer against dealer for breach of the implied warranty of merchantability, even though dealer had not given a written warranty to buyer).

<sup>147</sup> E.g., *id.*

<sup>148</sup> 26 F. Supp. 2d 1168.

<sup>149</sup> 319 F. Supp. 2d 943, 947 (D. Minn. 2004) (citing *McNamara*, 26 F. Supp. 2d at 1175).

<sup>150</sup> No. Civ. 99-140-B, 2000 WL 1480373, at \*1–2 (D.N.H. Feb. 28, 2000) (citing *McNamara*, 26 F. Supp. 2d at 1171–75) (in dicta the court states that the MMWA

above, these three judges would not have allowed the automobile buyer to sue the dealer under the MMWA because the dealer had not provided a written warranty to the buyer.

Although these cases are currently few in number, it is necessary to correct the flawed reasoning upon which the holdings were based in order to avoid having other courts follow suit. The evidence that others might follow suit is two-fold. First, although only four cases have directly addressed this question, three out of the four (a majority) have erroneously found that the MMWA does not allow for suit on a bare implied warranty. Second, two of the three judges simply followed the holding of the *McNamara* case with no supporting reasoning. The author believes that they did so because if one is not familiar with commercial law and the MMWA in particular, at first blush *McNamara*'s reasoning appears to make sense. Thus, other courts might make the same mistake. Happily, however, those courts and attorneys who do some digging will discover that the *Consumer Warranty Law* treatise agrees with this author's position and states that *McNamara* and its companion cases incorrectly interpret the MMWA.<sup>151</sup> In addition, although other commentators differ as to their interpretations of some MMWA sections, they agree that a consumer may bring an implied warranty case under the MMWA, even if the supplier has not issued a written warranty.<sup>152</sup>

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enforces written warranties and implied warranties that are made in connection with written warranties). It should be noted that *Gross* erroneously cited to the Fifth Circuit case of *Robin Towing Corp. v. Honeywell, Inc.*, 859 F.2d 1218, 1223 (5th Cir. 1988), for the proposition that the MMWA applies only if a supplier has issued a written warranty. *Gross*, 2000 WL 1480373, at \*2. Rather than holding as *Gross* asserts, *Robin Towing* held simply that § 2308 did not prevent the defendant supplier from disclaiming all implied warranties because the defendant supplier did not issue a written warranty or a service contract. *Robin Towing*, 859 F.2d at 1223.

<sup>151</sup> CARMEN CARTER ET AL., *supra* note 8, § 2.3.1.3; see also Annotation, *Consumer Product Warranty Suits in Federal Court Under Magnuson-Moss Warranty—Federal Trade Commission Improvement Act* (15 U.S.C.A. § 2301 et seq.), 59 A.L.R. FED. 461, 470 n.10 (1982) (“This provision has not only provided a means of enforcing the substantive requirements of the Act, but also has established a federal cause of action for breach of an implied warranty which has arisen under state law even if no written warranty was involved.”).

<sup>152</sup> CARMEN CARTER ET AL., *supra* note 8, § 2.3.1.3 (refuting the *McNamara* argument); Smith, *supra* note 127, at 225 (Magnuson-Moss provides consumers a federal cause of action for breach of an implied warranty of merchantability or fitness for a particular purpose whether or not a written warranty is also involved in the transaction); Nat'l Consumer Law Ctr., *12 Reasons to Love the Magnuson-Moss Warranty Act*, 11 J. CONSUMER & COM. L. 127, 128 (2008); see, e.g., Robert C. Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 FORDHAM L. REV. 273, 296 (1975). It should be noted that although *McNamara* was aware of, and cited to, several of the above commentators, it chose to ignore them because, apparently, they were cited by *McCurdy v. Texar, Inc.*, 575 So. 2d 299, 300–01 (Fla. Dist. Ct. App. 1991), and, according to the *McNamara* court, *McCurdy* “did not so much as advert to Section 2308(a), let alone attempt to reconcile its clear conflict with the broadly phrased language of Section 2310(d).” *McNamara*, 26 F. Supp. 2d at

So, what *was* the basis for the *McNamara* court's holding? In *McNamara*, the plaintiff homeowners purchased a window from the defendant. The defendant did not issue any written warranty to the plaintiffs in connection with the sale of the window. When plaintiff sued defendant for, *inter alia*, breach of an implied warranty under the MMWA, the court granted defendant's motion for summary judgment on the ground that a party "may not bring an implied warranty claim under Magnuson-Moss, in the absence of an adjoining written warranty."<sup>153</sup> The court acknowledged that "Section 2310(d) would appear to allow . . . a free standing cause of action, under Magnuson-Moss, for the alleged breach of the implied warranty," however, it felt that § 2310(d) conflicted with § 2308 in that § 2308 "reflects that an action for the breach of implied warranty would not lie, under Magnuson-Moss, in the absence of a written warranty, on the same product, from the supplier."<sup>154</sup> In reading § 2308, however, one sees that the provision does not indicate when an action under Magnuson-Moss will or will not lie, only § 2310(d) does this. Rather, § 2308(a) states that if a supplier or service contractor issues a written warranty, then such supplier or service contractor may not disclaim any implied warranty.<sup>155</sup>

*McNamara*, however, interpreted § 2308 differently. Although the basis for *McNamara*'s interpretation is not completely clear, it appears that the court believed that § 2308 supplements § 2310(d)'s delineation of which actions lie under the MMWA because the MMWA defines an implied warranty as one "arising under State law (*as modified by Sections 2308 and 2304(a) of this title*)."<sup>156</sup> Because of the "as modified" language, *McNamara* believed that § 2308 prohibits an action for breach of an implied warranty unless there is a written warranty.

*McNamara* is, however, incorrect in its labyrinthine interpretation of § 2308. First, nowhere does § 2308 have any language indicating that it is delineating what actions may or may not lie under the MMWA. Second, the "as modified" language in the implied warranty definition modifies the phrase "under State law" and thus refers to the fact that, although the existence of an implied warranty is determined by state law, the state's power in this area is limited by § 2308(a)'s restrictions on the supplier's ability to disclaim implied warranties and § 2304's restrictions on the full warrantor's ability to limit the duration of implied warranties. This interpretation is reflected in the fact that the "as modified" language immediately follows the phrase "under State law," rather than the language "an implied warranty"—"an implied warranty arising under State law (*as modified by . . .*)," thus indicating that the "as modified"

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1173. Of course, *McCurdy* and Denicola did not mention § 2308(a) because there is no conflict between sections 2308(a) and 2310(d), as outlined above.

<sup>153</sup> *McNamara*, 26 F. Supp. 2d at 1175.

<sup>154</sup> *Id.* at 1172.

<sup>155</sup> See discussion *supra* Part III.A.2.d.

<sup>156</sup> *McNamara*, 26 F. Supp. 2d at 1174 (emphasis added).

language refers to the phrase “under State law.”<sup>157</sup> Once § 2308 is given its proper interpretation, one sees that there is no conflict between §§ 2308 and 2310(d) and thus, no need for the court to resolve the conflict by adding on a limitation to § 2310(d) that appears nowhere in any provision of the MMWA.

The legislative history behind the MMWA further supports this Article’s interpretation of § 2310(d)(1) in that at least one witness at the hearings sought to limit the Act’s coverage to written warranties only. The witness involved, in seeking to represent the interests of the Association for Home Appliance Manufacturers, asked that the “or implied” warranty language be removed in favor of language restricting suits to warranties “in writing against defect or malfunction.”<sup>158</sup> The language that he sought to change was the language that would eventually become § 2310(d)(1), and the fact that the language was not changed evidences intent to allow bare implied warranty claims.<sup>159</sup>

### *ii. Horizontal and Vertical Privity*

As previously outlined,<sup>160</sup> the MMWA provides for four federal causes of actions for consumers. In § 2310(d)(1) the MMWA explicitly indicates who may bring suit and against whom suit may be brought. Thus, in some cases the MMWA supersedes state-created horizontal privity requirements. More significantly, the MMWA supersedes state-created vertical privity requirements and allows suit against remote sellers.

Despite the explicit provisions, however, many courts have disallowed some suits against remote sellers by incorrectly imposing state-created privity requirements upon consumer plaintiffs. In doing so, the courts have created the same lack of uniformity in the federal law that exists in the state law and defeated one of the MMWA’s purposes of allowing consumers to meaningfully (and consistently) enforce their warranty rights.<sup>161</sup>

#### *a. Horizontal Privity*

The horizontal privity requirement under the MMWA is largely governed by state law,<sup>162</sup> however, § 2310(d) does broaden the category of persons who can sue under the Act. This broadening occurs because § 2310(d) explicitly allows all *consumers* to bring suit.<sup>163</sup> A consumer is

<sup>157</sup> See 15 U.S.C. § 2301(7) (2006).

<sup>158</sup> *Consumer Products Warranties & Improvement Act of 1971: Hearings on S. 986 Before the Consumer Subcomm. of the S. Comm. on Commerce*, 92d Cong. 113, 115 (1971) (statement of George Lamb, General Counsel, Ass’n of Home Appliance Manufacturers) (internal quotation marks omitted).

<sup>159</sup> Compare *id.* at 128, with 15 U.S.C. § 2310(d)(1).

<sup>160</sup> See *supra* notes 127–32 and accompanying text.

<sup>161</sup> 120 CONG. REC. 40711 (1974) (statement of Senator Moss).

<sup>162</sup> William R. Kutner, Note, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code*, 62 CORNELL L. REV. 738, 757 (1977).

<sup>163</sup> See 15 U.S.C. § 2310(d)(1) (“[A] consumer . . . may bring suit.”).

defined as the buyer of a consumer product<sup>164</sup> and any person who is entitled to enforce against the warrantor under applicable state law. In this way, the MMWA mirrors state law. However, the definition of consumer also encompasses:

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).<sup>165</sup>

Thus, although the third-party beneficiary rules under UCC § 2-318 do not give explicit protection to transferees,<sup>166</sup> § 2310(d) fills in this gap.

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<sup>164</sup> The buyer cannot, however, be purchasing for purposes of resale. 15 U.S.C. § 2301(3).

<sup>165</sup> 15 U.S.C. § 2301(3).

<sup>166</sup> U.C.C. § 2-318 (2012). The uniform code allows the states to choose from three alternatives: Alternative A is the most restrictive and only extends the warranty to persons who are guests of the buyer or in the buyer's family or household; Alternative B extends the warranty to "any natural person who may reasonably be expected to use" the goods, however, the warranty is extended only if that person is injured in person; finally, Alternative C does extend the warranty to all natural persons who may be reasonably expected to use the goods (and thus would seemingly include transferees) and does not have the personal injury limitation, however, it does not explicitly state that the warranty extends to persons to whom the good was transferred. *Id.* Even if Alternative C is as broad as the MMWA, only 10 states have adopted either Alternative C or a hybrid of Alternatives B and C. These states are: Colorado, COLO. REV. STAT. § 4-2-318 (2012) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."); Delaware, DEL. CODE ANN. tit. 6, § 2-318 (2012) ("A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."); Hawaii, HAW. REV. STAT. § 490:2-318 (2008) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."); Iowa, IOWA CODE ANN. § 554.2318 (West 2001) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."); Minnesota, MINN. STAT. ANN. § 336.2-318 (West 2012) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."); North Dakota, N.D. CENT. CODE § 41-02-35 (2010) ("A seller's warranty, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."); South Carolina, S.C. CODE ANN. § 36-2-318 (2003) ("A seller's

warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty. A seller may not exclude or limit the operation of this section."); South Dakota, S.D. CODIFIED LAWS § 57A-2-318 (2012) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."); Utah, UTAH CODE ANN. § 70A-2-318 (LexisNexis 2013) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."); and Wyoming, Wyo. STAT. ANN. § 34.1-2-318 (2013) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.").

