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Manufacturers' Guarantees

M. J. Trebilcock*

* Of the Faculty of Law, McGill University.

I. Introduction

a. *The Case for Change*

One of the most prevalent consumer complaints today concerns both the nature of obligations and the performance of obligations by suppliers of goods or services under written guarantees or warranties (the terms are here used interchangably). While little empirical work has been undertaken in Canada on the operation of guarantees, data in some areas is available in the United States, and as many of our products are American designed or manufactured, this is likely to have a broad application here.[1]

The magnitude of the problem facing consumers today is indicated by the following figures: 1969 model cars tested by Consumers Union averaged 36 defects per car — more than twice as many as were discovered in 1967 models.[2] More than one in four 1967 model cars had been involved in safety-related recall campaigns by the end of 1967.[3]

The National Association of Fleet Administrators reported to the Federal Trade Commission (hereinafter F.T.C.) that dealers handled only 53% of warranty work satisfactorily, that 26% of all warranty repairs required repeated visits and 14% required the manufacturer's assistance.[4] In testimony before the Senate Committee on Commerce, David A. Swankin of Consumers Union reported their 1969 annual questionnaire elicited the information that 35% of interviewees described their latest new car as being in unsatisfactory condition when it was delivered. In answer to the

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[1] In this article, reliance is placed primarily on testimony and briefs at twelve days of hearings before the U.S. Senate and the House of Representatives on various Consumer Guarantee Bills during 1970 and 1971, on the *Report of the Senate Committee on Commerce on S. 986*, S. Doc. No. 92-269, 92nd Cong., 1st Sess. (July 16, 1971), the Federal Trade Commission's (hereinafter F.T.C.) *Reports on Automobile Warranties*, (1969 and 1970), the U.S. President's *Task Force Report on Appliance Warranties and Service*, (January 8, 1969), and in Canada on two studies by the Canadian Appliance Manufacturers' Association, (May, 1968 and March, 1971), a study by Professor Louis Romero of the University of Saskatchewan on new car warranties, (1971), a report on standard form contracts and warranties by a McGill Law School Opportunities for Youth Project, (October, 1971), and a study by the Automobile Protection Association, (Montreal), on relationships between manufacturers and new car dealers (October, 1971).

[2] F.T.C., *Report on Automobile Warranties*, (1970), at p. 56.

[3] F.T.C., *Staff Report on Automobile Warranties*, (1969), at p. 169.

[4] F.T.C., *Report on Automobile Warranties*, (1970), at p. 64.

question, "were you successful in having repair work done under factory warranty in a satisfactory manner?", 55.4% said yes, 32.3% said no, and 12.3% said that no work was required.[5] Even with generally unsatisfactory performances under auto warranties, manufacturers found themselves having to absorb an unexpectedly escalating level of costs. In 1966, manufacturers estimated that the cost to them of a basic 24 month/24,000 mile warranty was $50 - $60 *per* car. In 1967, when these manufacturers joined Chrysler in offering as well a 5 year power train warranty, warranty costs jumped to between $110 - $120 *per* car. In 1968 through 1969, manufacturers reduced their basic warranty to 12 month/12,000 miles and in some cases made the additional power train warranty an extra. These reductions resulted in an estimated saving to manufacturers of $65 *per* car on repairs which consumers will now have to meet themselves at ordinary retail rates (approximately $100 for the same repairs).[6]

The same pattern of experience appears to obtain in Canada. In a random survey undertaken by Professor Louis Romero of the University of Saskatchewan Law School in mid-1971 of 363 Ontario residents who had purchased new 1970 model American cars, it was found, *inter alia,* that:

(a) 15.74% of the respondents were not satisfied with the performance of their car;
(b) 51.31% had encountered mechanical problems;
(c) 21.87% defects in appearance;
(d) 42.27% squeaks or rattles;
(e) 31.97% were not able to have these defects corrected under their warranties.

The foregoing figures show not only how unsatisfactory many warranty practices are from a consumer's standpoint but also how valuable warranty protection potentially can be to him. The general position which obtains in the auto industry is not of course confined to it. In a survey in 1968 of 90,000 colour T.V. owners, Consumers Union found that 74% had been required to have repairs made to their sets (most of which were 1966 models or later). Of sets in service less than one year, owners of one set in ten were dissatisfied over service. In the case of Westinghouse, 1 person in 4 reported himself dissatisfied. 6% of the sets in the sample which had been

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[5] *Hearings on S. 3074 Before the Consumer Subcom. of the Senate Comm. on Commerce,* 91st Cong., 2nd Sess., Ser. No. 91-52, at p. 251 (1970), hereinafter referred to as *Hearings on S. 3074.*

[6] F.T.C., *Staff Report on Automobile Warranties,* (1969), at p. 202.

bought in 1968 had to have their picture tubes replaced before the year was out.[7]

Senator Moss in hearings of the Senate Committee on Commerce, January 20, 1970, reported that there are more than 70 million service calls per year on about 235 major appliances in some 60 million households in the U.S. In other words, on average, every U.S. family every year is likely to be involved in a service problem.[8] In Canada, a Canadian Appliance Manufacturers' Association study in 1971 showed that for a one year period, April 1970 to March 1971, automatic washers sold by leading manufacturers required 0.68 service calls for every unit installed during the first year of warranty protection. Almost 50% of these calls were "product fault" calls.

b. *Why the Present State of Affairs?*

A number of reasons have been advanced for the generally unsatisfactory warranty situation that obtains in the consumer marketplace. The Ford Motor Company, in a brief to the Senate Committee on Commerce, March 10, 1970,[9] pointed out in relation to autos (although the same considerations apply to many consumer "durables"), that the nation's car and truck population grew from 66 million in 1959 to 95 million in 1969. At the same time, vehicles became more complex and the range of accessories more extensive. Also, at the same time, the nation was being taxed by a soaring economy and the Vietnam war. Ford pointed out that there are three ingredients that are requisite to the creation of an adequate automotive service capability. The first is facilities, the second is tooling and equipment, and the third is skilled manpower. The pressures on the economy in this period created the most critical problems in the third sector — skilled manpower. This deficiency has an effect not only on the quality of service facilities available but also on quality control and other measures that can effectively be maintained in the factory. Ford pointed out that in their own case, between 1963 and 1969, there was an increase of 20% in Ford vehicles on the road, an increase of 24% in physical service capacity, but an increase of only 10% in the number of mechanics available to man these facilities. Ford thus argued for substantially increased public appropriations to vocational training programmes. It would clearly be irrational for the community to demand an increasing output of consumer products, an increasingly vigorous warranty

[7] *Hearings on S. 3074, op. cit.*, n. 5, at p. 250.
[8] *Ibid.*, at p. 23.
[9] *Ibid.*, at pp. 180 *et seq.*

regime and decline to provide the resources which in turn will provide the technicians that the community needs. Thus, the adequacy of existing vocational training programmes would seem to be a matter worthy of examination by concerned governments. This is underlined today when the demand for university graduates in many areas has become uncertain while the need for trained personnel in the service industries is undisputed and likely only to grow. A re-examination of educational priorities may, therefore, be called for.

Further reasons for the unsatisfactory warranty situation in the consumer market-place are given by dealers, particularly in the auto industry. They see themselves caught between very demanding consumers on the one hand requiring instant and flawless *service*, and on the other, very large manufacturers, with great market power, who are interested primarily in *sales*. Many dealers claim, for example, that they are compensated by manufacturers for warranty work at a lower scale than for ordinary retail service work, and that they are thus forced to do rushed jobs with junior mechanics to make the work pay. This claim is disputed by manufacturers, although in the auto industry there have been recent moves to review scales of compensation for warranty work. Dealers also claim that they are put under unreasonable pressure because of inadequate quality control measures in the factory which results in cars coming to them in a state which involves "remanufacturing" — "do-it-yourself kits" as some dealers told the F.T.C. This means that either the dealer must spend much more of his time on the pre-delivery inspection than he will be reimbursed for or he will do a shoddy pre-delivery inspection and risk subsequent warranty claims which impose new burdens on him.[10]

The argument that it is unreasonable to place the full force of warranty obligations on the dealer seems to have some force. Clearly it is in the consumer's interests to receive a defect-free car rather than simply be assured that if defects develop they will be fixed, because no matter how perfect a warranty scheme, the consumer will still be faced with (often unquantifiable) impositions on his resources of time and effort and convenience in having the warranty work done. The argument of Ford that the lack of trained personnel accounts for the inadequacy of quality control measures in the factory is not entirely convincing. If less money were to be spent on annual styling changes and more on developing a technology which would substantially reduce the margins of error in the basic manufacturing process, improvements could surely be achieved.

[10] See F.T.C., *Reports on Automobile Warranties*, (1969 and 1970).

