12 Reasons to Love the Magnuson-Moss Warranty Act*

Consumer practitioners often under-appreciate the Magnuson-Moss Warranty Act (herein referred to as Magnuson-Moss or the Act).[1] This article lists twelve reasons why this statute should be in every lawyer's consumer law arsenal. More details on the Act are found in NCLC's *Consumer Warranty Law* Ch. 2 (3d ed. 2006 and 2007 Supp.).

1. The Act Provides for Attorney Fees for Any Breach of an Implied Warranty, Even If There Is No Written Warranty

Unlike UCC Article 2, which provides for no attorney fees or costs, the Magnuson-Moss Warranty Act provides for costs, expenses, and attorney fees for a prevailing consumer.[2] Despite a common misconception to the contrary, these remedies are available where a seller breaches an implied warranty, even if the seller offers no written or express warranty.[3]

Whether there is an implied warranty and a breach of that implied warranty is a matter of state law. But, once that breach is established under state law, then Magnuson-Moss provides a superior remedy to that found under the UCC. This means that consumer attorneys should almost always add Magnuson-Moss counts in an implied warranty case.

2. Any Written Warranty Prevents Disclaimers of Implied Warranties

"As is" used car sales and other disclaimers of implied warranties are a major impediment for purchasers of defective products. Magnuson-Moss prohibits implied warranty disclaimers, at least during the term of any written warranty.[4] A written warranty is defined as meeting at least one of two criteria: 1) a written statement that a product is defect free or will perform at a specified level of performance for a specified time or 2) a written promise to refund, repair, replace or take other remedial action if the product fails to meet promised specifications.[5]

Thus a used car dealer's "50-50" scribble found on a sales contract is a written warranty to pay for 50% of repair costs, and should invalidate any attempt to disclaim implied warranties. A dealer's "we owe" written statement or a description of what aspects of the car have been inspected and found to be defect free may be inconsistent with an "as is" sale.[6]

Even a very limited written warranty can stop disclaimers of implied warranties.[7] For example, a written warranty limited only to the drive train should prevent disclaimer of any implied warranties relating to the vehicle.

3. Sale of a Service Contract May Prevent Disclaimers of Implied Warranties

Magnuson-Moss states that, if the seller "enters into" a service contract with the consumer within 90 days of a sale, then the seller cannot disclaim implied warranties.[8] This is an important protection because auto dealers typically disclaim implied warranties but also frequently sell service contracts in connection with their used and new vehicle sales.

The key issue is the definition of "entered into with the

consumer." Clearly, if a dealer sells and owns a service contract, it has entered into the contract with the consumer. Similarly, if the dealer hires an administrator to handle claims and other paperwork, the dealer still enters into the contract if it is contractually obligated to pay the claims. It is thus important to delve beneath the name on a service contract (who might only be the administrator) and determine who in fact owns the contract and is obligated to pay claims.

Since many auto and manufactured home dealers are including mandatory arbitration clauses in all their consumer contracts, this presented an important advantage for raising Magnuson-Moss claims.

Less clear is a common situation where a dealer sells another company's service contract and makes a sizeable profit on the transaction or services the vehicle and is paid by the company owning the contract for that service. The case law as to whether such a dealer has "entered into" a service contract is somewhat mixed.

Several cases find that a dealer selling someone else's service contract does not "enter into" a contract with the consumer.[9] Other courts have found that, where service must be obtained from that dealer, the dealer enters into a contract.[10] Other factors may suggest that the dealer has entered into the contract even when it does not own the contract.[11]

To maximize chances of a favorable ruling, discovery is essential. Does the contract specify an "issuing dealer"? Must the service be performed at the dealer? Has the dealer signed documents related to the service contract and what is the dealer's contractual relationship with the service contract owner? Does the dealer decide who receives a service contract and at what price? Are the contract owner and the dealer both owned by the same individual? Is a portion of the service contract premiums put into a reserve account to be paid to the dealer if losses are below a certain level? Is the service contract premium declared by the dealer on its taxes as income?