In addition, six states have adopted a statute that has modified Alternative C of § 2-318 to make it broader. These states are: Arkansas, ARK. CODE ANN. § 4-86-101 (2011) ("The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods."); Maine, ME. REV. STAT. ANN. tit. 11, § 2-318 (1995) ("Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods for breach of warranty, express or implied, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods."); Massachusetts, MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1999) ("Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section."); New Hampshire, N.H. REV. STAT. ANN. § 382-A:2-318 (2009) ("Lack of privity shall not be a defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, even though the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods."); Rhode Island, R.I. GEN. LAWS § 6A-2-318 (2001) ("A seller's or a manufacturer's or a packer's warranty, whether express or implied, including but not limited to a warranty of merchantability provided for in § 6A-2-314, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty."); and Virginia, VA. CODE ANN. § 8.2A-216 (2001) ("Lack of privity between the plaintiff and the defendant shall be no defense in any action brought against the manufacturer or lessor of goods, other than as lessor under a finance lease, to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not lease the goods from the defendant, if the plaintiff was a person whom the manufacturer or lessor might reasonably have expected to use, consume, or be affected by the goods.").

*b. Vertical Privity*

Although horizontal privity under the MMWA is primarily governed by state law, the vertical privity requirement is controlled by the MMWA.<sup>167</sup> Section 2310(d)(1) specifically obviates vertical privity, allowing suit by consumers against warrantors, suppliers, and service contractors.<sup>168</sup> Thus, a consumer may sue her direct seller under the MMWA, but more importantly, she may also sue the manufacturer. Manufacturers are subject to suit because they are generally both suppliers and warrantors under the MMWA. Manufacturers are suppliers under the MMWA because they are engaged in the business of making consumer products indirectly available to consumers,<sup>169</sup> i.e., they manufacture the products and then pass them on to retailers, dealers, etc. who then sell them to consumers. Manufacturers are also warrantors to the extent that they offer a written warranty or to the extent that they are or may be obligated under an implied warranty.<sup>170</sup>

Courts have, however, almost uniformly ignored the language of § 2310(d)(1) and found that suit may be brought under the MMWA for bare implied warranties only if the state law privity requirements are satisfied.<sup>171</sup> Thus, because only 23 states have eliminated the vertical privity requirement for breach of implied warranty claims,<sup>172</sup> in a majority

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Further, three states have adopted Alternative A of § 2-318, but also adopted a separate statute that has obviated vertical and horizontal privity. These states are: Mississippi, Miss. CODE ANN. § 11-7-20 (West 2008) (“In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action.”); Tennessee, TENN. CODE ANN § 29-34-104 (2012) (“In all causes of action for personal injury or property damage brought on account of negligence, strict liability or breach of warranty, including actions brought under the Uniform Commercial Code, privity shall not be a requirement to maintain such action.”); and West Virginia, W. VA. CODE ANN. § 46A-6-108 (LexisNexis 2006) (“Notwithstanding any other provision of law to the contrary, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made.”).

<sup>167</sup> Kutner, *supra* note 162, at 757.

<sup>168</sup> Other commentators have made a similar argument. *E.g.*, CAROLYN CARTER ET AL., *supra* note 8, § 2.3.6.2 (“The Act’s definitions of supplier and warrantor indicate that vertical privity is not required. The definition of supplier includes those who make products directly or indirectly available to consumers, encompassing remote manufacturers who indirectly make products available to consumers.”) (emphasis and footnote omitted).

<sup>169</sup> 15 U.S.C. § 2301(4) (“The term ‘supplier’ means any person engaged in the business of making a consumer product directly or indirectly available to consumers.”).

<sup>170</sup> *Id.* § 2301(5) (“The term ‘warrantor’ means 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.”).

<sup>171</sup> For a listing of all of the cases, please see Appendix A.

<sup>172</sup> The states are as follows: Alaska, Arkansas, Colorado, Delaware, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska,

of the country, a MMWA claim cannot be brought against a manufacturer for breach of UCC implied warranties unless that manufacturer has also given a written warranty. Specifically, 11 states use the lack of privity to disallow suit against a remote seller for breach of an implied warranty,<sup>173</sup> while six states require privity in breach of warranty cases, but make exceptions for specific types of consumer goods<sup>174</sup> or in limited circumstances.<sup>175</sup> Finally, 13 states require vertical privity for breach of warranty claims involving economic losses, but obviate the vertical privity requirement if the plaintiff has been personally injured.<sup>176</sup>

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Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Wyoming. For the case citations, please see Appendix B.

<sup>173</sup> The states are as follows: Arizona, Connecticut, Florida, Georgia, Kentucky, Ohio, Oregon, Utah, Vermont, Washington, and Wisconsin. For the case citations, please see Appendix C. Three states (AL, IL, NM) eliminated the vertical privity requirement for personal injury damages, but not for property damage or economic loss. Eleven states (AK, HI, ID, KS, MA, MD, NY, NC, TN, VT, WV) retain some vertical privity requirement, though on a limited basis. The majority of these states impose this requirement on cases alleging only economic damages. Others have more idiosyncratic limits; Kansas and Massachusetts, as an example, require vertical privity if the damages are economic and the plaintiff is a commercial entity. *See infra* note 176.

<sup>174</sup> California, *see All West Elecs., Inc. v. M-B-W, Inc.*, 75 Cal. Rptr. 2d 509, 514 (Cal. Ct. App. 1998), more recently, *see Torres v. City of Madera*, No. CV F 03-5999, 2005 WL 1683736, at \*16 (E.D. Cal. July 11, 2005) (requiring vertical privity for implied warranties with the exception of implied warranties on foodstuffs); Rhode Island, *Nichols v. R.R. Beaufort & Assoc., Inc.*, 727 A.2d 174, 179 (R.I. 1999) (requiring vertical privity for breach of warranty except in the case of a claim for breach of the implied warranty of fitness involving food and personal injury); Washington, *Tex Enters., Inc. v. Brockway Standard, Inc.*, 66 P.3d 625, 628–30 (Wash. 2003) (generally requiring vertical privity), *Baughn v. Honda Motor Co., Ltd.*, 727 P.2d 655, 668–69 (Wash. 1986) (but making exceptions for certain goods (e.g., food, clothing), for express warranties made by manufacturers in advertising), *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const.*, 831 P.2d 724, 730–31 (Wash. 1992) (and for cases where the plaintiff is an intended third-party beneficiary of a manufacturer's implied warranty).

<sup>175</sup> District of Columbia, *see Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 345 (D.C. 1989) (“[T]he District of Columbia is a jurisdiction affording recovery for tortious injury to the ultimate consumer—whether sought under a theory of strict liability or implied warranty.”); Indiana, *see Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 958–59 (Ind. 2005) (obviating vertical privity for implied warranty of merchantability, but keeping the requirement in place for express warranties and the implied warranty of fitness unless those two actions can be analogized to a tort action); North Dakota, *see Lang v. Gen. Motors Corp.*, 136 N.W.2d 805, 810 (N.D. 1965) (generally requires privity for breach of warranty actions, but has an exception for implied warranties when the manufacturer markets directly to the public).

<sup>176</sup> Alabama, *see Bishop v. Faroy Sales*, 336 So. 2d 1340, 1341 (Ala. 1976); *see, e.g.*, *Johnson v. Anderson Ford, Inc.*, 686 So. 2d 224, 228 (Ala. 1996) (requiring vertical privity for property damage and economic loss); *Rhodes v. Gen. Motors Corp., Chevrolet Div.*, 621 So. 2d 945, 947 (Ala. 1993); Hawaii, *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734, 743 & n.5 (Haw. 1983) (vertical privity required for implied warranty unless the consumer has suffered personal injury); Idaho, *Melichar v. State Farm Fire & Cas. Co.*, 152 P.3d 587, 593 (Idaho 2007) (privity is required for express warranty actions and implied actions to recover economic losses); Illinois, Bd. of

Given, however, that the states currently do not allow MMWA claims if the plaintiff seeks personal injury damages, the requirement of privity for economic loss claims prevents a consumer from bringing a MMWA claim in these 13 states.<sup>177</sup> Consequently, a plaintiff in the above 13 states may bring a MMWA claim for breach of an implied warranty against her immediate seller, but not against the manufacturer that was responsible for the defect.

The courts that condition the MMWA implied warranty action upon state privity requirements contend that an implied warranty is defined as one which “arises under State law (as modified by sections 2308 and 2304(a))” and when a state retains its vertical privity requirements, an implied warranty does not arise under state law if a party is not in privity with the consumer.<sup>178</sup> The courts’ interpretation of the MMWA is, however, incorrect for several reasons: it is counter to the language of the

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Educ. of Chicago v. A, C & S, Inc., 546 N.E.2d 580, 595–96 (Ill. 1989) (vertical privity is required for express warranties and implied warranties, however, the requirement of vertical privity is obviated in implied warranty actions for personal injury); Kansas, under case law, privity is required for warranty actions that result in solely economic or property loss, Prof’l Lens Plan, Inc. v. Polaris Leasing Corp., 675 P.2d 887, 898–99 (Kan. 1984), however, state consumer protection statute eliminates privity requirements on any warranty actions for consumer goods, KAN. STAT. ANN. §§ 50-623–50-643 (2005); Maryland, Frericks v. Gen. Motors Corp., 363 A.2d 460, 462–63 (Md. 1976) (vertical privity not required for breach of the implied warranty of merchantability, nor for other warranty actions in which personal injury is alleged); Massachusetts, *see Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 97–99 (D. Mass. 1998) (discussing the fact that, in Massachusetts, vertical privity is not required for breach of warranty actions involving consumer goods, or those involving personal injuries); New Mexico, Perfetti v. McGhan Med., 662 P.2d 646, 655 (N.M. Ct. App. 1983) (obviating vertical privity for breach of the implied warranty of merchantability); *see also* Armijo v. Ed Black’s Chevrolet Ctr., Inc., 733 P.2d 870, 872 (N.M. Ct. App. 1987) (New Mexico adopted Alternative A of U.C.C. § 2-318, and this legislative choice has colored state courts’ willingness to relax privity requirements); New York, Spiegel v. Saks 34th St., 252 N.Y.S.2d 852, 858 (N.Y. App. Div. 1984) (vertical privity not required for express warranties created by advertising); Hole v. Gen. Motors Corp., 442 N.Y.S.2d 638, 640 (N.Y. App. Div. 1981) (vertical privity not required for implied warranties where there is personal injury); North Carolina, vertical privity is required for warranty actions involving economic loss, but is obviated for personal injury because, pursuant to North Carolina Products Liability Act, N.C. GEN. STAT. § 99B-2(b) (2011), vertical privity is not required for any action involving personal injury or property damages, *see Kinlaw v. Long Mfg. N.C., Inc.*, 259 S.E.2d 552, 556–57 (N.C. 1979) (vertical privity obviated for express warranties); Tennessee, First Nat’l Bank of Louisville v. Brooks Farms, 821 S.W.2d 925, 931 (Tenn. 1991) (vertical privity obviated for breach of warranty claims involving personal injury or property damages, but not for those involving economic losses); Vermont, Vermont Plastics, Inc. v. Brine, Inc., 824 F. Supp. 444, 452–53 (D. Vt. 1993) (citing O’Brien v. Comstock Foods, Inc., 212 A.2d 69 (Vt. 1965)); West Virginia, Dawson v. Canteen Corp., 212 S.E.2d 82, 84 (W. Va. 1975) (obviates vertical privity for all warranty actions) (citing W. VA. CODE ANN. § 46A-6-108 (1974)).

