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NOTES

HORIZONTAL PRIVACY UNDER THE MAGNUSON-MOSS WARRANTY ACT: A PRACTITIONER'S GUIDE

I. Introduction

On January 4, 1975, Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.¹ Title I of the Act establishes uniform standards of content and clarity for warranties on goods moving in interstate commerce in an attempt to bring warranty performance in line with consumer expectations.² In analyzing any warranty legislation, the nature of the horizontal privity requirement is a necessary consideration because it determines who may take advantage of the warranty. Although the question of horizontal privity may appear to be a very narrow topic of analysis when considering an act that deals with warranty content and clarity standards, it is an initial consideration for persons wishing to avail themselves of the Act's protection, and by suppliers of consumer products who are confronted by an aggrieved party attempting to enforce the obligations of the warranty. Therefore, after a brief consideration of the general scope of the Act, § 101(3) and its legislative history will be analyzed to determine the nature and scope of horizontal privity under the Act. Section 101(3) defines the classes of persons who will be considered "consumers" for purposes of the Act and thereby be entitled to the remedies afforded by it.

Moreover, to fully understand the impact of § 101(3), state law regarding horizontal privity must be examined. The Act, following a limited preemption approach as to state law, does not invalidate or restrict the right of any consumer under state law,³ but supplements existing state remedies for breach of warranty. Therefore, to place the Act's horizontal privity aspects in proper perspective and to analyze their practical effect, it is necessary to determine the persons to whom the Act applies and the extent to which it supplements state law. Present state law regarding horizontal privity is embodied in § 2-318 of the Uniform Commercial Code (UCC) which has been adopted in one of its three alternative forms by the majority of the states.

1 15 U.S.C.A. §§ 2301-12 (1975) [hereinafter cited as the Act]. Title I of the Act is entitled "Consumer Product Warranties," but is better known as the Magnuson-Moss Warranty Act, and is the subject of this note. Title II is entitled "Federal Trade Commission Improvements" and amends the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.* (1970)) in order to improve the FTC's consumer protection activities.

2 For a general discussion of the Act and its provisions, see Magnuson, *Fair Disclosure in the Marketplace of Warranty Promises—Truth in Warranties for Consumers*, 8 UCC L. J. 117 (1975); *cf.* Leete, *A Look at the Consumer Warranty Problem—The Federal Solution*, 6 U. TOLEDO L. REV. 351 (1975).

3 Section 111(b)(1) of the Act provides: "Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." 15 U.S.C.A. § 2311 (b)(1) (Supp. 1975). This approach to state law is known as limited preemption of state law. It allows state laws to stand as long as they do not conflict with the federal law. *See* *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1859).

II. The General Scope of the Act

To understand the general context in which the horizontal privity aspect of the Act is pertinent, an understanding of the scope of the Act as a whole is essential. The Act applies only to warranties on "consumer products" which are defined as:

any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).⁴

As the definition indicates, the consumer product must be "distributed in commerce." This means that they must be "sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce."⁵ "Commerce," for purposes of the Act, means "trade, traffic, commerce or transportation—(A) between a place in a State and any place outside thereof, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)."⁶ In discussing the Act and its effect on state law, it should be remembered that this "commerce" requirement must be satisfied before the Act becomes operative. Because the Act's definition of "commerce" is so broad, however, it will be assumed for the purposes of this discussion that this prerequisite is satisfied.

The Act, while imposing some specific limitations on the operation of state law, does not invalidate or restrict any right or remedy of any consumer under state law. It does not "affect the liability of, or impose liability on, any person for personal injury, or . . . supersede any provision of State law regarding consequential damages"⁷ However, state law requirements regarding clarity, content, and designation of warranties must be identical to the Act's requirements⁸ applicable to these three areas.⁹ Furthermore, while the Act allows suppliers of consumer products to disclaim all warranties, it makes ineffective for purposes of the Act and state law a disclaimer, modification, or limitation violative of § 108 of the Act. Section 108 limits the supplier's right to disclaim implied warranties when he has given a written warranty.¹⁰

The scope of the Act is limited due to the remedies it provides for breach of warranty. Remedies available to an aggrieved consumer for breach of warranty are limited to repair, replacement or refund.¹¹ Thus, for practical purposes,

4 15 U.S.C.A. § 2301(1) (Supp. 1975).