4. More Courts Are Refusing to Require Arbitration of Magnuson-Moss Written Warranty Claims

Prior to 2002, it appeared that Magnuson-Moss claims could not be forced into binding arbitration because of the Act's language and legislative history and, most particularly, because of an FTC rule that explicitly prohibits binding arbitration of written warranty disputes.[12] Since many auto and manufactured home dealers are including mandatory arbitration clauses in all their consumer contracts, this presented an important advantage for raising Magnuson-Moss claims.

In 2002, both the Fifth and Eleventh Circuits found congressional intent to be the opposite of what had previously been assumed, and refused to give any deference to the FTC rule.[13] For a time, this seemed to spell the death knell for the argument that binding arbitration was inconsistent with the Magnuson-Moss.

Recently, though, a number of courts have taken another look at the issue and have found fault with the Fifth and Eleventh Circuit's reasoning and description of the Act's legislative history. As a result, a new crop of cases has found a binding arbitration requirement to be inconsistent with a Magnuson-Moss written warranty claim.[14]

Because of the contrary precedent from the Fifth and Eleventh Circuits, practitioners must be prepared for extensive briefing on this issue. The arguments for the consumer are set out in some detail and a sample brief is found at NCLC's *Consumer Arbitration Agreements* § 4.2.2, Appx. G (5th ed. 2007). The brief is also found in MS Word on the Companion CD-Rom.

5. Even If Enforceable, the Arbitration Requirement Must Be Placed in the Written Warranty

Even the Eleventh Circuit refuses to require arbitration of written warranty disputes where the arbitration requirement is not disclosed in the written warranty.[15] Magnuson-Moss thus provides a second basis to defeat a mandatory arbitration requirement, even where a court finds Magnuson-Moss *not* to conflict with a mandatory arbitration provision

This is a particularly important Magnuson-Moss application because arbitration clauses are rarely placed in the written warranty, meaning written warranty disputes typically need not be arbitrated.[16] Moreover, merely placing the arbitration clause in the written warranty may not be enough to make the clause enforceable, particularly where the consumer never sees the written warranty until after the purchase. To be safe, the seller may have to include the arbitration requirement in the sales agreement and *also* disclose it in the warranty.

6. Magnuson-Moss Loosens Many Privity Requirements

Some states still require that a consumer be in privity with the defendant in a UCC breach of warranty case. Magnuson-Moss loosens these rules to a significant extent. The Act gives a remedy to any consumer damaged by the warranty breach, thus including subsequent transferees of the product, largely eliminating state horizontal privity requirements.

Magnuson-Moss also eliminates state vertical privity requirements in written warranty cases, allowing the consumer to sue manufacturers and other indirect sellers. While many courts do not view Magnuson-Moss as expanding state vertical privity requirements as to *implied* warranties, at least Illinois courts do so if there is a written warranty.[17]

7. Magnuson-Moss Written Warranties May Exist Even Where a Court Might Find No Express Warranty Exists

The definition of a written warranty does not depend on state law.[18] Thus any idiosyncratic state interpretation of the UCC's express warranty provisions is largely irrelevant to the interpretation of written warranties under Magnuson-Moss.

Under the UCC, a representation relating to the goods that becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the representation.[19] Some recent decisions have narrowly construed this definition, holding that a manufacturer's standard new car warranty is not an express warranty if it promises only that the manufacturer will repair the goods, without explicitly describing the goods as free from defects or warranting that the goods are free from defects.[20]

These decisions can be criticized for their failure to recognize that implicit within the repair promise is an assurance that the goods will conform to a defect-free standard. But, even if a court finds there is no express warranty, a repair or replace warranty clearly meets the Magnuson-Moss' definition of "written warranty." Another example of a written warranty that may not be an express warranty is a "we owe" form where a dealer promises to fix or replace specific features of a car.[21]

8. Magnuson-Moss Revocation of Acceptance May Be Superior to UCC Article 2 Revocation

Revoking acceptance using Magnuson-Moss offers certain advantages over a UCC revocation. The consumer should be able to recover attorney fees in a Magnuson-Moss action to enforce

the revocation. In addition, Magnuson-Moss revocation may be available where UCC revocation is not.