<sup>177</sup> See discussion *infra* Part III.A.3.b.iii.

<sup>178</sup> CAROLYN CARTER ET AL., *supra* note 8, at § 2.3.6.2 (internal quotation marks omitted) (quoting 15 U.S.C. § 2301(7) (2006)).

MMWA; it creates an untenable position because of § 2310(f); and the courts' interpretation of the definition of "implied warranty" is not in keeping with the MMWA's policy of paving the way for consumers to bring suit against warrantors.

The courts' interpretation of the term "arising" is incorrect. The general definition of "arise" in this context is "to come into being."<sup>179</sup> Thus, whether an implied warranty arises or not is a question of whether an implied warranty exists, as determined by a particular state's version of UCC §§ 2-314 (implied warranty of merchantability) and 2-315 (implied warranty of fitness for a particular purpose). The issues of who may sue on the implied warranty (horizontal privity) and against whom (vertical privity) are separate questions. Although the MMWA defers to state law concerning the existence of the warranty, it explicitly answers the question of who may sue and against whom suit may be brought in § 2310(d)(1) by stating that a consumer may sue a supplier, warrantor, or service contractor.

An example will help to demonstrate why it is nonsensical to interpret "arising" as encompassing the existence of implied warranties and the privity requirements. Suppose that a consumer, Stella, purchases a Corvette from a car dealer. The manufacturer of the Corvette is General Motors Corporation (GMC). A week after Stella's purchase the brakes on the Corvette fail due to a defect in the manufacturing of the car. Stella crashes into a pole. She is personally injured and the car is totaled. Stella lives in a state that requires vertical privity for claims seeking economic losses, but does not require vertical privity for claims seeking personal injuries. Thus, although GMC has given an implied warranty of merchantability, because it is "a merchant with respect to goods of that kind,"<sup>180</sup> Stella can only sue GMC for her personal injuries. She cannot sue GMC for her loss of the car. Thus, if we adopted the majority of courts' definition of arising under state law, we would say that the implied warranty arose, but also did not arise, under state law. On the other hand, if we adopted the dictionary definition of arise, it would be a simple matter to determine whether the implied warranty arose or not, we look to UCC § 2-314 and ask, "did the warranty come into existence?"

The courts' interpretation of the definition of "implied warranty" is also not in keeping with the MMWA's policy of paving the way for consumers to bring suit against suppliers and warrantors.<sup>181</sup> First, the

<sup>179</sup> WEBSTER'S NEW WORLD DICTIONARY 31 (1990); WEBSTER'S NINTH NEW COLLEGiate DICTIONARY 102 (1983); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 148 (2d ed. 1959); see also THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 47 (1999) (defining "arise" as to "begin to exist"); THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 445–46 (1971) (defining "arise" as to "come into existence").

<sup>180</sup> U.C.C. § 2-314 (2012) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.").

<sup>181</sup> See *supra* note 10 and accompanying text.

interpretation fails to make up for deficiencies in the state warranty protection legislation that existed at the time<sup>182</sup> because it dumps the consumer back into the state privity scenario that was problematic in 1975. This privity scenario was problematic because, although many of the consumer complaints at the time related to defective products that manufacturers and producers had introduced into the stream of commerce, in 20 of the states the consumer had no redress against this remote seller because the consumer was not in privity with the seller.<sup>183</sup> Further, even though 30 states had obviated their vertical privity requirements, half had done so only with regard to suits involving personal injury.<sup>184</sup> Thus, in providing for suit against a remote seller for a consumer who had suffered only economic damages, the MMWA filled in the gap that was present in state warranty law. Further, in providing for suit on a bare implied warranty claim, the MMWA monetarily penalized those manufacturers who introduced defective products into the stream of commerce, but who did not provide a written warranty.

In addition, the courts' definition can create a situation where, even though the UCC creates an implied warranty vis-à-vis the manufacturer, the consumer has no redress under either state or federal law against either the manufacturer or the dealer. To illustrate, we return to Stella who has now bought a blow dryer. Stella purchased the blow dryer from an outlet store that prominently displayed signs throughout the store and at all cash registers indicating that the retailer made no warranties on the goods sold and properly disclaiming all implied warranties. The manufacturer of the blow dryer has not provided a written warranty for the blow dryer (as it is entitled to do under the Act), however, an implied warranty of merchantability attaches to the sale because the manufacturer is a seller in goods of the kind and it has not disclaimed the implied warranty. If the blow dryer malfunctions due to a manufacturing defect, but causes economic loss as opposed to personal injury, the vertical privity requirements in her state preclude her suit against the manufacturer. However, under the MMWA, the only person that Stella may sue is the manufacturer because § 2310(f) provides that only the warrantor making a warranty is subject to suit. If Stella cannot bring her MMWA claim against the manufacturer, however, then the Act

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<sup>182</sup> CAROLYN CARTER ET AL., *supra* note 8, § 2.1.1 n.2 (citing *Skelton v. Gen. Motors Corp.*, 500 F. Supp. 1181 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981)).

<sup>183</sup> States requiring privity for all breach of warranty cases were as follows: Arizona, California, Connecticut, Florida, Georgia, Kentucky, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Washington, Wisconsin, and Wyoming. See Appendix D for the relevant citations.

<sup>184</sup> States obviating vertical privity when a consumer was personally injured were as follows: Alabama, Alaska, Hawaii, Idaho, Illinois, Indiana, Kansas, Maryland, Mississippi, Missouri, Montana, New York, South Dakota, Tennessee, and Vermont. See Appendix E for the relevant citations.

has failed its purpose of holding manufacturers accountable for defective products by providing private consumer redress.

In addition to failing to make up for deficiencies in state law protection, the courts' erroneous interpretation of § 2310(d)(1) fails to provide the uniformity of law needed in a federal statute that applies to all jurisdictions. Such uniformity is achieved if the definition of an implied warranty instructs the courts only to look to state law to determine whether an implied warranty exists. With regard to the *existence* of state implied warranties, uniformity generally existed because all states, except Louisiana, had enacted the UCC through which implied warranties were created, disclaimed, and modified. Thus, the states had similar provisions regarding the existence of implied warranties.

Conversely, in 1975 it did not make sense to include the state privity requirements in the definition of implied warranty because, as was shown above, the states were not uniform in their vertical privity rules. Thus, the MMWA put in clear language as to who could sue (horizontal privity), and who could be sued (vertical privity). It provided that a consumer could sue and a supplier, warrantor, or service contractor could be sued.<sup>185</sup> Further, given that the state privity rules continue to vary from state to state,<sup>186</sup> the courts will create uniformity of application by following the clear language of § 2310(d)(1) that allows a consumer to sue a remote seller for breach of the state implied warranties.

### *iii. Personal Injury Damages and Jurisdiction*

The final basic provision of the MMWA is the savings clause contained in § 2311. To understand this provision it is important to understand that the Act was designed to make up for deficiencies in the state warranty protection legislation that existed at the time.<sup>187</sup> It "was not designed to completely supplant the state law of warranties and sales but, instead, to provide a basic level of honesty and reliability to the entire transaction."<sup>188</sup> Thus, to the extent that a state law provided greater protection than the MMWA, that law was not pre-empted,<sup>189</sup> however, if the state law provisions were inconsistent with the MMWA, they were pre-

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<sup>185</sup> 15 U.S.C. § 2310(d)(1) (2006).

<sup>186</sup> See discussion *supra* Part III.A.3.b.ii.

<sup>187</sup> CAROLYN CARTER ET AL., *supra* note 8, § 2.1.1 n.2 (citing *Skelton*, 500 F. Supp. at 1181).

<sup>188</sup> *Id.*; see *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1525 (D.D.C. 1986) (quoting *Schroeder*, *supra* note 8, at 35) (refusing to certify a punitive damages class, the District Court stated its understanding that the Act "add[ed] a new layer of federal warranty law to existing state warranty doctrines," but for the most part did not supplant state law).

<sup>189</sup> See *Consumer Warranty Protection—1973: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 93d Cong. 93–94 (1973) (statement of Prof. Fairfax Leary, Jr., University of Pennsylvania Law School) (indicating that § 111 needed to be changed to make sure that the bill does not preempt stronger protection offered under state law—the change recommended was made).

empted.<sup>190</sup> Section 2311(b)(1) of the MMWA makes this clear when it states that “[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.”<sup>191</sup>

While § 2311(b)(2) is less clear than the preceding subsection, the title of § 2311, “Applicability to other laws,” makes it clear that subsection (2) is also a savings clause, designed to prevent the preemption of state law except in the circumstances specifically delineated in the Act.<sup>192</sup> To understand § 2311 one first has to remember that § 2310 provides a consumer with four causes of action and allows the consumer to recover any and all damages under those causes of action, including general, incidental, and consequential.<sup>193</sup> However, in the area of personal injury damages, the drafters wanted to “retain any right or remedy of any consumer for personal injury existing under state law.”<sup>194</sup> At the same time, they did not want to impose personal injury damages in those states that placed limitations on such damages in breach of warranty.<sup>195</sup>

Thus, while all states (except Louisiana) had enacted the UCC by 1970, and the UCC specifically provided for the award of consequential damages for injury to the person,<sup>196</sup> some states still placed limitations on the recovery of personal injury damages.<sup>197</sup> For example, although the Act eliminated the vertical privity requirement for breach of warranty claims, the drafters did not necessarily want to completely upset the distinction between the tort action of strict liability and the contract action of breach of warranty.<sup>198</sup> In some states the notice requirement in the UCC<sup>199</sup> placed a significant limitation upon a consumer’s ability to sue a manufacturer for personal injury damages. Such a requirement does not exist for a torts products liability action. By directing courts to look to state law to determine whether personal injury damages were available for a MMWA

<sup>190</sup> See *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 455 (Fla. Dist. Ct. App. 2005) (citing *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 531 (N.Y. App. Div. 1992)) (“With regard to warranties on consumer products, the MMWA modifies the applicability and operation of the UCC and, to the extent applicable, supersedes inconsistent provisions of the UCC.”)).

<sup>191</sup> 15 U.S.C. § 2311(b)(1) (2006).

<sup>192</sup> *Id.* § 2311(b)(2).

<sup>193</sup> *Id.* § 2310(d)(1) (consumer “may bring suit for damages and other legal and equitable relief”).

<sup>194</sup> *Wise v. Gen. Motors Corp.*, 588 F. Supp. 1207, 1209 (W.D. Va. 1984) (citing H.R. REP. NO. 93-1107 (1974)).

<sup>195</sup> S. REP. NO. 93-1408, at 28 (1974) (Conf. Rep.). In referring to § 2311, the report stated that “a third party warrantor or other warrantor of a consumer product is not liable under title I of the bill for damages resulting from personal injury (either direct or consequential), but he could still be liable if State law imposed liability.” *Id.*

<sup>196</sup> U.C.C. § 2-715 (2012).

<sup>197</sup> See, e.g., *Parish v. B.F. Goodrich Co.*, 235 N.W.2d 570, 573 (Mich. 1975) (“The UCC did not create a new and separate consumer’s product liability claim against the manufacturer.”).

<sup>198</sup> See *id.* at 573–75.