Of course, fewer cars may then be needed, and some may question whether there is sufficient incentive to auto manufacturers to reorganise their priorities in this way. Perhaps the impact of more austere imports from the Continent and Japan may force a change of thinking on this issue.

c. *The Economics of Change*

The F.T.C. was so concerned about the issue of quality control that the basic recommendation of its study was that a *Quality Control Act* be enacted specifying with great precision the level of quality that must be attained in various components of a car. This mandatory, statutory warranty would be enforceable by individual consumers and also by a government agency such as the F.T.C. when it came to its notice, through subsequent testing, etc. (it was not envisaged that State inspectors would be present in the factory), that particular models of automobile did not comply with the prescribed standards. The F.T.C., in submissions to the Senate Committee on Commerce, estimated that, given adequate financial appropriations, it would take two years to develop appropriate standards.[11]

One may reasonably entertain reservations as to the practicality of this approach. Prescribing standards in the way apparently envisaged by the Commission would seem to create many of the same problems that arise in the case of direct public standard setting.[12] Different standards would have to be set for different categories of cars. There would be considerable potential debate arising simply on the threshold question of what category a given car should be placed in for purposes of the standards to be applied to it. Having established the categories, the standards themselves, as the whole experience in the standard-setting field indicates, would be a matter of enormous controversy. As new cars are developed, especially those serving different purposes from present cars, e.g., cars specially suited for urban commuter purposes, new standards would be required. This would be an immense task, and so far one has dealt only with cars.

While noting these reservations, it must still be acknowledged that from the consumer's point of view, it is better to get a product

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[11] *Hearings on S. 3074, op. cit.*, n. 5, at p. 179.

[12] The Chairman of the F.T.C. himself conceded that direct public standard setting in relation to quality, in the case of cars, would be "hideously expensive", *inter alia: ibid.*, at p. 179. See generally on problems of standard setting, Dr. Robert F. Legget, *Standards in Canada*, Information Canada, (Ottawa, 1970).

without defects than one which is defective but which he can have rectified (even at the manufacturer's expense). It must also be acknowledged that to start at the other end of the transaction and give the consumer increased warranty rights enforced, in practice, principally against the dealer in the first instance, is likely to increase the pressure on the latter when, through no particular fault of his own, he is unable to procure the personnel to handle the volume of work involved.

However, as the recent readjustments of compensation rates show, this pressure is sooner or later passed back to the manufacturer. No matter what market power is possessed by manufacturers, the fact of the matter is that they need retail outlets to sell their goods. If anti-trust laws prevent manufacturers setting up their own retail outlets (as U.S. anti-trust laws presently do), manufacturers are forced to offer terms to dealers which make entry into this sector of industry worthwhile to them. The Ford Motor Company pointed out in its brief to the Senate Committee on Commerce [13] that in 1969, their total expenditure on advertising was $150 million, the cost incurred to amortize the special tools that are required to produce its new models $325 million, and warranty expenses $300 million. With warranty expenses forming so large a portion of a company's operating expenditure, there is every incentive to the manufacturer to reduce them. If the possibility of reducing them by reducing the term of its warranty is foreclosed by competition or otherwise, and if the facts of life are that manufacturers need independent retail outlets in order to sell their products, the only way warranty costs can be reduced is by making a better product. It is true that on the Canadian scene, anti-trust laws have not prevented vertical integration of manufacturing and retailing stages in the distribution process to nearly the same extent as in the U.S., and indeed one of the principal complaints of independent auto dealers in Canada is that they are subject to improper competitive practices from "tame" dealerships owned or controlled by manufacturers who are able to view the profitability etc. of these dealerships against their total manufacturing and retailing operations. To prevent abuses of market power that may thus arise, consideration may need to be given to the development of an appropriate anti-trust policy in this regard. If this is not done, oligopolistic situations which exist at the manufacturing level (e.g., in the auto industry) will be re-created at the retailing level. Even if this can be avoided, there may be a case for an additional

[13] See *supra*, n. 9.

safeguard to prevent specific, "short-term" abuses of market-power which, while in the larger picture, may be capable of resolution by the market itself, can in the short term cause unfairness to a particular dealer. To this end, a provision such as section 2-302 of the U.S. *Uniform Commercial Code,* which enables a court to review unconscionable transactions in both a consumer and a commercial context, should be adopted in Canadian jurisdictions. It is worth noting that several members of the U.K. Law Commission, in its report on Exemption Clauses in Sales of Goods (1969), favoured following the American experience and allowing courts to review not only consumer transactions but commercial transactions as well.[14] On the other hand, little would seem to be gained by going further and attempting to prescribe the rates at which the dealer must be reimbursed by the manufacturer for warranty repairs, as some recent U.S. Warranty Bills, e.g., H.R. 10690 (1970)[15] before Congress have sought to do. The relationship between manufacturer and dealer is too complex to single out one aspect of their dealings alone for regulation. If warranty work was required to be reimbursed at normal retail rates one might find, for example, that manufacturers would reduce the profit margins allowed to dealers on the sale of new cars, on the ostensible grounds that, through the sale of these cars, dealers would in the future be assured of "captive" repair work at profitable rates.

On the assumption that competitive forces will, by and large, compel manufacturers to offer reasonable terms, including reasonable warranty reimbursement rates, to (independent) dealers, it would seem to follow that increased warranty costs resulting from increased levels of consumer protection are going to have to be passed back to the manufacturer. The prospect of increased costs of this kind may act as an added inducement to manufacturers to deal with the product quality problem directly through improved quality control measures rather than indirectly and less satisfactorily through warranty reimbursement. At some point, presumably, economies of scale enter the picture. For a dealer to deal with defects individually must, at some point, be more expensive ultimately for the manufacturer than if the latter through improved technology attacks the problem *en masse* on the production line.

Of course, one objection to this line of analysis may be that in a highly oligopolistic industry like the automobile industry, where

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[14] The Law Commission and the Scottish Law Commission, *Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act, 1893,* H.M.S.O., No. 24, (London, July 24, 1969), at pp. 34 *et seq.*

[15] See *infra,* p. 21.

also there is little cross-elasticity of demand between automobiles and other means of transport, increased warranty costs resulting from improved warranties will simply be passed straight back to the consumer in the form of higher prices for the product so that neither the manufacturer nor the dealer meets these costs, and no attempt will be made to improve the product. In this way, the volume of cars required by consumers would also be less threatened.

This argument raises complex and important issues that are beyond both the province of this article and the competence of this writer. However, it again serves to underline how complex the interrelationships are in a field such as that under inquiry and how sterile any approach is which ignores them.

On the oligopoly argument, however, one or two tentative thoughts can be offered. First, while it may be true that the *American* automobile industry is oligopolistic and not therefore in itself truly competitive, American consumers can turn elsewhere for their cars. The rapid growth in volume of imported cars is testimony to the fact that consumers are now doing just this. Therefore, to analyse the automobile market in America only in American terms mistakes the extent of the market and the extent of competitive forces operating in the market. Secondly, as our cities become more congested, and as public transportation improves, a real alternative to the use of the motor car may emerge, so that at some point consumers may feel it worthwhile to transfer their demand for cars to public transport. If this occurs, the automobile industry will be facing a form of competition from the public transport sector. This again may operate as an inducement to build a better, or at least a different, car. Finally, even if in every sense the American automobile industry is oligopolistic, and will remain so, many sectors of industry producing consumer products are not, and in these cases increased warranty costs resulting from improved warranty protection should, given a truly competitive market, create incentives to produce better products. In the case of the automobile industry (on the present hypothesis), the State may be compelled to develop an industrial strategy special to it. Even on the present hypothesis, and without a special industrial strategy, the possibility that all increased warranty costs may be passed on to consumers may still amount to a net benefit to them. Costs will be spread both over persons and over time. Consumers will, in effect, have been forced to buy an insurance policy against the contingency of defects materialising. The misfortune will have been spread around.

One concluding observation that should be made in this introduction to the topic of manufacturers' guarantees is this. A whole

variety of factors present today in the market-place account for the fact that a consumer's expectations about a product or service are not met. Only a composite attack on all these factors is likely to produce a reasonable result. To hang everything on some form of regulation of manufacturers' guarantees is to distort the nature of the problem and prejudice the formulation of viable and balanced solutions to it. For example, it is important that adequate private law redresses be available for deceptive advertising and sales practices (as under the recently proposed U.S. *Uniform Consumer Sales Practices Act*). The law of misrepresentation also requires reform so that a larger range of sales pitches at the point of sale will attract relief and so that a coherent range of remedies covering the present condition, warranty, representation hierarchy is available tailored to reflect the gravity of the impact of the seller's conduct on the buyer's expectations in each case. Moreover, in transactions between seller and buyer, the problem of contracting out of the law's implied terms needs to be resolved. In relation to manufacturers, a doctrine of strict product liability without privity is obviously called for in Canada. Finally, in relation to safety-related defects, a comprehensive system of public standard setting needs to be developed (as recommended by the U.S. *National Commission on Product Safety* in 1970). While it is not possible in this article to argue the case for these various proposals, the guarantee proposals that are here advanced are posited against a legal setting in which these other deficiencies in the law have also been met.