One important example is where the immediate seller has effectively disclaimed implied warranties, and the consumer thus seeks to revoke acceptance as to the manufacturer or other indirect seller. In at least some states, courts refuse to allow UCC revocation against an indirect seller. But, since Magnuson-Moss more explicitly provides for remedies against remote sellers offering written warranties (*see* #6, *supra*), Magnuson-Moss revocation may be available against these indirect sellers where UCC revocation is not.[22]

One issue though is whether Magnuson-Moss authorizes revocation as a remedy. The Act explicitly states that the consumer can sue for equitable relief,[23] and some courts have viewed this provision as authority to entertain suits for rejection or revocation of acceptance.[24]

Tying rejection or revocation of acceptance to equitable relief, however, could lead a court to require the consumer to meet such equitable standards as irreparable injury and absence of an adequate remedy at law.[25] Unlike rescission, which is an equitable remedy, most courts hold that revocation of acceptance is a remedy at law.[26] The Act's general authorization of suits for damages is sufficient to encompass a suit for revocation of acceptance, because a revocation award can be expressed as a money judgment, conditioned upon the return of the goods if the consumer has not already done so.[27] Even if a suit for revocation of acceptance were not a suit for damages, it would be encompassed by the Act's authorization of "other legal ... relief."[28]

Some courts have suggested that, because the Act explicitly requires only a *full* warrantor to provide a refund or replacement (if it fails to remedy defects after a reasonable number of attempts), revocation of acceptance is not an available remedy under the Act for breach of a *limited* warranty.[29] This reasoning confuses two separate rules.

Magnuson-Moss, like the typical state lemon law, provides an affirmative right to a refund or replacement for certain warranties in certain circumstances, so that the consumer need not prove all the elements required by the UCC for revocation of acceptance. But when this special right does not apply, the legislative history makes it clear that Congress intended courts to look to state law to determine the buyer's remedies.[30] If the buyer meets the UCC requirements for revocation of acceptance, then the buyer should be entitled to that remedy under the Magnuson-Moss Act.

9. Magnuson-Moss Does Not Require Notice of a Breach

An element of a UCC Article 2 warranty case is that the consumer must have provided notice of the warranty breach. Magnuson-Moss also contains preconditions to litigation, but these are different than those for UCC Article 2 cases. If an alternative dispute mechanism is disclosed in the written warranty and it qualifies under FTC rules, then the consumer must resort to this non-binding mechanism before instituting suit. If a qualifying mechanism is not disclosed, then the consumer must give the warrantor a right to cure.

While these Magnuson-Moss preconditions may be more onerous than mere notice of the breach, Magnuson-Moss is an important option where the consumer did not meet the UCC notice requirement. When timeliness of notice of the breach is at issue, or the defendant claims the form of notice was improper or that the notice was sent to the wrong party, the consumer can still proceed under agnuson-Moss years after the breach occurred. The consumer instead engages in informal dispute resolution. If that is not required, then the consumer instead offers a right to cure.

Moreover, the Magnuson-Moss preconditions may not be that onerous. The consumer need not resort to dispute resolution if either the requirement is not disclosed in the written warranty or the mechanism does not qualify under various FTC standards.[31] In addition, offering the right to cure should not be seen as an impediment. Many consumers have already given the seller a right to cure when they asked for repairs under the warranty. If a repair will not resolve the problem, the seller can only comply with a right to cure by replacing the product with a non-defective one.

10. The Act Applies to Leases

An important Magnuson-Moss application is to automobile and other personal property leases. Statutes in some states providing consumer warranty rights, such as certain lemon laws or statutes limiting disclaimer of implied warranties, do not apply to leases. Magnuson-Moss has an important role filling in these gaps.

Although the Act's language is somewhat convoluted as it applies to leases, a growing majority of cases find that the Act does in fact apply to lease transactions.[32] Most cases finding no coverage are either older[33] or rely on unusual facts.[34] Nevertheless, because of the complexity of the Act's coverage language as it applies to leases, it is recommended that close attention be paid to the analysis found in NCLC's *Consumer Warranty Law* § 2.2.5 (3d ed. 2006 and 2007 Supp.).