5 15 U.S.C.A. § 2301(13) (Supp. 1975).

6 15 U.S.C.A. § 2301(14) (Supp. 1975).

7 15 U.S.C.A. § 2311(b)(1) and (2) (Supp. 1975). See note 3 *supra*.

8 15 U.S.C.A. § 2311(c)(1)(B) and (C) (Supp. 1975).

9 See 15 U.S.C.A. § 2302-04 (Supp. 1975).

10 15 U.S.C.A. § 2308(a) and (c) (Supp. 1975).

11 The term "remedy" means whichever of the following actions the warrantor elects:
 (A) repair,
 (B) replacement, or
 (C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

15 U.S.C.A. § 2301(10) (Supp. 1975).

the consumer who holds title to the consumer product is the only one who will benefit from the remedies provided under the Act. The Act encourages warrantors to settle consumer disputes through informal dispute settlement mechanisms.¹² However, should a warrantor fail to comply with any obligation under the Act or under a warranty he has given, the aggrieved consumer "may bring suit for damages and other legal and equitable relief . . . in any court of competent jurisdiction in any State . . ."¹³

With this general understanding of the Act's scope, an examination of its horizontal privity aspects is now appropriate.

III. Horizontal Privity Under the Act

The horizontal privity aspects of the Magnuson-Moss Warranty Act are embodied in § 101(3) of title I of the Act which defines "consumer" to mean:

a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).¹⁴

The definition contains three distinct classes of protected consumers; each class will be considered in light of the Act's legislative history and purpose to determine who receives consumer warranty protection under the Act.

A. "A buyer (other than for purposes of resale) of any consumer product"

Section 101(3) initially indicates that warranty protection will be extended to any buyer who purchases a consumer product for purposes other than resale.¹⁵ Thus, a buyer is entitled to enforce all nondisclaimed warranties if he, for example, purchases a consumer product and uses it himself, or intends to give it as a gift, or intends to lease the product. Furthermore, § 101(3) implicitly does not restrict the types of sellers from whom the buyer must purchase. The legislative history clearly indicates that a sale is not limited to purchases from retailers.¹⁶ A buyer may purchase the consumer product from any "supplier,"¹⁷

12 15 U.S.C.A. § 2310(a)(1) (Supp. 1975).

13 15 U.S.C.A. § 2310(d) and (e) (Supp. 1975).

14 15 U.S.C.A. § 2301(3) (Supp. 1975).

15 *Id.*

16 Many of the bills introduced into the House of Representatives and the Senate which concerned consumer warranty protection included the limitation that the buyer must purchase the product "at retail" to be afforded protection under the Act. *See, e.g.*, H.R. 4809, 92d Cong., 1st Sess., § 101(3) (1971); H.R. 5037, 92d Cong., 1st Sess., § 2(3) (1971); H.R. 20, 93d Cong., 1st Sess., § 101(3) (1973); and S. 356, 93d Cong., 1st Sess., § 101(3) (1973). This restriction was deleted from the Act.

17 Section 101(4) of the Act defines the term "supplier" to mean: "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C.A. § 2301(4) (Supp. 1975).

be it a manufacturer, wholesaler, distributor, or any other person "engaged in the business of making a consumer product directly or indirectly available to consumers,"¹⁸ and still be afforded the Act's protection.