<sup>199</sup> U.C.C. § 2-607(3)(a).

claim, Congress allowed the states to retain the tort/contract distinction if they desired. In addition, at the time of the Act's enactment, there were also courts that applied the contract statute of limitations when personal injury damages were involved and others that applied the tort statute of limitations.<sup>200</sup> Finally, courts disagreed, and continue to disagree, as to whether personal injury that manifests as mental distress or anguish is recoverable for breach of warranty.<sup>201</sup>

The savings clause in § 2311 is designed to accommodate the preferences of both the liberal and the strict states. It does so by providing that the Act does not *affect* the imposition of personal injury damages in those states that allow it,<sup>202</sup> and it does not *impose* personal injury damages in those states that do not allow it.<sup>203</sup> Thus, to determine whether personal injury damages are available for the MMWA actions, one is to look to state law.<sup>204</sup> The one exception to this general rule is

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<sup>200</sup> Patricia M. McEntee, Note, *Products Liability—Warranties—the Uniform Commercial Code Provides an Alternative Remedy to Strict Liability in Tort Regarding Injuries Suffered from a Defective Product Without Requiring Privity*, 13 ST. MARY'S L.J. 196, 202 n.42 (1981) ("[comparing] Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 10 (S.D. Tex. 1976) (suit allowed to be brought under U.C.C. for personal injuries as consequential damages for breach of warranty) and Allen v. Ortho Pharmaceutical Corp., 387 F. Supp. 364, 368–69 (S.D. Tex. 1974) (personal injury action caused by defective oral contraceptive can be brought as breach of warranty under Code) *with* Holifield v. National Cylinder Gas Div. of Chemetron Corp., 542 S.W.2d 218, 222 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (court refused right to bring action under Code for personal injury because such an injury is grounded in tort and should be brought under strict liability"); *see also* Parrish, 235 N.W.2d at 575–76 (finding that three-year statute of limitations rather than the four-year UCC statute of limitations applied to a breach of warranty action for personal injuries); Parrish v. B. F. Goodrich Co., 207 N.W.2d 422, 425 n.6 (Mich. Ct. App. 1973), *rev'd on other grounds*, 235 N.W.2d 570 (Mich. 1975) (explaining a split of opinion: "Layman v. Keller Ladders, Inc.", 224 Tenn. 396, 455 S.W.2d 594 (1970), applies the four-year limitation period from the code which runs from the point when delivery is made; *Heavner v. Uniroyal, Inc.*, 118 N.J. Super. 116, 286 A.2d 718 (1972), in spite of a four-year period in the commercial code, applies a two-year limitation period for breach of warranties resulting in personal injury; *Stanford v. Lesco Associates, Inc.*, 10 U.C.C. Rptr. 812 (D.D.C. 1972) applies the code['s] four-year limitation period which runs from the date of purchase; *Hoffman v. A. B. Chance Co.*, 339 F. Supp. 1385 (M.D. Pa. 1972) holds a cause for breach of warranty accrues at delivery and applies the four-year limitation period of the commercial code; *Mahalsky v. Salem Tool Co.*, 461 F.2d 581 (6th Cir. 1972), applies Ohio's two-year statute of limitation for personal injury in breach of warranty actions where no privity of contract exists between the parties; but see *Ohio Brass Co. v. Allied Prods. Corp.*, 339 F. Supp. 417 (N.D. Ohio 1972) which applies the four-year limitation period applicable to warranty actions where recovery is sought for contract damages.").

<sup>201</sup> See 24 WILLISTON ON CONTRACTS § 66:61 (4th ed. 2002).

<sup>202</sup> 15 U.S.C. § 2311(b)(2) (2006) ("Nothing in this chapter . . . shall . . . affect the liability of . . . any person for personal injury . . .").

<sup>203</sup> *Id.* ("Nothing in this chapter . . . shall . . . impose liability on[] any person for personal injury . . .").

<sup>204</sup> *MacKenzie v. Chrysler Corp.*, 607 F.2d 1162, 1166 (5th Cir. 1979) ("[T]he legislative history clearly implies that a resort to state law is proper in determining the applicable measure of damages under the Act.").

with regard to the violation of substantive provisions of the Act. There, the Act makes it clear that even if the state would not impose personal injury damages for such violations, the MMWA does.<sup>205</sup>

The second thing that the drafters wanted to accomplish with § 2311 was to make sure that the Act did not supersede UCC § 2-719(3),<sup>206</sup> which makes unconscionable any limitation of consequential damages for injury to the person in the case of consumer goods.<sup>207</sup> Such a preemption concerned a commercial professor of law who testified with regard to a version of the Act that did not have a savings clause covering personal injury damages.<sup>208</sup> In commenting on the bill, the professor stated that the UCC “specifically provides that any limitation of liability for personal injuries in a consumer product warranty is unconscionable, and the same concept should be made crystal clear in any federal bill.”<sup>209</sup> The savings provision of § 2311 was subsequently amended to include a statement that, other than §§ 2308 and 2304(a)(2), the MMWA does not preempt state law provisions “regarding consequential damages for injury to the person or other injury.”<sup>210</sup>

Although § 2310(d) of the MMWA specifically allows a consumer to “bring suit for damages and other legal and equitable relief,”<sup>211</sup> the majority of courts that have addressed this issue have found that personal injury damages caused by the breach of a written warranty or an implied warranty are not allowed for a MMWA claim.<sup>212</sup> Those cases have incorrectly interpreted the language of the Act and, in the process, have

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<sup>205</sup> 15 U.S.C. § 2311(b)(2)(A) (“Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall . . . affect the liability of, or impose liability on, any person for personal injury . . .”).

<sup>206</sup> U.C.C. § 2-719(3) (2012) (“Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable.”).

<sup>207</sup> *Consumer Warranty Protection—1973: Hearing on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate & Foreign Commerce*, 93d Cong. 103 (1973) (Statement of Prof. Fairfax Leary, Jr., Univ. of Penn. Law School).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> 15 U.S.C. § 2311(b)(2)(B).

<sup>211</sup> *Id.* § 2310(d)(1).

<sup>212</sup> The two lead cases upon which the other cases have relied are *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1035 (N.D. Ind. 1981) (the progenitor of a line of cases finding that consumers may not recover personal injury damages for MMWA claims) and *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1060–66 (5th Cir. 1984) (personal injury claims arising from breach of warranty are not cognizable under MMWA, rejecting plaintiff’s argument that § 2311 means only that the MMWA does not create any new substantive rights to personal injury damages, but if state law provides that right, then it is cognizable under the MMWA). See, e.g., *Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 525 (7th Cir. 2003) (citing *Boelens*, 748 F.2d at 1066) (finding that personal injury claims based on a breach of warranty are not cognizable under the Magnuson-Moss Act); *Grant v. Cavalier Mfg., Inc.*, 229 F. Supp. 2d 1332, 1334–35, 1338 (M.D. Ala. 2002) (applying *Boelens*, 748 F.2d 1058, to find that mental anguish damages are not available under MMWA because they are personal injury damages).

virtually eliminated federal jurisdiction for individual breach of warranty claims.

An examination of the reasoning of two of the lead cases, *Gorman v. Saf-T-Mate*<sup>213</sup> and *Boelens v. Redman Homes, Inc.*,<sup>214</sup> illustrates how the courts have misinterpreted the language of § 2311(b)(2)(A). As illustrated above, the title of § 2311 and its language make clear that the provision is a savings clause, i.e., its purpose is to make clear the areas of federal and state law that are preempted by the Act and the areas that are not.<sup>215</sup> In line with this purpose, § 2311(b)(2)(A) provides that “[n]othing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall . . . affect the liability of, or impose liability on, any person for personal injury.”<sup>216</sup> In reaching the conclusion that this language precludes an award of personal injury damages for any MMWA breach of warranty claim, the *Saf-T-Mate* and *Boelens* courts ignored the title of the provision and focused only on the one phrase, *does not impose* liability, and ignored the preceding phrase, *does not affect* liability. Further, they stated, “It is evident from this language that, except for the sections recited in parentheses, the MMWA itself creates no *new* cause of action for personal injury damages.”<sup>217</sup> The courts’ reasoning thus reveals that the courts are conflating a cause of action with a remedy for such cause of action. Consequently, instead of treating the clause as a savings clause, the courts treat it as a limitation on the available remedies for the federal causes of action.

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<sup>213</sup> 513 F. Supp. at 1035.

<sup>214</sup> 748 F.2d at 1060–66.

<sup>215</sup> See discussion *supra* notes 187–93 and accompanying text regarding § 2311 being a savings clause; see also *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. Abrams*, 697 F. Supp. 726, 733 (S.D.N.Y. 1988) (citing 15 U.S.C. § 2311) (“The Magnuson-Moss Act’s savings clause specifically preserves rights and remedies under state law.”). An article written at the time of the Act’s enactment supports this interpretation by indicating that “the consumer may seek all damages resulting from the warrantor’s failure to comply with either the Act itself or with a written or implied warranty, including damages relating to personal injury and other consequential damages. However, the warrantor’s liability for these latter damages will ordinarily be determined by state law in accordance with section 111(b)(2).” Denicola, *supra* note 152, at 297 (footnote omitted). Denicola further stated that “Section 111 attempts to delineate the extent to which the Act affects the complex pattern of existing state and federal law. Subsection (c), which relates to state disclosure and labeling requirements, and the interpretive problems which it generates, has already been discussed in connection with section 102. As previously noted, section 111(b)(1) preserves private rights and remedies under state and other federal law. The consumer is thus free to ignore the Act and seek redress through more traditional avenues such as breach of warranty, fraud, or rescission. The deference paid by section 111(b)(2) to state laws regulating liability for personal injury and consequential damages has also been considered.” *Id.* at 299–300 (footnote omitted).

<sup>216</sup> 15 U.S.C. § 2311.

<sup>217</sup> *Boelens*, 748 F.2d at 1065; see also *Saf-T-Mate*, 513 F. Supp. at 1035 (“[The] provision clearly indicates that the Act creates no *new* cause of action for personal injury damages except in the case of the specific provisions referred to in § 2311(b)(2).”) (emphasis added).

The basis for the courts' interpretation demonstrates the error in that interpretation. The issue presented concerning the availability of personal injury damages is not whether the MMWA has created a new cause of action for personal injury liability. The plaintiffs are not contending that the Act has done such, except in the specifically enumerated sections. Rather, the plaintiffs are suing under one or more of the four federal causes of action that are without question created by § 2310(d)(1). The issue then is whether the MMWA has limited the remedy available for the causes of action thus created. The language of § 2311 does not address this point, nor does any other provision of the MMWA. Rather, § 2310(d)(1) specifically allows for the standard remedy for the four causes of action that it creates when it states that the consumer may bring suit "for damages and other equitable relief." That standard remedy includes any damages that flow from personal injury.

The structure of the Act is very organized and all information concerning the private causes of action are contained in § 2310(d), in the definitions of terms used in subsection (d), or in sections to which subsection (d) specifically refers. This makes sense given subsection (d)'s title. Any limitations on the subsection (d) causes of action are referenced in subsection (d). Notably, subsection (d) does not reference § 2311. Thus, if Congress did intend to limit the remedy available for breach of warranty as the courts contend, it defies logic to suppose that Congress would put such a limitation in a savings clause, rather than in the spot where it put all other provisions relating to the causes of action and where it indicated the types of damages that are available.

In addition to statutory interpretation, the *Saf-T-Mate* court uses policy to support its holding. Specifically, it states its assumption that a federal cause of action for personal injury was not needed because cases involving personal injury would have damages that are high enough to warrant attorney representation.<sup>218</sup> There is, however, no evidence that all personal injury claims involve significant monetary loss.<sup>219</sup> Further, by making such an assumption, the court's holding limits the ability of the MMWA to achieve its stated purpose of providing redress to consumers for injuries caused by defective products where such injury is a breach of warranty, but not necessarily a recognized tort.