11. The Magnuson-Moss Statute of Limitations Is Just As Long As the UCC's

Many federal consumer protection statutes have short statutes of limitations. Magnuson-Moss, on the other hand, has no explicit statute of limitations, and courts typically apply the UCC's four-year limitation period.[35]

12. Magnuson-Moss Gives Consumers More Control Over Whether an Action Is Heard in State or Federal Court

Magnuson-Moss presents consumer litigants with unusual rules as to federal court jurisdiction. It is harder to get into federal court than for cases presenting other federal consumer protection claims, but easier than under a state law warranty claim. Importantly, the consumer, not the defendant, controls whether a case can be removed from state to federal court.

A consumer can obtain federal court jurisdiction under Magnuson-Moss by claiming at least $50,000 in economic damages. This is a lower threshold than federal diversity jurisdiction which requires $75,000. Diversity of the parties need not be shown.

Moreover, individual claims can be joined to reach the $50,000 threshold.[36] Joinder must comply with Federal Rule of Civil Procedure 20, which allows joinder if the plaintiffs' claims arise out of the same transaction, occurrence, or series of transactions or occurrences, and there is at least one common question of law or fact. Thus joinder should be allowed, for example, if the plaintiffs all are complaining about the same defect.

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On the other hand, the consumer can keep out of federal court in a Magnuson-Moss case simply by seeking less than $50,000 in the complaint and not joining the case with others who might bring the total amount sought above that amount. Then there will be no basis under Magnuson-Moss to remove the case to federal court.