II. Framing Guarantee Proposals

a. *The Specific Elements of the Problem from the Consumer's Perspective.*

The problems besetting consumers in this area, in specific terms, seem to be reducible to these:

(1) Consumers, at whatever point of time they come to consult a guarantee, are often unable to comprehend clearly its terms. An interesting insight into this issue is provided by a consumer survey recently undertaken by Professor William W. Whitford in Wisconsin.[16] In his survey of 300 consumers who had bought consumer goods to which guarantees with disclaimer clauses applied, fewer than 10% said that the disclaimer clause was explained to

[16] *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, [1968] Wisconsin L.R. 83.

them at the time of purchase. When consumers in the survey were asked to read a typical disclaimer clause, fewer than 50% reported a generally accurate conception of the meaning of the disclaimer. About 25% in the sample flatly stated that they did not know what the disclaimer meant. These patterns were reinforced by a survey Professor Whitford made of all first year law students at Wisconsin. Students were presented with an automobile guarantee form containing common provisoes, exceptions and disclaimers, and then given a straightforward hypothetical personal injury situation to which they were required to apply the guarantee. Only 50% of the students demonstrated some awareness of the meaning of the guarantee in their answers. In Canada, a Canadian Appliance Manufacturers' Association study in 1968 asked 14 housewives to sit down and apply 10 typical major appliance warranties then in use in Canada to a variety of hypothetical, standard, situations, to test their capacity to understand the coverage and terms of the warranties. 40% of the answers were incorrect.

(2) Even if the terms of a guarantee are drafted clearly, the operation of the market process today is not conducive to the guarantee being projected, at or before the point of sale, as a major factor in a prudent shopping decision. Typically, the guarantee will be packed with the goods or be "buried" in an operation manual and will not be readily accessible until after the goods are delivered to the consumer's home. While consumers seem generally concerned with whether they are receiving a guarantee, the offering of guarantees is not competitive in the sense that the consumer will not easily be able to compare the precise benefits conferred by one guarantee with those conferred by that accompanying a competing product before he makes his shopping decision. Even if he was able to make these comparisons, the consumer would still be unable to compare the crucial factor of relative *performances* under the guarantees, i.e., how fully is each honoured? To the extent that guarantees are presently advertised, a consumer is often not much better informed. If product A is advertised as being accompanied by a one year guarantee, and product B by a five year guarantee, the consumer cannot rely on product B's guarantee being superior to that of product A. Product A's guarantee may be an all-inclusive one year guarantee, while product B's may be five year parts only and not labour. Moreover, again, the question of relative performance under the guarantees cannot be determined by their terms.

(3) Partly because of factors (1) and (2) and partly in addition to them (e.g., as a result of considerations such as market power in particular industries), guarantees, even where they are not

misleading or inaccessible, often do not provide acceptable minimum standards of product quality and after-sales service. Indeed, through disclaimer clauses etc. contained in them, guarantees often give a consumer less protection than he would have had under the general law in the absence of a guarantee.[17] This point invokes considerations similar to those usually relied on in the context of the case for non-exclusion of implied terms as to quality, and the doctrine of strict liability in tort providing compensation to third parties damaged as a consequence of the unmerchantability of a product. One of the arguments that can be advanced in the latter context for a doctrine of strict liability (including liability for economic loss) is that this could be a major instrument in the regulation of manufacturers' guarantees. The obligation of merchantability applying both as between immediate parties and as between remote parties would, in effect, operate to put a "floor" under every manufacturer's (or supplier's) guarantee. Whatever the guarantee provided, a supplier would be bound to live up to the minimum obligation to provide a merchantable product. The writer strongly favours this position. The potential impact of these more general proposals on the guarantee problem, of course, illustrates the desirability of a comprehensive, balanced attack on the problem of product quality.

(4) However reasonable the terms of a guarantee, the fact remains that in many cases a manufacturer or supplier does not live up to those terms. In other words, the problem has two faces: (a) how to ensure that reasonable obligations as to standards of quality and service are undertaken in a guarantee by the manufacturer; (b) how to ensure that these obligations, once reasonable, are properly observed. It is clear from evidence received by the F.T.C. and other investigators in this area that the problem of proper execution of guarantee obligations is one of the major causes of consumer unhappiness with manufacturers' guarantees.

b. *Possible Responses*

A number of broad policy options for legislation present themselves for consideration. It may be possible to prohibit certain forms of warranties or warranty practices by means of criminal

[17] See U.S. President's *Task Report on Appliance Warranties and Service*, (1969), at pp. 43 *et seq*; *Report of the Senate Committee on Commerce on S. 986, op. cit.*, n. 1, at pp. 8 and 9; the F.T.C., *Report on Automobile Warranties*, (1970), at p. 31. For a specific example of such a warranty, see the warranty of the American Automobile Manufacturer's Association in issue in *Henningsen* v. *Bloomfield Motors Inc.*, 161 A.2d 69 (1960, N.J. Sup. Ct.).

sanctions. Again, it may be possible to vest in a regulatory agency or government department power to approve warranty forms and to issue cease and desist orders, etc., when violations of administrative rules occur. Further, it may be possible for the law to attempt to make guarantee practices more competitive by a policy of proper disclosure. Additionally or alternatively, the law might underwrite all guarantees by imposing mandatory, minimum obligations. In the latter two cases, breach of guarantee obligations might only give affected consumers a private right of action and attract no public enforcement measures.

It is now intended to examine some specific legislative schemes, either existing or proposed, which reflect these various policy options, and attempt to evaluate their respective strengths and weaknesses as responses to the various elements of the guarantee problem outlined above.

An example of a proposed criminal law response to the problem is section 20(1)(c) of Bill C-256, the Canadian *Competition Bill*, 1971. This section provides:

> No person shall...
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> (c) make a representation to the public in a form that purports to be
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> (i) a warranty or guarantee of a commodity or service, or
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> (ii) a promise to replace, maintain or repair a commodity or any part thereof or to repeat or continue a service until it has achieved a specific result
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> if such form of purported warranty or guarantee or promise is misleading or if there is no reasonable prospect that it will be carried out.

While this provision is a useful addition to Federal legislation directed at misleading advertising, for a number of reasons it cannot by any means be regarded as a total answer to the guarantee problem. First, because it is a public law response, the general problem of effective enforcement arises. Will resources be available to enforce the provision widely? Experience suggests the contrary. After all, the F.T.C. has, for many years, had power to enjoin misleading advertising of guarantees, and indeed since 1960 has had in force specific guidelines dealing with misleading advertising of guarantees. Despite this, all the evidence of unsatisfactory practices in this area outlined earlier has continued to accumulate, if not escalate. Secondly, because a criminal sanction is, after all, an extreme sanction, the provision is likely to be narrowly construed, and in practice applied primarily to situations involving *dishonest* guarantee claims, and an appropriately high onus of proof demanded. Thirdly, on the very wording of the provision, it has a highly limited scope.

It applies only where the guarantee is "misleading" or where "there is no reasonable prospect that it will be carried out". However, as was pointed out earlier, many guarantee problems arise either out of the fact that a guarantee which is in no respect misleading may nevertheless simply not adopt acceptable minimum obligations as to product quality or service, or out of the fact that even where acceptable obligations are undertaken, these obligations are not subsequently performed. The reference in the provision to the case where there is no reasonable prospect that a guarantee will be carried out can only possibly strike at the most extreme (and indeed probably fraudulent) situations. In the typical case, e.g., the automobile warranty, some franchised dealers of the manufacturer will perform the guarantee, other dealers will not. Other dealers are likely to be spread all along the spectrum between the two extremes. Section 20 of the *Competition Bill* will not deal with this situation. Fourthly, criminal sanctions will not normally compensate affected consumers. It is true that section 55 of the *Competition Bill* contemplates damages actions, but relief is apparently conditioned upon of the commission of a criminal offence, e.g., under section 20. Moreover, section 55 may be of doubtful constitutional validity.

It is unlikely that any reformulation of section 20 could meet the burden of these limitations. The provision is a useful one, but substantial additional measures are required. It should also perhaps be pointed out here that deceptive advertising of guarantees would fall within the private law redresses provided for deceptive sales practice in Acts such as the U.S. *Uniform Deceptive Trade Practices Act* and more recently in the proposed *Uniform Consumer Sales Practices Act*. The adoption of similar legislation has frequently been advocated in Canada and is badly overdue.