The initial phrase of § 101(3) also indirectly indicates that purchasers of used consumer products will be considered consumers for purposes of the Act. The same House and Senate bills that required that the consumer product be purchased "at retail,"¹⁹ also required that the buyer be the "first buyer" of the consumer product.²⁰ The House Conference Committee reported out an amended version of Senate Bill S. 356 that deleted the word "first" from the initial phrase of the definition of the term "consumer."²¹ Their report states that the change was made to "eliminate any possible construction that title I did not apply to the commercial sale of used consumer products."²² Thus, warranties given by a seller of used consumer products²³ are subject to the Act's provisions,²⁴ thereby bringing buyers of used consumer products within the Act's protection.

In summary, the initial phrase of § 101(3) clearly indicates that a consumer under the Act is a buyer of new or used consumer products from any "supplier" if he purchases for any purposes other than resale.

B. *"Any person to whom such product is transferred during the duration of an implied or written warranty . . . applicable to the product"*

Section 101(3) next focuses on the duration of the seller's warranty and on the person who holds title to the consumer product after it is introduced to the consuming public. The duration of the written warranty may be: (a) indefinite if the supplier warrants that the product is "defect free"; or (b) definite if the supplier warrants that the product "will meet a specified level of performance over a specified period of time."²⁵ The Act also places a similar emphasis on the

18 *Id.*

19 *See* note 16 *supra*.

20 *Id.*

21 S. 356, 93d Cong., 1st Sess., § 101(3) (1973). The term "consumer" means: "a buyer (other than for purposes of resale) of any consumer product. . ." HOUSE CONFERENCE REPORT ON CONSUMER PRODUCT WARRANTY AND FEDERAL TRADE COMMISSION IMPROVEMENT ACT, REPORT No. 93-1606, 93d Cong., 2d Sess., (1974), at 1. This definition of the term "consumer" reported out by the House Conference Committee is identical to the definition of the term "consumer" in the Act.

22 *Id.* at 29. The change was prompted due to warranty practices with respect to used automobiles. *Id.* at 28-29.

23 A seller of used consumer products who gives a warranty will be deemed a "warrantor" under the Act. Section 101(5) defines the term "warrantor" to mean: "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." 15 U.S.C.A. § 2301(5) (Supp. 1975).

24 However, a limitation relating to vertical privity on a consumer's remedy is found in § 110(f) which states:

For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

15 U.S.C.A. § 2310(f) (Supp. 1975).

25 § 101(6) of the Act defines the term "written warranty" to mean:

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified

time element in "service contracts."²⁶

The second phrase of § 101(3) indicates, then, that "any person" who is a transferee during the warranty period will be deemed a "consumer."²⁷ Commenting on the use of the term "person," the Senate Committee on Commerce Report on the Magnuson-Moss Warranty Act states that it is meant in its "all inclusive sense."²⁸ For example, "[A] corporation purchasing a color television set may be deemed to be a 'consumer' within the meaning of this [A]ct."²⁹ Thus, both natural or artificial persons who are transferees may be deemed consumers within the Act's definition.

The transferee need not be a purchaser of the consumer product. One of the bills discussed at the 1971 Hearings on Consumer Warranty Protection³⁰ gave warranty protection to transferees only if they were subsequent purchasers.³¹ Professor Willier, Director of the National Consumer Center, Boston College Law School, testifying at the 1971 Hearings, suggested that "any subsequent transferees, such as donees or purchasers, to whom the product is transferred during the lifetime of the warranty should also be afforded all the rights under the bill that are presently given the first purchaser at retail."³² The Act's definition of "consumer," § 101(3), deleted the requirement that the subsequent transferee be a purchaser,³³ in apparent agreement with Professor Willier's suggestion.

Section 101(3)'s silence on the use or purpose for which the transferee acquired the consumer product is significant. S. 356, the Senate bill eventually enacted into law, originally required that the product be transferred for use for

period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C.A. § 2301(6) (Supp. 1975).