The holdings limit consumer redress first because they severely cut down (if they do not eliminate completely) the number of claims that can be brought in federal court. This consequence is due to the fact that there is no federal jurisdiction over a MMWA claim unless the amount in controversy is \$50,000 or more, exclusive of interest and costs.<sup>220</sup> Thus, without the personal injury component, no warranty claims could be

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<sup>218</sup> *Saf-T-Mate*, 513 F. Supp. at 1033.

<sup>219</sup> Curiously, some courts would allow for personal injury damages if the claim was brought in state court, in spite of the fact that the MMWA makes no distinction between the remedies that are available in state court versus federal court.

<sup>220</sup> 15 U.S.C. § 2310(d)(1)(B), (d)(3)(B).

brought in federal court that involved typical household appliances, electronics, and automobiles. These types of consumer goods are, however, the most common types of consumer good and the types that would benefit the most from the MMWA provisions. Indeed, it was the problems with exactly these types of goods that led to the Act.<sup>221</sup>

Further, if a plaintiff has only suffered personal injury, then the *Saf-T-Mate* and *Boelens* decisions have basically taken away a MMWA cause of action and all of the benefits of that cause of action. In particular, as the preceding discussion in Part I makes clear, a plaintiff brings a MMWA cause of action for other important reasons apart from the possible availability of federal jurisdiction. There is the ability to obtain court costs and fees and attorneys' fees, the ability to sue a remote seller when state law requires vertical privity, and the ability of a transferee of a product to sue the seller when state law does not allow such actions.

Finally, in those cases where a plaintiff has suffered personal injury and economic loss, the cases have created a confusing mess of state law breach of warranty and MMWA breach of warranty. For example, if a plaintiff brings a MMWA claim for breach of warranty to recover for economic loss and a state breach of warranty to recover for personal injury, must the court bifurcate the attorneys' fees and court costs and fees into that portion that related to the personal injury state law claim and that portion that related to the MMWA economic loss claim?

## CONCLUSION

The federal Magnuson-Moss Warranty–Federal Trade Improvement Act has the potential to provide significant warranty protection to consumers. Many courts have relegated the Act to the role of policing the titling and content of written warranties. The Act's purpose is, however, much broader, encompassing the all-important private redress function. By severely limiting this function, the courts have curtailed the ability of the Act to provide incentives to the suppliers of consumer goods to “stimulate better product design and quality control for the production of more reliable products.”<sup>222</sup>

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<sup>221</sup> See *supra* Part I. Of course, there is the possibility of pooling the claims together in a class action. However, the MMWA limits the number of class actions that can be brought in federal court by requiring that the number of *named* plaintiffs must be 100 or more. 15 U.S.C. § 2310(e).

<sup>222</sup> S. REP. NO. 93-151, at 8 (1973).

## APPENDIX A

Cases holding that a court is to look to state privity requirements for breach of implied warranty to determine whether a plaintiff can bring a MMWA implied warranty claim against a remote seller.

Note that one state court has found that the MMWA obviates the vertical privity requirements for an implied warranty when a written warranty has been given:

ILLINOIS—Szajna v. Gen. Motors Corp., 503 N.E.2d 760, 769 (Ill. 1986); *see also* Rothe v. Maloney Cadillac, Inc., 518 N.E.2d 1028, 1029–30 (Ill. 1988). *See generally* Mekertichian v. Mercedes-Benz U.S.A., LLC, 807 N.E.2d 1165, 1170 (Ill. App. Ct. 2004) (giving an extensive discussion of the case law in the area and finding that it was bound by Illinois Supreme Court decision, rather than seventh circuit decision).

Another has found the MMWA obviates privity with regard to an action on a written warranty:

NEW JERSEY—Ventura v. Ford Motor Corp., 433 A.2d 801, 808 (N.J. Super. Ct. App. Div. 1981) (allowing consumer to sue manufacturer for breach of limited written warranty because § 2310(d)(1) removes the privity requirements).

## FEDERAL CIRCUIT COURT CASES

SECOND CIRCUIT—Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 249 (2d Cir. 1986) (the MMWA does not supplant state law privity requirement). One should note, however, that this case involved a horizontal privity issue rather than a vertical privity issue—specifically, whether purchasers of used cars could bring suit under the MMWA. *Id.* at 248. Also, the court said that privity requirements are obviated for written warranties because of the definitions of consumer, supplier, and warrantor. *Id.* Note also that the court relied on the following language in the Senate Report to support its holding:

It is not the intent of the Committee to alter in any way the manner in which implied warranties are created under the Uniform Commercial Code. For instance, an implied warranty of fitness for particular purpose which might be created by an installing supplier is not, in many instances, enforceable by the consumer against the manufacturing supplier. The Committee does not intend to alter currently existing state law on these subjects.

*Id.* (quoting S. REP. No. 93-151, at 21 (1973)).

This quote does not, however, support the court's holding because the quote says it will not alter the ways that implied warranties are created; it says nothing about the question of to whom the warranty will run once created. In fact, it does not mention privity at all. Also, the quote refers to the IWF, not the IWM. This reference indicates that the quote is not referring to the question of privity. Rather, it refers to the creation of an IWF. It simply acknowledges that an IWF is not generally created under § 2-315 vis-à-vis a manufacturer because the manufacturer usually does not satisfy the requirements for creating an IWF in that the manufacturer does not have "reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." U.C.C. § 2-315 (2012).

SEVENTH CIRCUIT—*Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 525 (7th Cir. 2003) (citing *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 249 (2d Cir. 1986); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1014 (D.C. Cir. 1986)) (whether or not privity is a prerequisite to a claim for breach of implied warranty under the MMWA hinges entirely on the applicable state law).

NINTH CIRCUIT—*Clemens v. Daimlerchrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (plaintiff's MMWA claims stand or fall with his express and implied warranty claims under state law; the court disallows implied warranty claim because there was no privity between plaintiff and manufacturer under California law).

ELEVENTH CIRCUIT—*Bailey v. Monaco Coach Corp.*, 168 F. App'x 893, 895 & n.1 (11th Cir. 2006) (plaintiff's MMWA implied warranty case against manufacturer dismissed because there was no privity, and Florida requires privity for economic losses; stating in a footnote that implied warranty claims "arise out of and are defined by state law"); *Gill v. Blue Bird Body Co.*, 147 F. App'x 807, 810 (11th Cir. 2005) (citing *Voelker*, 353 F.3d at 525; *Abraham*, 795 F.2d at 249; *Walsh*, 807 F.2d at 1011; *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 291–92 (4th Cir. 1989)) ("[C]ourts have uniformly held that Magnuson-Moss does nothing to alter or modify state law privity requirements. The question of whether privity is required thus hinges entirely on applicable state law."). Note that *Carlson* did not involve privity. *Carlson*, 883 F.2d 287.

## FEDERAL DISTRICT COURT CASES

ARIZONA—*Haugland v. Winnebago Indus.*, 327 F. Supp. 2d 1092, 1096 (D. Ariz. 2004) (relying on *Voelker*, 353 F.3d at 525, *Walsh*, 807 F.2d at 1014–16, *Abraham*, 795 F.2d at 247–49, *Watson v. Damon Corp.*, No. 1:02-CV-584, 2002 WL 32059736, at \*17 (W.D. Mich. Dec. 17, 2002), and *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 n.13 (S.D.N.Y. 1982), to hold that court must look to state privity

requirements for MMWA implied warranty; not considering the § 2310(d)(1) argument); *Plagens v. Nat'l RV Holdings, Inc.*, 328 F. Supp. 2d 1068, 1072–73 (D. Ariz. 2004) (relying on *Walsh*, 807 F.2d at 1016, not considering the § 2310(d)(1) argument—because Arizona does not allow suit against manufacturer for breach of implied warranty, plaintiff's MMWA action is not allowed).

**DISTRICT OF COLUMBIA**—*Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1525 (D.D.C. 1984), *rev'd on other grounds*, 807 F.2d 1000 (D.C. Cir. 1986) (“If, in this action, there are to be any implied warranty claims at all under Magnuson-Moss, they must ‘originate’ from or ‘come into being’ from state law. Therefore, if a State does not provide for a cause of action for breach of implied warranty where vertical privity is lacking, there cannot be a Federal cause of action for such a breach.” (footnote omitted) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1969) for the definition of “arise”)).

**FLORIDA**—*David v. Am. Suzuki Motor Corp.*, 629 F. Supp. 2d 1309, 1324 (S.D. Fla. 2009) (court applies Florida law to find that plaintiff cannot sue manufacturer under MMWA for breach of implied warranty, relying on *Bailey*, 168 F. App'x at 894, and *Walsh*, 807 F.2d at 1012–14, but does not address § 2310(d)(1)); *Powers v. Lazy Days RV Ctr., Inc.*, No. 8:05-CV-1542T17EAJ, 2006 WL 373011, at \*2 (M.D. Fla. Feb. 16, 2006) (holding consistently with *David*, 629 F. Supp. 2d 1309, relying on *Abraham*, 795 F.2d at 248–49). There are a number of additional Florida district court cases that say the same thing. See *CARTER ET AL.*, *supra* note 8, § 2.3.6.2 n.369.

**GEORGIA**—*Monticello v. Winnebago Indus., Inc.*, 369 F. Supp. 2d 1350, 1360–61 (N.D. Ga. 2005) (dismissing MMWA implied warranty claim because plaintiff was not in privity with the manufacturer under state law).

**ILLINOIS**—*IWOI, LLC v. Monaco Coach Corp.*, 581 F. Supp. 2d 994, 999–1001 (N.D. Ill. 2008) (court relies on seventh circuit case of *Voelker*, 353 F.3d at 525, to say that plaintiff lacks privity with manufacturer because Illinois law requires privity when breach of warranty claim is for economic loss, expressly rejecting the Illinois Supreme Court's finding that a non-privity consumer can bring an implied warranty claim against a manufacturer who has given a written warranty; says that a federal court is not required to follow the Illinois court's interpretation of the MMWA because it's a federal statute). There are a number of additional Illinois district court cases that say the same thing. See *IWOI*, 581 F. Supp. 2d at 1000 (providing additional cases); *CARTER ET AL.*, *supra* note 8, § 2.3.6.2 n.369.

OHIO—*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 684 F. Supp. 2d 942, 954 (N.D. Ohio 2009).

MICHIGAN—Gernhardt v. Winnebago Indus., No. 03-73917, 2003 WL 23976324, at \*5–6 (E.D. Mich. Dec. 30, 2003) (dismissing MMWA claim for breach of implied warranty because court is to look to Michigan law because of “arising under” language and because Michigan requires privity). *But see* Gernhardt v. Winnebago Indus., 58 U.C.C. Rep. Serv. 2d (West) 28, 30 (E.D. Mich. Oct. 12, 2005) (defendant’s motion for summary judgment regarding the UCC and MMWA implied warranty claims denied because a reexamination of Michigan law reveals that Michigan law does not require privity).

NEW YORK—Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 605 n.13 (S.D.N.Y. 1982) (“If state law requires vertical privity to enforce an implied warranty and there is none, then, like the yeastless souffle, the warranty does not ‘arise.’ This conclusion is reached in Miller & Kanter, *Litigation Under Magnuson-Moss*, 13 U.C.C. L.J. 10, 21 (1980).”).

WISCONSIN—Sheehan v. Monaco Coach Corp., No. 04-C-717, 2006 WL 208689, at \*6 (E.D. Wis. Jan. 25, 2006) (citing *Voelker*, 353 F.3d at 525; *Walsh*, 807 F.2d at 1014; *Abraham*, 795 F.2d at 249) (court finds that because the parties lack privity of contract under Wisconsin law, the plaintiffs’ breach of implied warranty claim under the MMWA fails as a matter of law).