Leaving the criminal law sphere, it is instructive to examine three Bills which were the subject of extensive U.S. Congressional hearings in 1970 and 1971. The Bills are interesting because of the wide divergences of approach that they reflect.

(i) H.R. 18056

H.R. 18056 was introduced into the House of Representatives by the Nixon Administration in 1970.[18]

This Bill has two broad thrusts: (a) the prohibition of deceptive advertising practices in relation to guarantees; and (b) the disclosure

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[18] *Warranties and Guaranties, Hearings Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce,* 91st Cong., 2nd Sess., Ser. No. 91-79 (1970).

in meaningful form of all relevant information as to the scope and operation of the guarantee in the guarantee form itself.

The first objective is sought to be attained by defining guarantee and warranty very broadly as "any express statement of guarantee or warranty, or any description, sample, model or any affirmation of fact or promise, whether in advertising or otherwise, made by the guarantor to the purchaser, which relates to consumer products or services and becomes part of the basis of the bargain, as to that description, sample, model, affirmation or promise." Expressions of opinion or commendation are excluded. "Consumer products" are defined as "goods that are normally used for personal, family, or household purposes and that actually cost the purchaser more than $25." "Services" are defined as meaning "repairs or other work actually costing more than $25 performed on consumer products." A deceptive guarantee is one which is false, fraudulent or misleading to a reasonable man exercising due care. The Bill goes on to provide that, unless excluded, a warranty that a consumer product is fit for the ordinary purposes for which such product is used shall be implied in every sale of a consumer product by a supplier. This term may be excluded by the use of words such as "as is" or "with all faults". However, if a supplier uses the term "warranty" or "guarantee" in advertising, labelling, point of sale material, or other representations concerning a consumer product or service, any attempted disclaimer of the statutory warranty of fitness for purpose is deemed to be a deceptive guarantee and of no effect.

It is an offence under the Bill for any supplier (a) to make any deceptive guarantee with respect to a consumer product or services, or (b) to fail to perform any obligation under the statutory warranty as to fitness where this exists. These offences under the Bill are also deemed to be unfair or deceptive practices within section 5 of the *Federal Trade Commission Act* and expose a supplier to the usual cease and desist order procedures under the latter Act or the injunctive proceedings which may be brought by the F.T.C. under the Bill itself in Federal District Courts. Where an injunction has been issued, or a cease and desist order becomes final (and conditional upon this), any consumer affected by the practice in question is given a right of action in damages. The Bill (section 18) makes it clear, however, that the consumer retains a right of original action in respect of breaches of implied warranties or other causes of action arising outside the Bill.

The second broad thrust of H.R. 18056 — meaningful disclosure of guarantee terms — takes the form of a broad regulation-making

power vested in the F.T.C. enabling the latter to make regulations providing that a guarantee:

(1) is expressed in simple and readily understood terms;

(2) clearly and conspicuously discloses the name and address of the guarantor and, where applicable, the name and address of any person or persons, or the identification of any class of persons authorized to perform the obligations set forth in the warranty or guarantee.

Regulations may provide, among other things, that the warranty or guarantee:

(1) describe the parts of the product which are covered by the warranty or guarantee;

(2) state the nature of the damage and defects which are covered by the warranty or guarantee;

(3) disclose the duration of any obligations under the warranty or guarantee;

(4) state the conditions, if any, which the person claiming under the warranty or guarantee must fulfill before the guarantor will perform his obligations;

(5) state the time at which and the manner in which the guarantor will perform his obligations;

(6) state the period of time within which, after notice of malfunction or defect, the guarantor shall repair, replace, or otherwise perform any obligations under the warranty or guarantee;

(7) disclose the characteristics or properties of the products, or parts thereof, that are not covered by the warranty or guarantee;

(8) not contain words or phrases which would mislead reasonable men as to the nature or scope of the warranty or guarantee;

(9) state the step-by-step procedure which the owner should take in order to obtain performance of any obligation under the warranty or guarantee;

(10) state any means available for quick informal settlement of any warranty or guarantee dispute.

Mr. James Lynn, General Counsel, Department of Commerce, in hearings before the Senate Committee on Commerce, justified the Bill in the following terms:

> We firmly believe that informative, accurate, clear and fairly written guarantees, backed up by guarantors who deliver what they promise are essential to our free market economy. Fair presentation of the guarantee prior to sale as well as full performance of obligations after sale are needed to facilitate value comparisons by consumers and promote competition in marketing and servicing. And it is our view that competition, if allowed to work, will cure existing problems connected with warranties.
>
> However, the Department opposes legislative solutions that would dictate to the manufacturer and the consumer the kind of warranty or guarantee protection that must be sold. We oppose the imposition by

> the Government of compulsory warranties. We think that it is a basic commercial right — of both buyer and seller — to freely and knowingly allocate the economic risks relating to the quality of goods.[19]

Thus, the essential thrust of the Administration's Bill is seen to be disclosure — the consumer is to be accurately informed of the terms of a guarantee so that he can make appropriate comparative shopping choices and secure the benefits of a more competitive market-place. The Bill effectively allows the parties to exclude or modify all substantive obligations as they desire.

How realistic is this approach? Mr. George Gordin Jr., Senior Attorney, National Consumer Law Center at Boston College Law School, in Senate Committee hearings put the objections well:

> I think, Mr. Chairman, there is a broad misconception about warranties and I think this is perpetuated by business spokesmen and others. It is that somehow the consumer bargains for the kind of warranty he gets, and they cite this as a principal reason for opposing the imposition of minimum standards for warranties.
>
> I think we heard that this morning from Mr. Lynn, who in effect reiterated what he stated at the January 20 hearing, when he said he was opposed to dictating the kinds of warranty protection that must be sold, because, he said, it is a basic commercial right of both the buyer and seller to freely and knowingly allocate the economic risk relating to the quality of the goods.
>
> I would ask you, Mr. Chairman, or anyone in this room, when the last time was when they had an opportunity to bargain, freely and knowingly, or in any other way, for the kind of warranty that they received.
>
> I think it is pure myth to suggest that consumers bargain for their warranties. There is no competition in warranty today. I don't really believe there ever has been. The only competition in warranty that most of us are familiar with was the so-called competition of the automobile manufacturers in warranties and we know from the reports of the Federal Trade Commission what in effect the consumers got for the so-called bargaining that was offered to them and the bargains that they supposedly received. These are contracts of adhesions, they are presented on a purely take-it-or-leave-it basis. You can't shop around for better bargains in warranties. The only difference is in language, it is not in the substance of a warranty.
>
> It seems to me that if people who say that there ought to be competition in warranty really mean what they say, then they ought to have no objection whatever if the statute that you are proposing here would say something to the effect that you cannot have any boiler plate language in warranties, you cannot have any prewritten warranty language in a warranty offer, because then clearly it is not bargained for.

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[19] *Hearings on S. 3074, op. cit.*, n. 5, at p. 35.

> They ought to be prepared to accept a statute that would require them to prove that warranties were bargained for. This at least would go along with the notion they offer of competition, it seems to me.[20]

This point was, in fact, conceded at various points by industry representatives during the hearings. For example, Mr. Winston H. Pickett, Associate Counsel, General Electric Co., and Chairman of the Legislation and Policy Subcommittee of the Consumer Issues Committee of the U.S. Chamber of Commerce, in an exchange with counsel assisting the Senate Committee said:

> *Mr. Pickett:* I have a very good respect for the consumer's perception. I think you can say a guarantee is the word which attracts his attention and if specifically explained will enable him to make his own judgment between your guarantee and mine.
>
> *Mr. Sutcliffe:* Will that be at the time of sale or will that be if in fact the thing malfunctions?
>
> *Mr. Pickett:* You raise a very difficult question. How do you get across contents of a guarantee prior to the time of sale?
>
> *Mr. Sutcliffe:* S. 3074 has provisions for making sure that the consumer is aware of the guarantee prior to the time of sale.
>
> *Mr. Pickett:* I think that is a very difficult problem to assure any consumer. For example, I don't know how you can guarantee at the retail level that every product that has a guarantee is read to the consumer prior to the time he buys it. That is a very troublesome administrative thing.
>
> Ideally, it would be wholly desirable, and that is why manufacturers try to hang them on the products that are displayed, that is why they run their guarantees in ads and the like.[21]

These views are reinforced by the survey undertaken by Professor Whitford [22] where it will be recalled that fewer than one in ten consumers had terms of guarantees explained to them at the time of purchase. Professor Whitford in his article expresses doubts as to whether, no matter how guarantees were to be re-worded, consumers would be likely ever to achieve a substantially different level of acquaintance with their terms at the time of sale. These doubts appear to reflect a realistic appreciation of the shopping process in the modern consumer market-place. First, many appliances etc. today are bought by mail-order, so that the fact that the guarantee might be hanging on a demonstration model in some distant showroom is irrelevant to this form of transaction. Secondly, even where the purchase is made in the shop, and even assuming that the guarantee is displayed with the product and not buried in an opera-