Although a supplier may not disclaim or modify implied warranties given to a consumer when such supplier makes any written warranty to the consumer with respect to the product (§ 108(a)), § 108(b) provides that the duration of the implied warranty may be limited to the duration of the written warranty of reasonable duration, and such limitation is not unconscionable and is set forth clearly on the face of the warranty. 15 U.S.C.A. § 2308(b) (Supp. 1975).

²⁶ Section 101(8) of the Act defines the term "service contract" to mean: "a contract in writing to perform, over a fixed period of time or for a specified duration, service relating to the maintenance or repair (or both) of a consumer product." 15 U.S.C.A. § 2301(8) (Supp. 1975).

²⁷ 15 U.S.C.A. § 2301(3) (Supp. 1975).

²⁸ REPORT OF THE SENATE COMM. ON COMMERCE, MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT, S. Rep. No. 93-151, 93d Cong., 1st Sess. 12 (1973).

²⁹ *Id.*

³⁰ *Hearings on Consumer Warranty Protection Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971) [hereinafter cited as 1971 Hearings].

³¹ *Id.*; H.R. 261, 92d Cong., 1st Sess. (1971). Section 8 of H.R. 261, entitled "Transfer of Warranty," stated:

The transfer of goods covered by this Act from one retail purchaser to another during the lifetime of the warranty shall not act to terminate that warranty and subsequent purchasers shall be entitled to full use and enjoyment of the warranty protection for the duration of the warranty period just as if the original purchaser had not transferred the item.

Id. at 50.

³² 1971 Hearings, *supra* note 30, at 235.

³³ 15 U.S.C.A. § 2301(3) (Supp. 1975).

personal, family, or household purposes.³⁴ The Senate Committee on Commerce Report on S. 356³⁵ stated that "[T]he definition of consumer is not intended to include persons who utilize consumer products for commercial purposes."³⁶ The later deletion of this restriction from the Act strongly indicates Congress' intention not to restrict the use of a consumer product. A transferee can use the consumer product for a commercial or noncommercial purpose and still be afforded the Act's protection.

The second phrase of § 101(3), thus, indicates that a transferee, whether a natural or an artificial person, and whether or not a subsequent purchaser, may enforce the obligations of a supplier's written or implied warranties during the warranty period regardless of whether the consumer product is used for commercial or noncommercial purposes.

C. "*Any other person who is entitled by the terms of such warranty . . . or under applicable State law to enforce against the warrantor . . . the obligations of the warranty . . .*"

The final phrase of § 101(3) does not designate any specific person or class of persons as beneficiaries of the Act's warranty protection. Instead, it deems two categories of persons as "consumers" for purposes of the Act: (1) those persons who are designated in the warranty as entitled to enforce the obligations of the warranty as a result of the buyer-supplier bargaining process; and (2) persons considered consumers under applicable state laws. Section 101(3) provides that the buyer and supplier have the right to bargain over who may enforce the obligations of the warranty, in addition to those persons specifically provided protection under the Act. However, no agreement between the buyer and supplier can operate to limit the right of any other person entitled "under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)."³⁷

34 S. 356, as reported by the Senate Committee on Commerce, defined "consumer," in part, to mean: ". . . any person to whom such product is transferred for use for personal, family, or household purposes during the effective period of which is normally used for personal, family, or household purposes. . . ." REPORT OF THE SENATE COMM. ON COMMERCE, *supra* note 28, at 33.

35 See note 28 *supra*.

36 *Id.* at 12. The Report gave the following example:

For instance, a clothes washer might be purchased by a consumer and subsequently transferred within the warranty period to a person who installs the machine in a commercial laundromat. The subsequent transferee would not be a consumer, since the product is not being used for personal, family, or household purposes.

Id.