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1. 15 U.S.C. §§ 2301–2312.
2. *Id.* § 2310.
3. NCLC, Consumer Warranty Law § 2.3.1 (3d ed. 2006 and 2007 Supp.).
4. 15 U.S.C. § 2308.
5. 15 U.S.C. § 2301(6); 16 C.F.R. § 700.3.
6. Hamilton v. O'Connor Chevrolet, Inc., 2005 WL 3109149 (N.D. Ill. Nov. 16, 2005); Horton Homes, Inc. v. Brooks, 832 So. 2d 44 (Ala. 2001); Griffs v. Leisure Tyme RV, Inc., 884 So. 2d 241 (Fla. Dist. Ct. App. 2004); Marine Midland Bank v. Carroll, 98 A.D.2d 516 (N.Y. App. Div. 1984).
7. *Cf.* Kimpel v. Del. Pub. Auto Auction, 2001 WL 1555932 (Del. Ct. Com. Pl Mar. 6, 2001) (very limited service contract).
8. 15 U.S.C. § 2308(a).
9. *See* Priebe v. Autobarn Ltd., 240 F.3d 584 (7th Cir. 2001); Computer Network, Inc. v. AM Gen. Corp., 696 N.W.2d 49 (Mich. Ct. App. 2005).
10. Patton v. McHone, 822 S.W.2d 608 (Tenn. Ct. App. 1991). *See also* Letter from Allen W. Hile, Jr., Assistant Dir., Div. of Mktg. Practices, Fed. Trade Comm'n, to Jean Noonan, Clearinghouse No. 55,632 (Feb. 21, 2005); Gen. Motors Acceptance Corp. v. Jankowitz, 523 A.2d 695 (N.J. App. Div. 1987).
11. *See* Johnson v. Earnhardt's Gilbert Dodge, Inc., 132 P.3d 825 (Ariz. 2006); Villaneuva v. Toyota Motor Sales, U.S.A., Inc., 869 N.E.2d 866 (Ill. App. Ct. 2007).
12. *See* NCLC's Consumer Arbitration Agreements § 4.2.2 (5th ed. 2007).
13. Walton v. Rose Mobile Homes, L.L.C., 298 F.3d 470 (5th Cir. 2002); Davis v. Southern Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002).
14. *See* Higgs v. The Warranty Group, 2007 WL 2034376 (S.D. Ohio July 11, 2007); Rickard v. Teynor's Homes, Inc., 279 F. Supp. 910 (N.D. Ohio 2003); Browne v. Kine Tysons Imports, Inc., 190 F. Supp. 2d 827 (E.D. Va. 2002); Koons Ford of Baltimore, Inc. v. Lobach, 919 A.2d 722 (Md. 2007); Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (S.C. 2007); Tucker v. Ford Motor Co., 2007 Va. Cir. LEXIS 24 (Va. Cir. Ct. Feb. 1, 2007).
15. Cunningham v. Fleetwood Homes of Georgia, Inc., 253 F.3d 611 (11th Cir. 2001); see also Harnden v. Ford Motor Co., 408 F. Supp. 2d 300 (E.D. Mich. 2004); DaimlerChrysler Corp. v. Mathews, 848 A.2d 577 (Del. Ch. Ct. 2004); Larrain v. Bengal Motor Co., Ltd., 2008 WL 183495 (Fla. Dist. Ct. App. Jan. 23, 2008); Tropical Ford, Inc. v. Major, 882 So. 2d 476 (Fla. Dist. Ct. App. 2004); Manly v. Daimler Chrysler Corp., Clearinghouse No. 55,633 (Mich. Cir. Ct. Aug. 30, 2005). Oddly, the only two contrary cases are out of the Eleventh Circuit, thus ignoring the precedent in *Cunningham:* Patriot Mfg., Inc. v. Dixon, 399 F. Supp. 2d 1298 (S.D. Ala. 2005); Patriot Mfg., Inc. v. Jackson, 2005 WL 3086668 (Ala. Nov. 18, 2005).
16. *Id.*
17. *See* NCLC's Consumer Warranty Law § 2.3.5 (3d ed. 2006 and 2007 Supp.).
18. *Compare* 15 U.S.C. § 2301(6) *with* 15 U.S.C. § 2301(7).
19. U.C.C. § 2-313(1).
20. *See* NCLC, Consumer Warranty Law § 3.2.2.4.2 (3d ed. 2006 and 2007 Supp.).
21. Hamilton v. O'Connor Chevrolet, Inc., 399 F. Supp. 860 (N.D. Ill. 2005).
22. Sheehan v. Monaco Coach Corp., 2006 WL 208689 (E.D. Wis. Jan. 25, 2006); Mydlach v. DaimlerChrysler Corp., 2005 WL 2414352 (Ill. App. Ct. Sept. 30, 2005); Shuldman v. DaimlerChrysler Corp., 1 A.D.3d 343, 768 N.Y.S.2d 214 (2003); Gochey v. Bombardier, Inc., 153 Vt. 607, 572 A.2d 921, 11 U.C.C. Rep. Serv. 2d 870 (1990).
23. 15 U.S.C. § 2310(d)(1).
24. Hamdan v. Land Rover N. Am., Inc., 2003 WL 21911244 (N.D. Ill. Aug. 8, 2003); Jones v. Fleetwood Motor Homes, 1999 WL 999784 (N.D. Ill. Oct. 29, 1999); Holland v. Baja Marine Corp., 1999 Del. Super. LEXIS 512 (Del. Super. Ct. Nov. 3, 1999); Mydlach v. DaimlerChrysler Corp., 846 N.E.2d 126 (Ill. App. Ct. 2005) (characterizing revocation under Magnuson-Moss Act as equitable, but without discussion), *appeal allowed*, 857 N.E.2d 674 (Ill. 2006). *See also* Peacock v. Damon Corp., 2006 WL 2711762 (W.D. Ky. Sept. 20, 2006) (allowing Magnuson-Moss revocation claim to go to jury). *But cf.* Stoebner Motors, Inc. v. Automobili Lamborghini S.P.A., 459 F. Supp. 2d 1028 (D. Haw. 2006) (revocation not available against remote manufacturer without privity); Chaurasia v. Gen. Motors Corp., 126 P.3d 165 (Ariz. Ct. App. 2006) (Magnuson-Moss Act's authorization of equitable relief does not, in the absence of privity, allow consumer to revoke acceptance against manufacturer).
25. Jones v. Fleetwood Motor Homes, 127 F. Supp. 2d 958, 962, 967 (N.D. Ill. 2000) (erroneously concluding that claim for revocation must be treated as one for equitable relief, so plaintiff must show absence of adequate remedy at law; only Magnuson-Moss case cited for this proposition is one seeking an injunction, not revocation); *see also* NCLC's Consumer Warranty Law § 8.1.4 (3d ed. 2006 and 2007 Supp.).
26. *See* NCLC, Consumer Warranty Law § 8.1.4 (3d ed. 2006 and 2007 Supp.).
27. *See* Long v. Monaco Coach Corp., 2006 WL 2564040 (E.D. Tenn. Aug. 31, 2006) (Magnuson-Moss Act makes refund available for full warranty; revocation is available for limited warranty if state law allows, but lack of privity with remote seller bars it here); Larry J. Soldinger Assocs., Ltd. v. Aston Martin Lagonda of N. Am., Inc., 1999 WL 756175 (N.D. Ill. Sept. 10, 1999) (recognizing consumer's right to bring Magnuson-Moss claim for revocation of acceptance); Ward v. Tupelo Auto Sales, 1998 U.S. Dist. LEXIS 19074 (N.D. Miss. Nov. 20, 1998) (claim for reimbursement of purchase price falls within category of damages for economic loss which are recoverable under Magnuson-Moss); Gochey v. Bombardier, Inc., 153 Vt. 607, 527 A.2d 921 (1990) (revocation is available as a Magnuson-Moss remedy if it would be available under state law); *see also* Golden v. Gorno Bros., Inc., 410 F.3d 879, 884 (6th Cir. 2005) (contrasting rescission with revocation of acceptance; announcing formula for determining amount in controversy when revocation is sought in Magnuson-Moss suit); Milicevic v. Fletcher Jones Imports, Ltd., 402 F.3d 912 (9th Cir. 2004) (Nev. law) (affirming award of purchase price of car, minus value of reasonable use, under Magnuson-Moss Act); Gusse v. Damon Corp., 2007 WL 127804 (C.D. Cal. Jan. 17, 2007) (revocation or restitution is available under Magnuson-Moss Act because it is available under Song-Beverly Act); Hines v. Mercedes-Benz USA, L.L.C., 358 F. Supp. 2d 1222, 1235 (N.D. Ga. 2005) (consumer can seek revocation under Magnuson-Moss Act, but not shown here; no discussion of whether it is equitable or legal remedy).
28. 15 U.S.C. § 2310(d)(1).