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[20] *Ibid.*, at pp. 239-240.
[21] *Ibid.*, at p. 139.
[22] *Supra*, n. 16.

tion manual etc., and even assuming that it is neither deceptive in its terms nor incomplete in its information on essential matters, the fact remains that a comparative shopping decision in relation to guarantees accompanying competing products is, for the average consumer, still likely to be an incredibly difficult exercise. Under the Administration's proposals, provided these points were set out clearly in the guarantee, it would be possible (e.g., in relation to a washing machine) for guarantee A to cover the machine for 3 years all parts but not labour with shipping charges back to the factory, in the event of the need for repair, to be paid by the consumer, guarantee B to cover the machine for 5 years *some* parts only (e.g., transmission, i.e., fewer parts than in guarantee *A*), and labour included, and transportation to be arranged by the manufacturer, guarantee C to cover all parts and labour in the event of malfunction during the first 6 months but, thereafter, for the next 18 months some parts only, and guarantee D to cover all parts and labour for 12 months, transportation for repair to be arranged by the manufacturer. Different combinations of coverages could be elaborated almost endlessly. The clear result is that even given the earlier assumptions (an accessible guarantee etc.), the average consumer has not the slightest hope of making meaningful comparisons. After all, the fact must be faced that a consumer is being asked to make a comparative evaluation of what are essentially legal documents. It is difficult enough for him to make comparative evaluations of competing products of a technical nature, although even there in day-to-day life, he is likely to have picked up some minimal appreciation of what functions the machine which he wants should perform. However, the exercise of evaluating competing legal documents which, under the Administration's proposals, can be as complex and qualified as the supplier desires, provided all the provisoes etc. are included, is one which is entirely foreigu to any competence the consumer is likely to possess. To argue that the Administration's Bill requires all relevant points to be set out clearly misses the point entirely. From the consumer's point of view, to allow provisoes, disclaimers, etc. without restriction is *necessarily* to enable the creation of documents which he will be unable to understand. If more than 50% of first-year law students at a major American law school are unable to understand existing automobile guarantee terms, one cannot be optimistic that any reformulation of these terms in "clearer" language is going to lift the fog significantly for the majority of lay consumers. Moreover, the assumption above has been that the consumer is at least going to try to read and comparatively evaluate competing guarantees. This assumption seriously mistakes the way consumer bargains are struck today.

As experience with standard form contracts at large has shown, a consumer's principal concern at the time of purchase is usually simply the subject matter of the contract and the price together with any verbal representations or assurances made to him by his seller. Collateral terms relating to credit, guarantees etc., embodied in printed documents are taken, for the most part, as read. Beyond the broad fact that credit is available, and a guarantee is offered, the consumer is usually unwilling or unable to go.

It might be argued that one way of ensuring that the importance of comparison shopping in relation to guarantees could more forcibly be brought to impinge on the consumer's consciousness is to require that they be advertised whenever the product which they accompany is advertised. Firstly, it should be noted that the Administration's Bill does not provide this, although one would have thought that if it was seriously intended to utilize free market forces to regulate guarantees, something in this direction would have been attempted. However, it would obviously be both impractical and pointless to require the full terms of a guarantee to be advertised each time that the product is advertised. The consumer would be just as confused by the combinations of coverages as in the example given above. On the other hand, as will be seen shortly when Bill S. 3074 is examined, it might be possible broadly to categorize guarantees by reference to statutory criteria and insist that at least the broad category of the guarantee be indicated whenever the product is advertised, e.g., "full" guarantee, "partial" guarantee, so that broad comparisons of respective coverages could be readily made from advertisements, and also indeed from the title to the guarantees themselves if these were to be required to be displayed with the products. This proposal will be discussed more fully shortly, but it is relevant to note at this point that both Administration spokesmen and industry representatives were vehemently opposed to it. The principal objection appears to have been that to require a supplier to describe his guarantee as a "partial guarantee" (e.g., because it related only to parts and not labour) was to suggest that it was something mediocre and second-class in nature and was really like asking a salesman to deprecate his own products. Moreover, it was argued that this proposal would operate unfairly against a small supplier who, because of inability to maintain a large service network, could only offer a parts guarantee and not labour. Thus, further concentrations of economic power would be encouraged. The answers to these objections seem to be clear. A guarantee providing a partial coverage *is* inferior to one providing full coverage. The only question is whether the con-

sumer is to be allowed to know this. If we believe in competition and bilaterally informed sellers *and* buyers, the answer is easy. Again, even if to force a small supplier to disclose that he cannot offer as extensive a guarantee as other suppliers may damage him, the question must still be asked, why is the consumer not entitled to the guarantee information. Competition is designed precisely to weed out efficient suppliers from less efficient suppliers. If this favours larger industrial units who through economies of scale, etc. can offer a better service, the consumer is at least entitled to know what his choices are. To describe this as an improper form of competition, as Administration spokesmen did, is impossible to follow. If in order to protect the smaller and less efficient supplier, one must deliberately withhold relevant information from the consumer, one has abandoned the very principle which the Administration's Bill purports to utilize.

(ii) H. R. 10690

This Bill, introduced at various times and by various members during the first and second sessions of the 91st Congress,[23] lies at the opposite end of the spectrum to the Administration's Bill.

H.R. 10690 starts by implying into every contract of sale by every manufacturer implied terms as to title and merchantability. Where the manufacturer has reason to know that goods are required for a particular purpose by the buyer, there is an implied warranty of fitness for purpose and this applies in some cases even though the buyer has not dealt directly with the manufacturer. In other cases, the retailer himself is subject to such a term. These terms are non-excludable except that where the buyer has examined the goods, there is no implied warranty with respect to defects which an examination ought to have readily revealed to him. These proposals are broadly in line with proposals referred to earlier in this article dealing with non-exclusion of implied terms. H.R. 10690 also requires certain information to be clearly stated in a guarantee. This information broadly follows that required in the Administration's Bill except, most significantly, it provides that the duration of a warranty must be "at least one year measured from the time of delivery of the product to the buyer except where in the opinion of the Commission [the F.T.C.] a warranty of greater or lesser duration would be more appropriate". The Bill also provides that

[23] *Hearings on H.R. 10690 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce,* 91st Cong., 2nd Sess., Ser. No. 9179 (1970).

a warranty is transferable during its lifetime to subsequent purchasers. The Bill then goes on to set out in detail the servicing obligations of a manufacturer:

> Sec. 9. The manufacturer of goods subject to this Act shall be prepared without cost or undue convenience and delay to the buyer to repair or replace merchandise which fails to meet the warranty standards established by this Act. In meeting this requirement, manufacturers shall —
>
> (a) establish service facilities of their own or designate service representatives in such quantity and location as the Commission shall deem appropriate, considering the cost of maintaining such facilities, the total sales volume of the manufacturer, the ease and frequency of repair of the product, its size, and other similar factors;
>
> (b) notify the buyer of the location of the nearest service facility;
>
> (c) supply promptly to their own or their agents' servicing centers all repair parts and components required for servicing of goods covered by the warranty;
>
> (d) provide without cost such technical manuals and other iuformation, including technical analysis and factory representatives, necessary for the prompt and satisfactory correction of all damaged and defective products;
>
> (e) develop procedures for servicing which will insure prompt repair or replacement of defective goods;
>
> (f) bear the entire cost of maintaining their own service facilities;
>
> (g) fully and promptly compensate their service representative for work done under the warranty in an amount equal to that which the servicing agent would receive for like service rendered to retail customers who are not entitled to warranty coverage, including such items as parts, service charges, labour charges, shipping and storage costs, overhead and a reasonable profit; and
>
> (h) establish a reserve fund and set aside such spare parts as, in the Commission's opinion, would be sufficient to meet the warranty obligations required by this Act even though the manufacturer were to go out of business or were to cease production of that product.

These provisions are followed by provisions requiring manufacturers to maintain detailed records of warranty claims, mode of settlement, etc., and to file public reports summarizing this information annually with the F.T.C. Violations of the Bill are deemed to be also violations of section 5 of the F.T.C. Act with the consequences, in terms of remedies, that that entails. Certain violations of the Bill are also made criminal penalties. Buyers are given civil remedies for damages for violations of the Bill without preconditions.