37 15 U.S.C.A. § 2301(3) (Supp. 1975). Not a single bill discussed during the 1971 and 1973 Consumer Warranty Protection Hearings included a proviso regarding state law within its definition of "purchaser" or "consumer." Fairfax Leary, Jr., of the Public Interest Research Group, testifying at the 1971 Hearings, noted that, as worded, the definition of "purchaser" in § 101(3) of H.R. 4809 ["Purchaser" means the first buyer at retail of any consumer product or service to whom a warranty is offered or given, and any other person who is entitled by the terms of such warranty to enforce against the warrantor the obligations of the warranty] appeared to permit a warrantor to limit the class of persons to whom his warranty would run. He pointed out that this would be a regression in the law and was probably one of the reasons why industry witness were in favor of a full federal preemption clause. 1971 Hearings, *supra* note 30, at 123.

Persons entitled to enforce the obligations of a warranty under applicable state law will also be considered "consumers" for purposes of the Act.³⁸ Since some states recognize even innocent bystanders as "consumers,"³⁹ the Act appears to be a viable alternative to state law remedies for even the remote "consumer." This appraisal, however, is misleading. The Act limits the remedies and damages available to an aggrieved consumer for breach of warranty to repair, replacement, or refund,⁴⁰ as opposed to more satisfactory recovery possibilities available under state statutes. Nor does the Act affect the liability of, or impose liability on, any person for personal injury or supersede state laws on consequential damages for injuries.⁴¹ In light of these two limitations, many persons considered "consumers" under state law, and therefore under the Act, will find the Act unappealing because of its limited remedies, and consequently will be forced to look exclusively to state law for recovery. Realistically, the Act limits the persons seeking recovery under its provisions to those who hold title to a defective consumer product; no other class of persons could obtain, or for that matter would desire to obtain, the remedies of repair, replacement, or refund.

While keeping in mind the remedy limitations and the Act's limited preemption approach as to state law,⁴² it is now necessary to analyze § 101(3) in its proper context by determining the effect it will have on state law dealing horizontal privity. In the majority of states this doctrine is embodied in § 2-318 of the Uniform Commercial Code (UCC).

IV. The Effect of § 101(3) of the Act on § 2-318 of the UCC

Section 2-318 consists of three alternative versions among which the states may choose. Each alternative will be analyzed in light of § 101(3) to understand the interaction between the Act and state law regarding horizontal privity.

Leary reasserted his observation during the 1973 Hearings, by noting that § 101(3) of H.R. 20 appeared to permit the supplier to specify in the terms of a warranty who may be entitled to protection, just as § 101(3) of H.R. 4809 had done. He initially suggested that warranty protection should extend to all persons who in normal course could reasonably be expected to use the product. However, realizing that the Committee might not want to force any state to extend state protection beyond that which that state wants to extend it under the doctrine of privity, Leary asserted that the Federal Act should not shrink the scope of state law. He suggested that the phrase reading ". . . and any other person who is entitled by the terms of such warranty to enforce against the warrantor the obligation of the warranty," (H.R. 20, § 101(3)), be changed to read: ". . . and any other person who under applicable state law is entitled to enforce against the warrantor the obligation of the warranty." *Hearings on Consumer Warranty Protection Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 94, 103-04 (1973).

The fact that the final Act retained what was restrictive language by itself, but added a proviso for the application of state law, makes it clear that the supplier-warrantor will only be allowed to extend protection beyond that provided under the Federal Act or state law, if he so chooses.

38 15 U.S.C.A. § 2301(3) (Supp. 1975).

39 See, e.g., *Wasik v. Borg*, 423 F.2d 44 (2d Cir. 1970); *Piercefield v. Remington Arms Co., Inc.*, 375 Mich. 85, 133 N.W.2d 129 (1965); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622 (1973).

40 15 U.S.C.A. § 2301(10) (Supp. 1975).

41 Nothing in this title . . . shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

15 U.S.C.A. § 2311(b)(2) (Supp. 1975).

42 See note 3 *supra*.

A. Alternative A⁴³

To qualify as a beneficiary of the seller's warranty under Alternative A, the aggrieved party (1) must be a member of the purchaser's family or a guest of his household, and (2) it must be reasonable to expect that such person would use or be affected by the goods sold. This alternative limits recovery to damages for personal injury.