## STATE CASES

Six states have weighed in on the question:

ARIZONA—Chaurasia v. Gen. Motors Corp., 126 P.3d 165, 171 (Ariz. Ct. App. 2006) (does not consider the § 2310(d)(1) argument, relying on *Abraham*, 795 F.2d at 247–49; *Perry v. Gulf Stream Coach, Inc.*, 814 N.E.2d 634, 644 n.6 (Ind. Ct. App. 2004)).

FLORIDA—There are quite a few Florida cases. These are just examples: *Ocana v. Ford Motor Co.*, 992 So. 2d 319, 325 (Fla. Dist. Ct. App. 2008) (relying on *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005), not discussing § 2310(d)(1)); *Rentas v. Daimlerchrysler Corp.*, 936 So. 2d 747, 750–51 (Fla. Dist. Ct. App. 2006) (MMWA does not obviate vertical privity for implied warranty; court relies on *Mesa*, 904 So. 2d 450, and *Cerasani v. Am. Honda Motor Co.*, 916 So. 2d 843 (Fla. Dist. Ct. App. 2005), does not talk about § 2310(d)(1)); *Cerasani*, 916 So. 2d at 847 (noting that state privity laws bar a Magnuson-Moss claim); *Mesa*, 904 So. 2d at 458 (“The MMWA does not supplant state law privity requirements for implied warranty claims. . . . Under Florida law, a plaintiff cannot recover *economic* losses for breach of implied warranty in

the absence of privity.”) (emphasis added) (relying on *Voelker*, 353 F.3d at 525; *Abraham*, 795 F.2d at 249 n.12; *Hahn v. Jennings*, No. 04AP-24, 2004 WL 2008474 (Ohio Ct. App. 2004); court does not discuss § 2310(d)(1) relating to privity)); *Brophy v. Daimlerchrysler Corp.*, 932 So. 2d 272, 274 (Fla. Dist. Ct. App. 2005) (relying on *Mesa*, 904 So. 2d at 458, and *Cerasani*, 916 So. 2d at 847; does not discuss § 2310(d)(1) relating to privity).

**ILLINOIS**—*Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760, 769 (Ill. 1986) (Court accepts Professor Schroeder’s analysis and suggestion that, “[i]n cases where no Magnuson-Moss written warranty has been given, Magnuson-Moss has no effect upon State-law privity requirements because, by virtue of section 2301(7), which defines implied warranty, implied warranty arises only if it does so under State law.”).

**INDIANA**—*Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 951 (Ind. 2005) (quoting *Voelker*, 353 F.3d at 525) (“Because §§ 2308 and 2304(a) do not modify, or discuss in any way, a state’s ability to establish a privity requirement, whether privity is a prerequisite to a claim for breach of implied warranty under the Magnuson-Moss Act therefore hinges entirely on the applicable state law.”) (internal quotation marks omitted) The Court does not discuss § 2310(d)(1).

**OHIO**—*Curl v. Volkswagen of Am., Inc.*, 871 N.E.2d 1141, 1145–47 (Ohio 2007) (citing *Voelker*, 353 F.3d at 525; *Abraham*, 795 F.2d at 249) (“Because the Act does not alter state law regarding implied warranty claims, nothing in the Act obviates state law privity requirements for these actions, and, where necessary, a party is required to establish privity to maintain a claim.” The MMWA claim was dismissed because Ohio requires privity.); *Whitt v. Mazda Motor of Am., Inc.*, No. 2010CA00343, 2011 WL 2520147, at \*4 (Ohio Ct. App. June 20, 2011) (citing *Curl*, 817 N.E.2d 1141).

**NEW YORK**—*Shuldman v. Daimlerchrysler Corp.*, 768 N.Y.S.2d 214, 216 (N.Y. App. Div. 2003) (following *Abraham*, 795 F.2d at 248) (stating in dictum that state privity laws apply with respect to a claim for breach of an implied warranty under the MMWA); *Beyer v. Daimlerchrysler Corp.*, 731 N.Y.S.2d 189, 194 (N.Y. App. Div. 2001) (citing *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528 (N.Y. App. Div. 1992)) (breach of an implied warranty should be dismissed in the absence of proof that plaintiff was in privity with the manufacturer); *Mendelson v. Gen. Motors Corp.*, 432 N.Y.S.2d 132, 136 (N.Y. Sup. Ct. 1980), aff’d, 441 N.Y.S.2d 410 (N.Y. App. Div. 1981) (“[T]he term ‘implied warranty’ is defined as an ‘implied warranty arising under State law . . . .’ Thus, State vertical privity rules control and the applicable measure of damages is that provided by State law.”) (citation omitted) (citing to Milton R. Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1 (1978)).

## APPENDIX B

States that have eliminated the vertical privity requirement for breach of implied warranty claims:

**ALASKA**—*Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 291–92 (Alaska 1976) (abolishing the privity requirement for actions arising under implied warranties); *Shooshanian v. Wagner*, 672 P.2d 455, 462 (Alaska 1983) (citing *Morrow*, 548 P.2d at 288–89) (extending the elimination of privity to all warranty actions).

**ARKANSAS**—ARK. CODE ANN. § 4-86-101 (2011) (“The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.”).

**COLORADO**—COLO. REV. STAT. § 4-2-318 (2012); *see, e.g.*, *Ranta Const., Inc. v. Anderson*, 190 P.3d 835, 844 (Colo. App. 2008).

**DELAWARE**—DEL. CODE ANN. tit. 6, § 2-318 (2005); *see, e.g.*, *Middlesex Mut. Assurance Co. v. Delaware Elec. Signal Co.*, No. 07C-12-005 THG, 2008 WL 4216145, at \*6 (Del. Super. Ct. 2008) (noting that privity of contract between the parties in a warranty action is not required—per statute (a hybrid of Alternatives B & C of U.C.C. § 2-318) vertical privity is obviated for natural persons who bring suit); *S & R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431, 437–38 (Del. Super. Ct. 1998).

**IOWA**—*Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305, 309–10 (Iowa 1995) (vertical privity not required in Iowa for breach of warranty actions, however, available damages are limited by requiring privity for any consequential economic loss damages).

**LOUISIANA**—*Walton Const. Co., LLC v. G.M. Horne & Co.*, 984 So. 2d 827, 834 (La. Ct. App. 2008); *Beth Israel v. Bartley, Inc.*, 579 So. 2d 1066, 1070–71 (La. Ct. App. 1991); *Stelly v. Gerber Prods. Co.*, 299 So. 2d 529, 532 (La. Ct. App. 1974) (vertical privity not a requirement for the ultimate purchaser).

**MAINE**—ME. REV. STAT. ANN. tit. 11, § 2-318 (1995) (Alternative C of UCC § 2-318 which obviates vertical privity); *Sullivan v. Young Bros. & Co.*, 91 F.3d 242, 249–50 (1st Cir. 1996) (reiterating that the statute obviates vertical privity); *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 915 n.3 (Me. 1973) (reiterating that the statute obviates vertical privity).

MICHIGAN—*Pack v. Damon Corp.*, 434 F.3d 810, 820 & n.12 (6th Cir. 2006) (eliminating the privity requirement for all implied warranty claims, but retaining for express warranties); see *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 774 N.W.2d 332, 341–43 (Mich. Ct. App. 2009).

MINNESOTA—*Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 20–21 (Minn. 1997) (holding that MINN. STAT. § 336.2-318 (1996) obviates vertical privity for all breach of warranty claims).

MISSISSIPPI—MISS. CODE ANN. § 11-7-20 (West 2008) (privity not required); *see, e.g.*, *Precision Interlock Log Homes, Inc. v. O’Neal*, 689 So. 2d 778, 780 (Miss. 1997) (manufacturer and dealer joint and severally liable).

MISSOURI—*Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 128–30 (Mo. 2010) (obviating vertical privity for implied warranties, but requiring vertical privity for express warranties, with some limited exceptions).

MONTANA—*See, e.g.*, *Streich v. Hilton-Davis, a Division of Sterling Drug, Inc.*, 692 P.2d 440, 448 (Mont. 1984) (“The privity requirement was abolished in Montana.”); *Whitaker v. Farmhand, Inc.*, 567 P.2d 916, 920–21 (Mont. 1977).

NEBRASKA—*See Peterson v. N. Am. Plant Breeders*, 354 N.W.2d 625, 630–32 (Neb. 1984) (citing *Hiles Co. v. Johnston Pump Co. of Pasadena, Cal.*, 560 P.2d 154, 157 (Nev. 1977)) (obviating vertical privity for all warranties except, implicitly, a warranty of workmanlike performance in construction).

NEVADA—*Hiles Co. v. Johnston Pump Co. of Pasadena, Cal.*, 560 P.2d 154, 157 (Nev. 1977) (“[L]ack of privity between the buyer and manufacturer does not preclude an action against the manufacturer for the recovery of economic losses caused by breach of warranties.”).

NEW HAMPSHIRE—*Gross v. Shep Brown’s Boat Basin*, No. Civ. 99-140-B, 2000 WL 1480373, at \*1 n.1 (D.N.H. Feb. 28, 2000) (holding that enactment of Alternative C of § 2-318 obviated vertical privity for warranties more broadly); *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 796–97 (N.H. 1993) (enactment of Alternative C of § 2-318 obviated vertical privity for implied warranties).

NEW JERSEY—*Spring Motors Distrib., Inc. v. Ford Motor Co.*, 489 A.2d 660, 663 (N.J. 1985) (obviating vertical privity for all warranty claims); *see*,

e.g., *Paramount Aviation Corp. v. Agusta*, 288 F.3d 67, 75–76 (3d Cir. 2002) (indicating that the holding in *Spring Motors* remains the law).

OKLAHOMA—*Elden v. Simmons*, 631 P.2d 739, 742 (Okla. 1981) (citing *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849 (Okla. 1979)) (“[T]his Court . . . eliminated the requirement of vertical privity.”); *Old Albany Estates, Ltd.*, 604 P.2d at 852 (eliminating vertical privity for implied warranty claims).

PENNSYLVANIA—*Spagnol Enters., Inc. v. Digital Equip. Corp.*, 568 A.2d 948, 952 (Pa. Super. Ct. 1989) (“[I]t is clear from this Court’s reading of the *Kassab* opinion that it was intended to apply to all breach of warranty cases brought under the warranty provisions of the Uniform Commercial Code for all types of damages, whether they be personal injuries, damage to property or economic loss.”); *see Kassab v. Cent. Soya*, 246 A.2d 848, 856 (Pa. 1968) (obviating vertical privity in warranty cases, but facts do not involve purely economic claims).

SOUTH CAROLINA—*Gasque v. Eagle Mach. Co.*, 243 S.E.2d 831, 832 (S.C. 1978) (state’s adoption of a hybrid of Alternatives B and C of § 2-318 of the UCC obviates vertical privity for all breach of warranty claims brought by natural persons).

SOUTH DAKOTA—*Cundy v. Int’l Trencher Serv., Inc.*, 358 N.W.2d 233, 240 (S.D. 1984) (section 2-318 obviates vertical privity requirement for all breach of warranty claims).

TEXAS—*See Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456, 465 (Tex. 1980) (removing the privity requirement for any implied warranty action involving personal injuries); *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 78 (Tex. 1977) (privity not required for implied warranty of merchantability actions); *Ford Motor Co. v. Lemieux Lumber Co.*, 418 S.W.2d 909, 911 (Tex. Civ. App. 1967) (citing *U.S. Pipe & Foundry Co. v. City of Waco*, 130 108 S.W.2d 432 (1937)) (“We think it is clear in Texas today that privity is no longer required in an action based upon a breach of an express or implied warranty that a product is suitable for the purpose for which it is sold.”).