The principal thrust of H.R. 10690 is to provide a machinery, *via* the F.T.C., for public standards to be set for the terms of all guarantees. Earlier in this article, reference was made to some of the difficulties involved in setting minimum quality standards for goods. Precisely the same range of difficulties arise in respect of setting

minimum quality standards for guarantees. These are well set out by the Chairman of the F.T.C., Miles W. Kirkpatrick, in comments on the Bill to the House Committee:

> ...As H.R. 10690 is presently drafted, it contemplates in effect a full and complete supervision by the designated administration authority over all the warranties now being offered in the market-place. Although we have no firm estimate of the number of different products covered by warranties today nor of the number of manufacturers and sellers offering warranties with their products, it is not unreasonable to assume that product warranties presently being offered number well in to the thousands.
>
> In our judgment, effective and meaningful administration of the bill's provisions would require the administering body to examine the text of every warranty offered in the market-place in order to check its conformity to the Act's provisions. Further, the administering authority will have to examine the manufacturers' and retailers' performance under their warranties and will also have to collect data on the reasonable life expectancy of each warranted product, the propensity of the product to require servicing and other data relevant to the question of whether the duration of the warranty should be lengthened or shortened. Finally, the administering agency will have to make inspections and investigations as are necessary to enable it to determine whether adequate service facilities and price inventories are being maintained in order to provide the promised performance under the warranty as set forth in Section 9 of the bill.[24]

It will readily be apparent from these remarks that the State would be embarking upon an enormously expensive and complex exercise if it sought to prescribe the terms of every guarantee, or even only guarantees in those sectors of the market in which the highest incidence of complaints arise. Moreover, if the State were to be willing to embark upon this type of exercise, there would seem to be virtues in proceeding directly to the prescription of quality standards for goods, rather than guarantees, and thus eliminate the problems at source. However, either exercise, outside the realm of personal safety where different considerations apply and in relation to which experience in the setting of effective public standards has not been such as to justify venturing further afield with any confidence,[25] would not seem to be a practical possibility in Canada. Moreover, it is submitted that the extreme measures contemplated by H.R. 10690 are unnecessary if one attacks all aspects of the product quality problem,[26] which objective this article assumes as one of its initial premises. H.R. 10690 seems to make the mistake

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[24] *Ibid.*, at p. 60.

[25] See e.g., *Report of the U.S. National Commission on Product Safety*, (1970).

[26] See *supra*, p. 10.

of attempting to solve the whole product quality problem through the medium of regulation of manufacturers' guarantees. This distorts the nature of the problem and leads to harsh and unworkable measures.

(iii) S. 3074

This Bill, *The Consumer Products Warranty and Guaranty Bill*, was passed unanimously by the U.S. Senate in 1970. It has since been stalled in House Committees. It was subsequently reintroduced in the Senate as S. 986, which, in addition, contains sweeping additions to the powers of the F.T.C. in the administration of this and other consumer legislation. S. 986 has been the subject of further Congressional Hearings, and at the time of writing has been passed by the Senate but not the House.[27]

S. 3074 is thus important because of the widespread support it has received from legislators and also from the U.S. Federal Trade Commission in Congressional hearings.

The Bill relates to consumer products (not services) costing more than $5. It requires, as did the previous two Bills, disclosure of certain basic information in all written warranties. The Bill then proceeds to introduce its most important requirement, the designation of warranties. If a warranty incorporates the Federal minimum standards for a warranty set out in the Bill, it must be conspicuously designated a "full [period of duration] warranty". Where these standards are not met, a warranty is to be designated a "partial warranty". The Federal minimum standards, in essence, require that a supplier must repair, or replace if repair is not possible or cannot be timely made, any malfunctioning or defective warranted product within a reasonable time, and without charge.

A consumer product within the Bill is permitted to carry both full and partial warranties (successively), and service contracts in addition to or in lieu of warranties are also permitted.

Where any express warranty against defect or malfunction is given, disclaimer of implied warranties is prohibited except that implied warranties may be limited in duration to the duration of an express warranty of reasonable duration.

The F.T.C. or the Attorney-General is empowered to apply to the Court for injunctive relief to restrain the issuance of deceptive warranties. A consumer's private law remedies for breach of either

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[27] For *Hearings on S. 3074*, see *supra*, nn. 7 and 18; for hearings on S. 986, see *Hearings on S. 986 Before the Consumer Subcomm. of the Comm. on Commerce*, 92nd Cong., 1st Sess., Ser. No. 92-8 (1971).

express or implied warranties are not affected by the Bill, although provision is made for recovery of costs, including attorney's fees in successful suits. Under S. 986, the F.T.C. is given wide rule-making power to define prohibited deceptive practices, and also power to obtain preliminary injunctions from the courts pending cease and desist proceedings on the part of the Commission. Both these proposed additions to the F.T.C.'s powers, particularly the former expanding the Commission's rule-making power, have proved very controversial.

While the provisions of S. 3074 are by no means free from criticism, the Bill suggests some interesting possibilities and, in the development of the proposals which follow, it is used as the major point of reference.

III. Some Guarantee Proposals

a. *Coverage of the Legislation*

S. 3074 is confined in its coverage to consumer products costing more than $5. Other bills before Congress have used other monetary floors, e.g., $10, and $25. Earlier versions of S. 3074 had confined its warranty provisions to "mechanical, electrical or thermal" parts of a consumer product. None of the three Bills discussed in this article apply their disclosure provisions in relation to written guarantees to guarantees of service. All three Bills deem affirmations of fact or promises made by a supplier to a purchaser in respect of consumers' products or services to be express warranties. These variations raise important questions.

First, there does not appear to be any justification in applying disclosure provisions etc. only to guarantees of products costing above a certain figure. If a supplier chooses to offer a guarantee, he presumably does so because he considers that there are competitive advantages to be gained in so doing, and he ought therefore to be made to accept the basic obligation of providing something which is meaningful and not misleading. It is very important to note that S. 3074 does not require a supplier to issue a warranty at all, nor if a warranty is issued does the Bill stipulate any minimum period of duration. This approch is *prima facie* desirable in that it is consistent with the enhancement of the integrity of the free market process. Only in so far as a supplier chooses to issue a warranty is he bound to meet the standards of disclosure imposed by the Bill. As will be argued later, there may be a justification, in framing requirements for giving consumers notice of their legal rights

in this and other regards, for imposing requirements in relation to products and services proportionate to the incidence of complaints in particular commodity or service areas. But the substantive regulations to be applied should apply to all suppliers who choose to issue guarantees.

Whether minimum standards for guarantees should relate only to some components of a product, e.g., electrical, mechanical or thermal parts is doubtful. Fine problems of definition would inevitably arise, and in any event even if a part clearly does not fall within these categories, a defect in it may equally render the whole unit non-operational. For example, a leaking tub in a washing machine may render the whole machine unusable, although strictly speaking the tub is not an electric, etc. part. The clearest form of coverage is that already used in the better guarantees: a product is simply guaranteed against "defects in materials and workmanship" for a stipulated period. The law is very familiar with this kind of concept where, under the *Sale of Goods Acts*, courts must assess the total operability of a product, whatever the source of the defect in the particular case. S. 3074 in its guidelines correctly adopts this approach.

Should warranty legislation cover services? Clearly it should. We are becoming in many areas a service-intensive society and it is very common today to find suppliers of services, e.g., educational services, health services, television and appliance repairs, automobile overhauls, offering guarantees in relation to their services. As a minimum, the information requirements imposed by S. 3074 should, with suitable modifications, be extended to services. Indeed, one bill before Congress, H.R. 13390 (1970), provides for this.[28] The question of what guidelines should be framed for guarantees of services will be considered shortly.

It will be recalled that all three Bills discussed concern themselves with affirmations of fact or promise, deeming these to be express warranties. S. 3074 applies this provision to products and services, although the information to be provided and the provisions in S. 3074 pertaining to the designation of warranties by reference to statutory guidelines apply only to products. It is probably unnecessary to attempt to deal with non-written "warranties" in this context. "Affirmations of fact or promise" can more effectively be dealt with in the context of both civil law redresses for

[28] *Hearings on H.R. 13390 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce*, 91st Cong., 2nd Sess., Ser. No. 91-79 (1970).

deceptive practices and the law of misrepresentation. One of the criticisms that has been directed at these provisions of S. 3074 is that they appear to allow a retailer's salesman to make express warranties which override a manufacturer's written warranty and bind the latter to statements by a person over whom he has no control. Under the law relating to deceptive practices and misrepresentation, this issue will fall to be resolved on ordinary principles of contract, agency and vicarious liability. No policy factors seem to be present which call for the application of different principles. Legislation concerning itself with the problem of written guarantees which unquestionably do emanate from a manufacturer cannot easily, within the same framework of regulation, deal also with the problem of oral misrepresentations or misleading advertisements which may emanate from any of a number of sources in the distribution process and may relate to any of a variety of issues. The legislation presently under consideration should confine itself to warranties by way of written instrument. The short but clear definition of warranty in section 20 of the Canadian *Competition Bill*, subject to an amendment making clear that the definition refers only to written promises, seems generally appropriate to define the scope of legislation in the present context in so far as it relates to warranties of products or services.