In the states which have enacted this version of § 2-318, judicial decisions abolishing the privity requirement are a prerequisite to transferees or persons other than members of the buyer's family, household, or guests in his home recovering in a breach of warranty action.⁴⁴ The Official Code Comment indicates that beyond the stated class of beneficiaries, the Code "is neutral and not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."⁴⁵ Courts, therefore, having the discretion to extend warranty protection to other third persons beyond those designated in Alternative A, have done so repeatedly.⁴⁶ However, other state courts have sustained the traditional privity requirement in a breach of warranty action, thereby ignoring the Comment language and giving § 2-318 a narrow construction.⁴⁷

Section 101(3)'s most obvious impact on Alternative A is that it extends warranty protection to persons outside the class of named beneficiaries without the previously required judicial decisions. Warranty protection will now extend to an indefinite number of transferees of the consumer product (whether a natural or an artificial person) during the warranty period.⁴⁸

Stewart v. Gainesville Glass Co., Inc.,⁴⁹ is a recent, pre-Act case which provides a model of the probable effect that the Act will have on Alternative A states. In *Gainesville Glass*, plaintiff, a homeowner, brought an action against Thermoproof Glass Co., a manufacturer of insulated window glass. The allegedly defective window glass was manufactured and sold by Thermoproof to defendant, Gainesville Glass Co., Inc. Gainesville sold the glass window to Nix Construction Co., a general contractor, who installed the glass in a house for the original owner from whom the plaintiff purchased. The manufacturer, Thermoproof, expressly warranted the performance of the glass for a period of 10 years against defects (*i.e.*, that the glass would not develop material obstruction of vision resulting from

43 UNIFORM COMMERCIAL CODE § 2-318, Alternative A [hereinafter cited as UCC] provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home 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. A seller may not exclude or limit the operation of this section.

44 UCC § 2-318, Comment 3.

45 *Id.*

46 *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967); *Salvador v. I.H. English of Philadelphia Inc.*, — Pa. —, 319 A.2d 903 (1974); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. Ct. App. 1967). See also cases contained in note 39 *supra*.

47 See, e.g., *Horne v. Armstrong Products Corp.*, 416 F.2d 1329 (5th Cir. 1969).

48 15 U.S.G.A. § 2301(3) (Supp. 1975).

49 233 Ga. 578, 212 S.E.2d 377 (1975).

film formation or dust collection between interior glass surfaces of the units) alleged in this litigation. The plaintiff contended that a breach of this warranty occurred approximately four years after the manufacture and installation of the glass.⁵⁰ The Supreme Court of Georgia, finding for the defendant, held that privity was required in actions for breach of express warranty except as provided by statute and where the warranty clearly extends to some identifiable third person.⁵¹

Assuming the allegations of the complaint to be true, *Gainesville Glass* would have been decided in favor of the plaintiff had the Act been in effect when the glass was manufactured.⁵² The plaintiff-homeowner was a transferee of the glass⁵³ and the warranty given with it. Since there was a breach of the warranty during its operative period, plaintiff, as holder of the warranty, would be entitled to have the glass repaired, replaced, or having the price refunded.⁵⁴

This model clearly illustrates that § 101(3) expands the doctrine of horizontal privity in Alternative A states. A much broader class of transferees of consumer products in Alternative A jurisdictions will now be entitled to warranty protection.

B. *Alternative B*

Alternatives B and C of § 2-318 were offered by the Permanent Editorial Board of the UCC in response to the developing case law⁵⁵ and legislative dissatisfaction with the restrictiveness of Alternative A. The new Alternatives were designed for states in which the case law had expanded warranty protection beyond that provided under Alternative A or for states which desired to achieve such expansion through legislation.⁵⁶ Alternative B⁵⁷ reaches beyond Alternative A by permitting "any natural person," not only members or guests of the buyer's household, to recover for personal injury if the warranty is breached and it is reasonable that such person could have been expected to use, consume, or be

50 *Id.* at 377.