VIRGINIA—*Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 491 S.E.2d 731, 734 (Va. 1997) (obviating vertical privity for all warranty claims, but privity is required to obtain consequential economic loss damages).

WYOMING—*See McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 90 (Wyo. 1989) (enactment of Alternative C of § 2-318 obviates vertical privity for all breach of warranty claims).

## APPENDIX C

Jurisdictions that require vertical privity for breach of implied warranty claims:

ARIZONA—*Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 386–87 (Ariz. 1981) (cases of implied warranty require vertical privity to succeed).

CONNECTICUT—*See, e.g.*, *Borucki v. MacKenzie Bros. Co.*, 8 A.2d 224, 225 (Conn. 1938) (limiting implied warranty actions to those in privity); *O & G Indus., Inc. v. Lafarge Bldg. Materials, Inc.*, No. CV065002572, 2010 WL 760430, at \*4 (Conn. Super. Ct. Jan. 22, 2010) (“Connecticut law provides that a contractual breach of warranty claim requires privity.”); *Gordon v. Clairol, Inc.*, 166 A.2d 209, 210 (Conn. C.P. 1960) (citing *Borucki*, 8 A.2d at 225) (affirming the privity requirement); *Hermanson v. Hermanson*, 117 A.2d 840, 842 (Conn. Super. Ct. 1954) (limiting express warranty actions to those in privity).

FLORIDA—*West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 84–85, 92 (Fla. 1976); *see, e.g.*, *David v. Am. Suzuki Motor Corp.*, 629 F. Supp. 2d 1309, 1322–23 (S.D. Fla. 2009) (citing *Hoskins v. Jackson Grain*, 63 So. 2d 514 (Fla. 1953) and *West*, 336 So. 2d 80) (reiterating the history of the *Hoskins* and *West* decisions); *Cerasani v. Am. Honda Motor Co.*, 916 So. 2d 843, 847 (Fla. Dist. Ct. App. 2005) (noting that state privity laws bar a Magnuson-Moss claim).

GEORGIA—*See, e.g.*, *Terrill v. Electrolux Home Prods., Inc.*, 753 F. Supp. 2d 1272, 1288 (S.D. Ga. 2010); *Monticello v. Winnebago Indus., Inc.*, 369 F. Supp. 2d 1350, 1360–61 (N.D. Ga. 2005); *McQueen v. Minolta Bus. Solutions, Inc.*, 620 S.E.2d 391, 393–94 (Ga. Ct. App. 2005); *Cobb Cnty. Sch. Dist. v. MAT Factory, Inc.*, 452 S.E.2d 140, 145–46 (Ga. Ct. App. 1994).

KENTUCKY—*Compex Int'l Co. v. Taylor*, 209 S.W.3d 462, 464–65 (Ky. 2006) (“[A] seller’s warranty protections are only afforded to one with whom there is privity of contract.”).

OHIO—Vertical privity is required for all warranty actions. *See, e.g.*, *Curl v. Volkswagen of Am., Inc.*, 871 N.E.2d 1141, 1145–47 (Ohio 2007) (“Ohio continues to require privity as to contract claims.”); *Whitt v. Mazda Motor of Am., Inc.*, No. 2010CA00343, 2011 WL 2520147, at \*4 (Ohio Ct. App. June 20, 2011) (quoting *Curl*, 871 N.E.2d at 1147) (“[Plaintiffs] may assert a contract claim for breach of implied warranty only against parties with whom they are in privity.”).

OREGON—*Simonsen v. Ford Motor Co.*, 102 P.3d 710, 721 (Or. Ct. App. 2004) (citing *Colvin v. FMC Corp.*, 604 P.2d 157 (1979)) (requiring

privity of contract in implied warranty action for personal injuries and citing to a court of appeals case that held the same with regard to economic losses). Note that Oregon has eliminated the vertical privity requirement with regard to express warranties. *See State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 216–18 (Or. 1968), *cert. denied*, 393 U.S. 862 (1969); *Price v. Gatlin*, 405 P.2d 502, 503 (Or. 1965); *see also Hupp Corp. v. Metered Washer Serv.*, 472 P.2d 816, 817 (Or. 1970) (citing *Campbell*, 442 P.2d at 221 (O’Connell, J., dissenting) and *Price*, 405 P.2d at 504 (O’Connell, J., dissenting)) (“A minority dissented in [*Price* and *Campbell*]; however, such decisions are now the law of this state.”).

UTAH—*Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 18 (Utah 1990) (requiring privity for contract warranty actions and classifying § 2-318 as relating to “[t]ort warranties”) (internal quotation marks omitted).

VERMONT—Vermont requires vertical privity for breach of implied warranty claims involving economic loss. *See Gochey v. Bombardier, Inc.*, 572 A.2d 921, 924 (Vt. 1990) (lack of privity does not bar a breach of express warranty claim, regardless of the types of damages); *see also Vermont Plastics, Inc. v. Brine, Inc.*, 824 F. Supp. 444, 452–53 (D. Vt. 1993) (summarizing Vermont’s laws on privity and concluding that Vermont does not require privity for express warranty actions or for implied warranty actions involving personal injury or property damage).

WASHINGTON—Washington generally requires vertical privity, *Tex Enters., Inc. v. Brockway Standard, Inc.*, 66 P.3d 625, 628–30 (Wash. 2003), but makes exceptions for certain goods (e.g., food, clothing), for express warranties made by manufacturers in advertising, *Baughn v. Honda Motor Co.*, 727 P.2d 655, 668–69 (Wash. 1986), and for cases in which the plaintiff is an intended third-party beneficiary of a manufacturer’s implied warranty, *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 831 P.2d 724, 730–31 (Wash. 1992).

WISCONSIN—*Smith v. ATCO Co.*, 94 N.W.2d 697, 704 n.2 (Wis. 1959) (“Wisconsin . . . requires that privity exist between the plaintiff user and the manufacturer . . . in breach of warranty cases.”); *see, e.g., Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 801 N.W.2d 781, 816 (Wis. Ct. App. 2011) (“Wisconsin has always required privity of contract in an action for a breach of implied warranty.’ Wisconsin still does and we are bound, of course, by supreme court decisions.”) (citation omitted) (quoting *Dippel v. Sciano* 155 N.W.2d 55, 57 (1967)) (citing *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179, 187 n.15 (1991)).

## APPENDIX D

Jurisdictions in 1975 requiring vertical privity for breach of implied warranty claims. Note that most of the jurisdictions required vertical privity for all breach of warranty claims, not just those for breach of implied warranty:

**ARIZONA**—The general rule in Arizona required privity for warranty actions. *See Jordan v. Worthington Pump & Mach. Co.*, 241 P.2d 433, 435 (Ariz. 1952); *see also Bailey v. Montgomery Ward & Co.*, 431 P.2d 108, 111 (Ariz. Ct. App. 1967) (“[P]ersonal injuries caused by defective products should be based upon tort law,” under strict liability principles, not under warranty law.).

**CALIFORNIA**—The general rule in California required vertical privity for all warranty breach actions, both express warranty and implied warranty, with limited exceptions. *Burr v. Sherwin Williams Co.*, 268 P.2d 1041, 1048–49 (Cal. 1954).

**CONNECTICUT**—As of 1975, Connecticut had drawn a firm line between actions under tort law and those under contract. Tort actions did not require privity; contract actions (including all arising under breaches of warranty) did. *See, e.g., Borucki v. MacKenzie Bros. Co.*, 8 A.2d 224, 225 (Conn. 1938) (allowing negligence in tort to proceed without privity and limiting implied warranty actions to those in privity); *Gordon v. Clairol, Inc.*, 166 A.2d 209, 210 (Conn. C.P. 1960) (affirming the privity requirement); *Hermanson v. Hermanson*, 117 A.2d 840, 842 (Conn. Super. Ct. 1954) (limiting express warranty actions to those in privity).

**FLORIDA**—In the early-to-mid 1970s in Florida, the lines between tort and contract as they relate to implied warranties were blurred. A 1953 state high court decision held that a breach of implied warranty suit could be brought against a manufacturer without privity. *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514, 515 (Fla. 1953). In 1976, however, the Florida Supreme Court adopted the doctrine of strict liability in tort, and, in reconciling that doctrine with warranty law, declared that a warranty claim required a contractual relationship. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 91 (Fla. 1976). Since then, the law has remained that vertical privity is required for all breach of warranty actions under contract law. *See, e.g., David v. Am. Suzuki Motor Corp.*, 629 F. Supp. 2d 1309, 1322–23 (S.D. Fla. 2009) (reiterating the history of the *Hoskins*, 63 So. 2d 514, and *West*, 336 So. 2d 80, decisions); *Cerasani v. Am. Honda Motor Co.*, 916 So. 2d 843, 847 (Fla. Dist. Ct. App. 2005) (citing *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005)) (noting that state privity laws bar a Magnuson-Moss claim).

GEORGIA—As of January 1975, the rule in Georgia required vertical privity for all breach of warranty claims, *Studebaker Corp. v. Nail*, 62 S.E.2d 198, 201–02 (Ga. Ct. App. 1950), with an exception where a manufacturer issues an express warranty directly to the consumer, *Chrysler Corp. v. Wilson Plumbing Co.*, 208 S.E.2d 321, 323 (Ga. Ct. App. 1974).

NEBRASKA—With regard to implied warranties (but not express warranties), vertical privity was required except in the case of foodstuffs. *Asher v. Coca Cola Bottling Co.*, 112 N.W.2d 252, 255–56 (Neb. 1961).

NEVADA—In 1975, contractual privity was required for any breach of warranty action in Nevada. *Belcher v. Nevada Rock & Sand Co.*, 516 F.2d 859, 860 (9th Cir. 1975); *Amundsen v. Ohio Brass Co.*, 513 P.2d 1234, 1234–35 (Nev. 1973); *Long v. Flanigan Warehouse Co.*, 382 P.2d 399, 402–03 (Nev. 1963).

NEW JERSEY—In 1975, vertical privity was the rule, with an exception for implied warranties of fitness. *See Monsanto Co. v. Alden Leeds, Inc.*, 326 A.2d 90, 95 (N.J. Super. Ct. Law Div. 1974) (stating the general rule); *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 310–11 (N.J. 1965) (relating to implied warranty exception), *overruled on other grounds by Alloway v. Gen. Marine Indus.*, 695 A.2d 264 (N.J. 1996).

NEW MEXICO—The general rule in 1975 was that privity was required for any warranty action. *Tharp v. Allis-Chalmers Mfg. Co.*, 81 P.2d 703, 704 (N.M. 1938).

NORTH CAROLINA—The general rule in 1975 was that privity was required for breach of implied warranty actions while there were limited exceptions for certain products. *Williams v. Gen. Motors Corp.*, 198 S.E.2d 766, 768 (N.C. Ct. App. 1973).

NORTH DAKOTA—Vertical privity is required except where a manufacturer markets directly to the public. *Cf. Lang v. Gen. Motors Corp.*, 136 N.W.2d 805, 810 (N.D. 1965).

OHIO—In 1966, the Ohio Supreme Court carved out strict liability in tort as a way for plaintiffs to escape the limitations and requirements of contract claims, including privity. *Lonzrick v. Republic Steel Corp.*, 218 N.E.2d 185, 188, 192 (Ohio 1966). This left all contract-based breach-of-warranty claims requiring vertical privity. *Id.*

OKLAHOMA—In 1975, Oklahoma required vertical privity in breach of warranty claims, with the only exception for implied warranty claims regarding foodstuffs. *Moss v. Polyco, Inc.*, 522 P.2d 622, 625 (Okla. 1974) (“The UCC . . . presupposes a buyer in privity with a seller, the concept

being extended only as provided by the Legislature."); *Sw. Ice & Dairy Prods. Co. v. Faulkenberry*, 220 P.2d 257, 259 (Okla. 1950).