However, two substantive additions need to be made to the definition. First, service contracts, which are becoming quite common, should be put on the same footing as warranties. If this is not done, there will be a temptation for some elements in industry to convert their warranties into service contracts (perhaps for a token consideration) and place themselves beyond the ambit of the legislation. Secondly, and more importantly, warranties of residential buildings should be included within the legislation. These are often mass-produced today and marketed in much the same way as goods, they are often accompanied by written guarantees of the workmanship and materials, they involve a far larger investment for the consumer than either goods or services, and complaints to Box 99 of the Department of Consumer and Corporate Affairs in Ottawa indicate that they are a growing source of complaint on the part of consumers.[29] For all these reasons, homes, garages, outbuildings, etc., built or supplied in a residential context and accompanied by a written guarantee can and should be

[29] See *Annual Report of the Department of Consumer and Corporate Affairs, Consumer Service and Information Branch*, (1970).

brought within the ambit of legislation regulating guarantees. Again, as a minimum, provisions setting out informational requirements on important issues pertaining to the operation of building guarantees should be developed following the pattern of provisions on this question in the context of products and services.

b. *The Requirements of the Legislation*

Legislation should have three broad aims.

(i) The Prevention of Deceptive Practices in Relation to Guarantees

Adoption of an Act modelled on the U.S. *Uniform Deceptive Practices Act* or the proposed U.S. *Consumer Sales Practices Act* and reform of the law of misrepresentation in the civil sphere, together with provisions such as section 20 of the *Competition Bill* in the criminal sphere, should adequately take care of this problem.

(ii) The Disclosure of Basic Guarantee Information to the Consumer

It can scarcely be a matter of debate that a guarantee should adequately inform a consumer as to the scope and operation of the guarantee. This requirement is common to all Bills presently before Congress, including that of the Administration. The specific requirements of these Bills are closely similar and seem entirely adequate models for legislation in Canada, provided that products, services, and residential buildings are all included.

The writer is highly sceptical that this information will have more than a minimal impact on the consumer at, or before, the time of purchase, but when his purchase gives him trouble, he should at least at that point of time be able to ascertain the application of the guarantee to the situation with maximum ease and accuracy.

(iii) The Stimulation of Competition in the Offering of Guarantees

This is by far the most difficult issue to meet in the area of guarantees. The importance of the issue is highlighted by the position the writer has taken on two of the three U.S. Bills considered. In relation to H.R. 10690, he argued that detailed prescription of the terms of all guarantees, including the extent of their coverage, and their duration, involved standard-setting exercises of a magnitude that rendered the proposals impractical. If the prescription of minimum standards is abandoned as the operative philosophy

in the area, one is thrown back on the discipline of market forces to control the quality of guarantee terms. On the other hand, it was argued, by way of objection to the Administration's Bill H.R. 18056, that simple disclosure in a guarantee of vital information, without more, would achieve almost nothing towards the end of making the provision of guarantees more competitive. It was pointed out that often guarantees were not accessible at the point of sale, that if they were accessible, they were unlikely to be read, that if they were read, comparative evaluation of competing guarantees, with the complex combination of coverages and exemptions possible, would be almost impossible.

Having argued that standard setting is impractical, and that consumers are unlikely to read guarantees at the point of sale, no matter how clearly worded, what other possibilities are there for regulating the quality of guarantees?

The essential premises adopted here are these: consumers generally do regard the provision of guarantee coverage as important when they shop for products, etc. However, for reasons which have already been advanced, the prospect of consumers making detailed pre-purchase evaluations of guarantees accompanying competing products is slight. The one proposition that consumers are capable of fastening on to quickly and easily is the *duration* of the guarantee. More than this, in the popular conception of a guarantee, when an item is advertised, or stated, to be guaranteed for a particular period, the assumption commonly made by consumers is that if the product goes wrong during this period through no fault of theirs, it will be fixed free of charge. The consumer tends to assume *prima facie* that this element is common to *all* guarantees. He is well aware that some guarantees are for longer periods than others. That fact is generally readily ascertained i.e., is it a 6 month guarantee, or is it a 12 month guarantee? What is not readily ascertainable is whether a particular guarantee derogates from the *prima facie* assumption that *within the duration of the guarantee,* any defect which develops will be fixed free of charge. Because this fact cannot be readily ascertained, the consumer tends usually to proceed with the transaction with this assumption undisturbed, and only when trouble develops is he likely to find that his assumption was false. This, of course, is a major cause of consumer disappointment with guarantees.

These two very important points — first, that a consumer is capable of, and interested in, distinguishing e.g. a 6 month guarantee from a 12 month guarantee, i.e., is concerned about the issue of duration of the period for which he is protected, and secondly,

that he tends to assume that, beyond differences in duration, all guarantees within their respective periods of duration enable him to have defects fixed without cost to himself — are borne out by authoritative testimony before Congressional Committees. Mr. Casper Weinberger, then Chairman of the F.T.C., in evidence before the Senate Committee on S. 3074, said:

> *Mr. Weinberger.* Frequently, there is no deception in the legal sense because if the full proposed contract had been gone through carefully by the purchaser or his counsel, they would have learned precisely the limits of the protection that is offered. This is not practical and ordinarily is not done. With the term such as "guarantee", that conveys a certain set of rights to the average person; then, I think if that term is going to be used, it is essential, as I say, that the reasonable expectations of the purchaser be carried out.
>
> *Senator Moss.* The normal purchaser sees that big word "guarantee" and he never stops to read the fine print?
>
> *Mr. Weinberger.* That is too often the case.[30]

Also, Professor Whitford, in the second of two articles describing the results of an automobile warranty study done in Wisconsin, found in his survey of new car buyers that 64% of all buyers were correct in their impressions of the duration of their warranties, while in relation to various hypothetical repairs required to their cars, accuracy of impression of warranty coverage ranged from 34% to 50%.[31]

It is submitted that if one accepts the premises from which this discussion has been proceeding, the objectives of legislation in this context become clear: (1) to bring strongly to the mind of the consumer before the time of purchase the one fact about guarantees that he can quickly and readily appreciate — their duration; (2) while allowing differences in the duration of competing guarantees, to encourage as far as possible the development of common obligations on the part of manufacturers which are in accord with the popular conception of a guarantee. In this way, competitive forces in the market-place will be able to focus exclusively on the *duration* of competing guarantees as a means of evaluating their comparative quality. The problem of ensuring that guarantees which are comparable in their terms (other than duration) are comparably honoured is for the moment left aside.

At this point, it is instructive to return to S. 3074. One of the principal thrusts of the Bill is to ensure that guarantees satisfying

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[30] *Hearings on S. 3074, op. cit.*, n. 5, at p. 12.

[31] *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, [1968] Wisconsin L.R. 1006, at p. 1055.

the popular conception of guarantees are clearly differentiated from guarantees offering a less complete coverage. This is sought to be achieved by the designation "full [x] month guarantee" in the case of the all-inclusive guarantee and the designation "partial [x] month guarantee" in the case of a guarantee something less than all-inclusive.

These provisions of S. 3074 warrant a number of comments.

First, it is curious that the Bill, having taken the initial step of categorising gnarantees in broad and hopefully meaningful terms, does not go on to propose measures that would ensure that these broad comparative characterizations are, in particular cases, brought forcibly to the mind of the consumer before he makes his shopping choice. An obvious measure would be to require that guarantees, conspicuously designated in the above terms, be prominently displayed on or with products themselves on display for sale. This, however, would not in itself go nearly far enough. As has been pointed out earlier, many sales today do not take place in the shop, mail order transactions being a prime example. Also, many consumers by the time they come to visit a shop, particularly in the case of major consumer purchases, are to a large extent already psychologically committed to a particular purchase. In order to inject the guarantee forcibly into a consumer's decision-making processes, relevant information about competing guarantee coverages must reach him at an earlier point of time than this. These factors lead clearly to the conclusion that essential guarantee information must be included in all advertisements (including e.g., mail order catalogues) of products which are accompanied by gnarantees.

Applying the thesis developed earlier, the only information that should be mandatory is the broad designation of the guarantee and its duration, e.g., "Full [x] months guarantee". This kind of information is already often advertised. The principal effect of mandatory advertising of guarantee designation and duration would simply be to standardise, in readily comparable form, this information. Moreover, such a requirement would be merely an extension of a principle presently operating in all Canadian jurisdictions in relation to advertisements of consumer credit terms. Where terms are advertised, certain essential information, particularly the effective rate of interest, must be included so that comparisons with competing sources of credit are facilitated. It is, of course, true that a retailer offering credit facilities is not obliged, under existing legislation, to advertise any credit terms at all when he advertises goods in respect of which credit is in fact available. But

one of the principal reasons for this limitation is that a credit supplier must be free to fix his credit terms by reference to the particular needs and credit worthiness of each customer, and it would not be practicable to insist that credit suppliers set out in their advertisement the criteria which govern these variables. However, these variables do not exist in the case of guarantees. Different guarantees are not offered to different customers. It would be perfectly practicable to insist on essential guarantee information (designation and duration or some other unit of usage, such as mileage) to be included in all advertisements of products carrying guarantees. Guarantee legislation which seeks to utilize competitive forces to control the quality of guarantee terms cannot hope to achieve this end without taking the two steps of requiring basic guarantee information to be conspicuously displayed on the product at the point of sale and (more importantly) of requiring the same information to be included in all advertisements of the product.