29. *See* Holmes v. Kabco Builders, Inc., 62 U.C.C. Rep. Serv. 2d 239, 244 n.7 (S.D. Ala. 2007); Traynor v. Winnebago Indus., Inc., 2006 WL 778703 (D. Ariz. Mar. 27, 2006).
30. H.R. Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7706 ("Warranties are currently governed by common law and the Uniform Commercial Code. ... In the jurisdictions where [the UCC] is in effect, it generally controls the rights of parties in commercial transactions and it is commonly accepted as today's law of sales.").
31. See NCLC, Consumer Warranty Law § 2.8 (3d ed. 2006 and 2007 Supp.).
32. *See e.g.* Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516 (7th Cir. 2003); Cohen v. AM Gen. Corp., 264 F. Supp. 2d 616 (N.D. Ill. 2003); Mago v. Mercedes-Benz, U.S.A., Inc., 142 P.3d 712 (Ariz. Ct. App. 2006); Am. Honda Motor Co. v. Cerasani, 955 So. 2d 543 (Fla. 2007); Freeman v. Hubco Leasing, 324 S.E.2d 462 (Ga. 1985); Mattuck v. DaimlerChrysler Corp., 366 Ill. App. 3d 1026, 852 N.E.2d 485 (2006); Ryan v. Am. Honda Motor Corp., 896 A.2d 454 (N.J. 2006); Szubski v. Mercedes-Benz, U.S.A., L.L.C., 796 N.E.2d 81 (Ohio Ct. Com. Pl. 2003); Henderson v. Benson-Hartman Motors, Inc., 33 Pa. D. & C.3d 6, 41 U.C.C. Rep. Serv. 782, 794 (C.P. 1983); Peterson v. Volkswagen of Am., Inc., 697 N.W.2d 61 (Wis. 2005).
33. *See, e.g.,* Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc., 97 N.C. App. 610, 389 S.E.2d 293 (1990).
34. Parrot v. DaimlerChrysler Corp., 130 P.3d 530 (Ariz. 2006).
35. *See* NCLC, Consumer Warranty Law § 2.7.8 (3d ed. 2006 and 2007 Supp.).
36. *Id*. § 2.7.2.