51 *Id.* at 378. See GA. CODE ANN. § 109A-2-318 (1973).

52 Section 112(a) of the Act provides: "This title shall take effect 6 months after the date of its enactment but shall not apply to consumer products manufactured prior to such date." 15 U.S.C.A. § 2312(a) (Supp. 1975).

53 It is assumed that glass would be deemed a "consumer product" under § 101(1) of the Act. See text accompanying note 4 *supra*.

54 15 U.S.C.A. § 2301(10) (Supp. 1975). Furthermore, § 110(d)(1) of the Act provides: Subject to subsections (a)(3) (informal dispute settlement procedure) and (e) (class actions), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.

15 U.S.C.A. § 2310(d)(1) (Supp. 1975).

55 For an analysis of this case law see Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099 (1960).

56 UCC § 2-318, Comment 3. See e.g., The Song-Beverly Consumer Warranty Act, CAL. CIV. CODE § 1793 (West 1973). See also Note, *Consumer Protection: The Effect of the Song-Beverly Consumer Warranty Act*, 4 PAC. L. J. 183 (1973).

57 UCC § 2-318, Alternative B, provides:

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 in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

affected by the goods.

Section 101(3) of the Act will expand warranty protection in Alternative B states in two respects. Although transferees of a consumer product are already extended warranty protection under Alternative B, Alternative B restricts that protection to "natural persons." The Act extends warranty protection to "any person" who is a transferee during the warranty period. Thus, in Alternative B states, such artificial persons as corporations or associations will now be extended warranty protection under the Act.

The Act also enlarges the scope of damages available to natural persons in Alternative B states. Alternative B allows for recovery of damages for personal injury only. Because natural person transferees are afforded warranty protection under Alternative B, they will be entitled to recovery under the Act and Alternative B. Therefore, if a transferee's consumer product is defective and explodes causing the transferee personal injury, he may recover for his personal injury under state law and may have his product repaired, replaced, or receive a refund under the Act.

C. *Alternative C*

Alternative C⁵⁸ extends warranty protection to any person, natural or artificial, if it is reasonable to assume that the entity would use or be affected by the goods. It also extends warranty protection to those not only injured in person but also to those whose property is damaged. It is evident that Alternative C extends warranty protection to a broader class of persons than does § 101(3), and provides for the recovery of all damages which might be incurred by a consumer who is injured by a defective consumer product. While § 101(3) has no effect on horizontal privity in Alternative C jurisdictions, recovery for property damage may be expanded in certain cases. A seller in an Alternative C jurisdiction may not limit his liability for personal injury, but he may still exclude or limit his liability for property damage.⁵⁹ Should a seller do so, a consumer will still be afforded the remedies provided under the Act.

V. Summary and Conclusion

In light of the Act's legislative history, the horizontal privity aspects of the Magnuson-Moss Warranty Act, as embodied in § 101(3), may be summarized in definitional form as follows: The term "consumer" means: (1) a buyer (other than for purposes of resale) of any new or used consumer product from any supplier; (2) any person (natural or artificial) to whom such product is transferred (whether or not a subsequent purchaser and regardless of whether the

58 UCC § 2-318, Alternative C, provides:

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.

59 *Id.*

consumer product is used for commercial or noncommercial purposes) during the duration of an implied or written warranty (or service contract) applicable to the product; and (3) any other person who is designated as 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).

This seemingly all-encompassing definition of who is a "consumer" for purposes of the Act is circumscribed by the limited remedies provided under the Act. The Act limits its remedies for breach of warranty to repair, replacement, or refund. It is evident that these remedies are beneficial only to consumers actually holding title and therefore the warranty to the consumer product. Consequently, the Act's liberal privity requirement is tempered by the limited remedies it provides.

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