**SOUTH CAROLINA**—In 1975, South Carolina required vertical privity for all breach of warranty claims for economic damages. *Sanders v. Allis Chalmers Mfg. Co.*, 115 S.E.2d 793, 796 (S.C. 1960); *Odom v. Ford Motor Co.*, 95 S.E.2d 601, 603–04 (S.C. 1956) (citing multiple cases to support the assertion) ("The general rule is that privity of contract is required in an action for breach of an implied warranty and that there is no such privity between a manufacturer and one who has purchased the manufactured article from a dealer or is otherwise a remote vendee.").

**WASHINGTON**—In 1975, privity was required in most breach of warranty actions, with limited exceptions for food, clothing, drugs, cosmetics, or "dangerous instrumentalities." *Brewer v. Oriard Powder Co.*, 401 P.2d 844, 846–47 (Wash. 1965) (quoting *Freeman v. Navarre*, 47 289 P.2d 1015, 1018 (Wash. 1955)).

**WISCONSIN**—Prior to 1975, the Wisconsin Supreme Court was clear in requiring vertical privity in all breach of warranty cases. *E.g., Smith v. ATCO Co.*, 94 N.W.2d 697, 704 n.2 (Wis. 1959) ("Wisconsin . . . requires that privity exist between the plaintiff user and the manufacturer . . . in breach of warranty cases.").

**WYOMING**—Prior to 1975, there were no Wyoming state court cases that addressed vertical privity and warranties directly. The general rule appears to have been the requirement of privity, with some tort-law-like exceptions, including goods that were inherently dangerous. *See Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969, 974 (Wyo. 1970).

## APPENDIX E

Jurisdictions in 1975 that obviated vertical privity for breach of implied warranty claims that involved personal injury, but not for economic losses.

**ALABAMA**—Vertical privity was obviated for personal injuries via the 1965 adoption of Alternative B of § 2-318 of the UCC, 1965 Ala. Acts 811, 836 (codified at ALA. CODE § 7-2-318 (2006)). *See Laird v. John Deere Co.*, 294 So. 2d 165, 168 (Ala. Civ. App. 1974).

**ALASKA**—Based on Alaska’s 1962 statute, vertical privity was not required for personal injury damages to the buyer. *See Uniform Commercial Code*, 1962 Alaska Sess. Laws 154, 168 (codified at ALASKA STAT. § 45.02.318 (2012)). However, beyond this exception vertical privity remained the general requirement. *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976, 978 (D. Alaska 1973).

**HAWAII**—The state of Hawaii law as it related to privity and breach of warranty in 1975 is difficult to pin down, largely based on a lack of relevant caselaw. As of 1975, there were no reported cases in Hawaii state courts that dealt with privity and breach of warranty. There was one such case in Hawaii Federal District Court that was then heard on appeal to the Ninth Circuit. *Chapman v. Brown*, 198 F. Supp. 78 (D. Haw. 1961), *aff’d*, 304 F.2d 149 (9th Cir. 1962). The single case on point removed the requirement of vertical privity in an implied warranty case seeking redress for personal injury. *Id.* at 118–19.

**IDAHO**—The general rule in Idaho as of 1975 required vertical privity to successfully pursue a breach of warranty action. *Abercrombie v. Union Portland Cement Co.*, 205 P. 1118, 1119 (Idaho 1922). Implied warranty actions that derived from personal injuries were exempted from the requirement, as the state courts analogized them to tort actions. *Robinson v. Williamsen Idaho Equip. Co.*, 498 P.2d 1292, 1297 (Idaho 1972). Those were, however, the only actions exempted.

**ILLINOIS**—In 1974, the Illinois Supreme Court declared that, “[P]rivity is of no consequence when a buyer who . . . has sustained personal injuries predicates recovery against a remote manufacturer for breach of an implied warranty.” *Berry v. G. D. Searle & Co.*, 309 N.E.2d 550, 556 (Ill. 1974). This was the only exception to the vertical privity requirement. *See Rozny v. Marnul*, 250 N.E.2d 656, 659–60 (Ill. 1969) (breach of express warranty under contract requires privity).

**INDIANA**—In the early 1970s, Indiana recognized an exception to the requirement of vertical privity for implied warranties of fitness where a breach caused personal injuries, analogizing to tort law. *Karczewski v.*

Ford Motor Co., 382 F. Supp. 1346, 1352 (D. Ind. 1974) (citing *Filler v. Rayex Corp.*, 435 F.2d 336 (7th Cir. 1970)). This was the only exception to the rule. *See id.*

**KANSAS**—As of 1975, the general rule in Kansas required privity of contract for breach of warranty actions. *Booth v. Scheer*, 185 P. 898, 899–900 (Kan. 1919). The state did recognize exceptions to the rule for implied warranty actions involving personal injury and specific types of goods. *See, e.g., Patterson v. George H. Weyer, Inc.*, 370 P.2d 116, 119 (Kan. 1962) (human health preparations); *Cernes v. Pittsburg Coca Cola Bottling Co.*, 332 P.2d 258, 261–62 (Kan. 1958) (food for human consumption); *Nichols v. Nold*, 258 P.2d 317, 323 (Kan. 1953) (drink containers).

**MARYLAND**—In 1969, the Maryland legislature modified the state’s incarnation of UCC § 2-318 to allow warranties to include “any other ultimate consumer or user of the goods or person affected thereby if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.” Act of Apr. 23, 1969, ch. 249, § 2-318, 1969 Md. Laws 709, 710 (codified at MD. CODE ANN., COM. LAW § 2-318 (LexisNexis 2002)). As explained by the Maryland Court of Appeals, “The effect of these changes was to abolish the privity requirements in warranty actions for personal injuries.” *Frericks v. Gen. Motors Corp.*, 363 A.2d 460, 463 (Md. 1976). Although this language is post-1975, it derives from legislative history accompanying the 1969 amendments and thus, is deemed operative as of January 1975. In 1975, the state also had an exception to privity requirements in place for the implied warranty of merchantability. *Sheeskin v. Giant Food, Inc.*, 318 A.2d 874, 886 (Md. Ct. Spec. App. 1974).

**MISSISSIPPI**—In 1975, the general rule in Mississippi required vertical privity for breach of warranty actions. *Watts v. Adair*, 52 So. 2d 649, 649 (Miss. 1951). An exception was made for implied warranty actions for goods for human consumption and involving personal injury (analogizing to tort liability). *Coca-Cola Bottling Co. v. Savage*, 89 So. 2d 634, 635 (Miss. 1956). This was, however, the only exception at the time.

**MISSOURI**—As of 1975, Missouri required vertical privity for all breach of warranty actions, with one exception. *Smith v. Ford Motor Co.*, 327 S.W.2d 535, 537 (Mo. Ct. App. 1959) (“The general rule of law is that only the person in privity with the warrantor may recover on a warranty.”). That exception was where goods for human consumption (or skin use, as soap would be) caused personal injury in violation of an implied warranty of fitness. *Id.* at 537–38 (citing *Worley v. Proctor & Gamble Mfg. Co.*, 253 S.W.2d 532 (Mo. Ct. App. 1952)).

MONTANA—Montana required vertical privity for warranty actions as a general rule. *Larson v. U.S. Rubber Co.*, 163 F. Supp. 327, 330 (D. Mont. 1958). Exceptions were in place for food and drugs that caused personal injury, analogizing to strict liability in tort. *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P.2d 268, 272–73 (Mont. 1973).

NEW YORK—As of 1975, privity requirements in New York had been eroding for some time. *Singer v. Walker*, 331 N.Y.S.2d 823, 829 (N.Y. App. Div. 1972) (“[T]he courts in New York have gradually eroded the concept that privity is required in order to maintain an action based on breach of an express or implied warranty.”). Privity was not required for express warranty claims where such claims were in advertising. *Spiegel v. Saks 34th St.*, 252 N.Y.S.2d 852, 858 (N.Y. App. Div. 1964). It was not required for implied warranty claims resulting in personal injury. *Meyer v. Gehl Co.*, 348 N.Y.S.2d 801, 804 (N.Y. App. Div. 1973) (citing *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 226 N.Y.S.2d 363 (N.Y. 1962)). Privity remained a requirement for implied warranty claims resulting solely in economic loss, however. *Smith v. Squire Homes, Inc.*, 329 N.Y.S.2d 243, 245–46 (N.Y. App. Div. 1972).

OREGON—In 1975, Oregon retained the vertical privity requirement for warranty claims based on purely economic loss, but allowed recovery in tort for product defects that caused personal injury. *Hupp Corp. v. Metered Washer Serv.*, 472 P.2d 816, 817 (Or. 1970) (citing *State ex rel. W. Seed Prod. Corp. v. Campbell*, 442 P.2d 215, 216–17 (Or. 1968)), *cert. denied*, 393 U.S. 862 (1969); *Price v. Gatlin*, 405 P.2d 502, 503 (Or. 1965)) (“A minority dissented in [*Price* and *Campbell*]; however, such decisions are now the law of this state.”).

SOUTH DAKOTA—South Dakota’s case law as of the 1960s required vertical privity for all warranty claims in contract, drawing a line of demarcation between such claims and those that occur in tort. *Whitethorn v. Nash-Finch Co.*, 293 N.W. 859, 860 (S.D. 1940). Following South Dakota’s adoption of a broadened Alternative B of § 2-318 in 1966, however, the picture gets murkier. 1966 S.D. Sess. Laws 459, 480 (codified at S.D. CODIFIED LAWS § 57A-2-318 (2012)). Not until 1979 did the South Dakota courts address the statute, deciding that while privity was no longer needed for express warranty claims, it was required for implied warranty claims that resulted solely in economic loss. *Brown v. Fowler*, 279 N.W.2d 907, 910 (S.D. 1979).

TENNESSEE—In 1972, the Tennessee legislature enacted a statute that removed privity requirements for any breach of warranty action that resulted in personal injury or property damage. Act of Apr. 3, 1972, 1972 Tenn. Pub. Acts 644 (codified as amended at TENN. CODE ANN. § 29-34-104 (2012)). This was an exception to the state’s general rule requiring vertical privity in all breach of warranty actions. *Walker v. Decora, Inc.*,

471 S.W.2d 778, 783 (Tenn. 1971). Thus, only actions for economic losses required privity as of January 1975.

VERMONT—As of 1975, Vermont required vertical privity for all breach of warranty claims, except those involving personal injury that can be analogized to strict liability in tort. *O'Brien v. Comstock Foods, Inc.*, 212 A.2d 69, 71–72 (Vt. 1965). Although the Second Circuit Court of Appeals predicted in 1970 that the state would remove the privity requirement in an action for warranty breach involving property damage, this did not come to pass until well after 1975. *Compare Wasik v. Borg*, 423 F.2d 44, 49 (2d Cir. 1970), *with Gochey v. Bombardier, Inc.*, 572 A.2d 921, 924 (Vt. 1990) (lack of privity does not bar a breach of express warranty claim, regardless of the types of damages).

UTAH—The vertical privity requirements in 1975 were unclear for Utah. *See Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 156–61 (Utah 1979) (recounting the development of warranty and adopting the principles of strict product liability); *Leininger v. Stearns-Roger Mfg. Co.*, 404 P.2d 33, 36–37 (Utah 1965) (refusing to find liability and pointing to a privity requirement); *Palmer v. Wasatch Chem. Co.*, 353 P.2d 985, 988 (Utah 1960) (avoiding holding on privity requirement in breach of warranty claim).