A second major reservation about the proposals contained in S. 3074 is that they provide insufficient "incentives" to use the all-inclusive or "full" guarantee form. This is a serious shortcoming of the Bill. While the Bill categorises all guarantees into two broad classes, "full" and "partial", the position remains that all of the existing combinations of coverages and exemptions will still be possible and will in many cases render the designations meaningless and indeed misleading. For example, product A carries a gnarantee desiguated "full 6 months guarantee", product B carries a guarantee designated "partial 5 year guarantee". Let us suppose that the product in question is a washing machine and the partial gnarantee covers only the transmission, parts only, not labour, and requires that the machine be shipped back to the factory at the customer's expense for repair. If we continue to apply our assumption that a consumer typically will not look past the broad issue of duration and investigate the fine print, the designation may serve only to confuse him. If, however, it puts him on notice that further investigation may be desirable, and he does read the fine print, the process of comparative evaluation is in fact as difficult as ever it was. It is a central tenet of the writer's position that the *only* basis of comparison that the typical consumer will be able to make work is one where the *only* comparison he has to make is *duration* (or some other umit of usage, such as mileage) and all other factors can be taken as given.

One might then ask whether this line of reasoning leads us to the conclusion that any form of guarantee other than a full guarantee should be prohibited. This conclusion is not, in fact,

inevitable, nor indeed would it be in the best interests of consumers. The fact of the matter is that with many products, some components, quite naturally, wear out faster than others. It is perfectly proper, and in the consumer's interest, that a supplier should, for example, be able to offer a warranty which covers for an initial period the whole product but for a subsequent period covers only limited components which can reasonably be expected to last longer than those excluded. However, this example itself points the way to the solution to the problem. If a supplier cares to offer a guarantee with a product, etc., with all the connotations that that commonly has for the consumer, it seems reasonable to assume, and expect of the supplier, that for *some initial period* following the provision of the product, building or service, it will operate as an entire unit without defect or malfunction. The converse of this proposition is that notwithstanding the furnishing of a guarantee, the supplier reserves to himself the right to have some components in the product break down (probably rendering the whole product inoperative) immediately following the sale, without responsibility on his part for the malfunction. A consumer receiving a product carrying a guarantee is entitled to assume that the product in its entirety, i.e., as a unit, will function effectively for *some* period after the sale. It might then be argued, however, that the most that this analysis adds up to is that guarantee for some initial period after the sale of the product etc. should cover all components, but nevertheless that labour charges should be excludable at the supplier's choice, subject to him being prepared to suffer the designation "partial" for his guarantee. There are several answers to this argument. First, the popular consumer conception of a guarantee is that he is going to receive *cost free* service from the product for the duration of the guarantee. The inclusion of the word "partial" is unlikely in many cases to shake that assumption at least for the initial period of life of the product etc. Secondly, to allow exclusion of liability for labour charges, in the initial period of the guarantee at least, is to seriously compromise the possibility of achieving a situation where competitive forces can really work to control the quality of guarantee, i.e. by focusing only on duration, all other factors being taken as given. Thirdly, the non-excludable implied term as to merchantability already adopted in several Canadian jurisdictions even now recognises the right of a consumer to the use of a product free of defect costs for a period after purchase. To insist on a full guarantee for this period is only to render more explicit what this term as to merchantability already largely provides for in the case of an immediate seller.

A provision to the following effect is therefore proposed: Guarantees covering any initial period of life of a product, building or service which are "partial" guarantees only, and notwithstanding that they are designated as such, should be deemed "deceptive" within civil legislation dealing with deceptive practices, e.g., a *Uniform Deceptive Trade Practices Act*, when such legislation, hopefully, is adopted in Canada, and possibly also within criminal legislation such as the *Competition Bill*, unless the supplier can show that *(a)* the derogations from the standards of a "full" guarantee were reasonable having regard to conditions in the relevant industry and to the commercial setting of the transaction and *(b)* the derogations from the statutory standards were specifically pointed out to, and formally acknowledged by, the consumer at the time of sale.

These proposals while retaining some measure of flexibility create strong incentives in favour of a supplier offering a full guarantee for some period of the initial life of a product, etc. It may be objected that what will happen is that a supplier will offer a trivial, e.g., three weeks, full warranty followed by a partial warranty of some kind. But because of the proposals relating to the display of guarantees at the point of sale, and mandatory advertising of essential guarantee information, this is unlikely to prove a very attractive expedient. For a supplier to advertise only a three weeks full guarantee is likely to be construed by a consumer as meaning that after three weeks the supplier acknowledges that almost anything might happen to his product. It should be remarked here that the ends of these proposals would be adequately served if the mandatory advertising requirement were to be applied only to guarantees or service contracts covering any *initial* period of life of a product, etc.

On the key question of how much *cost-free* life can a consumer expect to get out of competing products, i.e., how long is each supplier prepared to stand behind the *entire* product, it is submitted that the proposals set out above will provide the consumer with a meaningful answer. That simplicity of warranty is achievable even in relation to complex consumer products is illustrated by the 1972 American Motors warranty which in its entirety reads as follows:

1972 New Car Guarantee

When you buy a new 1972 car from an American Motors dealer, American Motors (Canada) Limited guarantees to you that, except for tires, it will pay for the repair/replacement of any part it supplies that is defective in material or workmanship.

> This guarantee is good for 12 months from the date the car is first used or 12,000 miles, whichever comes first. All we require is that the car be properly maintained and cared for under normal use and service in the 50 United States or Canada and that guaranteed repairs or replacements be made by an American Motors dealer.
>
> This guarantee is, to the extent not prohibited by law, in lieu of all other guarantees or warranties, express, implied or implied in law, of American Motors (Canada) Limited or others, including implied warranties of merchantability or fitness for a particular purpose.

The only feature of this warranty about which there could be serious objection is the disclaimer clause which would infringe several of the obligations which would be imposed on manufacturers if a doctrine of strict products liability (including liability for economic loss) were to be adopted in Canada. At negligible additional cost to the manufacturer, this clause could, and should, be deleted altogether. Very short, simple notes accompany this warranty and explain that warranty service is available from any authorized dealer for any owner who moves, or travels with the car, that warranty coverage extends to subsequent owners on payment of a nominal "identification" fee ($2). Also, for overnight warranty work, a "loaner car" is provided free by participating dealers. Finally, procedures for registering complaints are outlined, including free telephone tolls to the manufacturer.

c. *The Statutory Guidelines*

This brings us to one last general issue in relation to regulating the terms of guarantees. What are to be the norms by which guarantees are classified "full" or "partial"?

The provisions of S. 3074 are broadly satisfactory in this regard, because the guidelines in the Bill give effect to the popular consumer conception of a guarantee.

The duties of a supplier warranting consumer products in writing are stated in S. 3074 to be:

> (1) to repair, or replace if repair is not possible or cannot be timely made, any malfunctioning or defective warranted product;
>
> (2) within a reasonable time; and
>
> (3) without charge.

The expression "malfunctioning or defective", or variations of it, is quite common in existing guarantees and seems a satisfactory operative concept for the legislation. In this case, the argument for maintaining a unity of concept throughout the products liability area by invoking, perhaps, the concept of "unmerchantability" would seem to be outweighed by the consideration that a supplier under

a "full" warranty is commonly expected by a consumer to fix squeaks, rattles and defects in finish (and often does acknowledge an obligation to attempt to fix these), although these may not render the product unfit for its usual purpose, i.e., unmerchantable. "Malfunctioning or defective" seem equally viable concepts in the case of warranties of buildings and services.

The duty of a supplier when this state of affairs arises is "to repair, or replace if repair is not possible or cannot be timely made".[32] The term "repair" is defined as including replacement, and "replacement" is defined as including the refunding of the actual purchase price less reasonable depreciation based upon actual use if the warrantor is unable to effect replacement and repair is not possible or cannot be timely made, or if the person guaranteed is willing to accept such refund in lieu of repair or replacement. If services are to be brought within the one set of standards, "repair" would have to include "rectify", and "depreciation" would need to include "compensation for use" or "net benefits obtained".

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[32] Curiously, the enforceability at common law of an express warranty offered by a manufacturer has not been clearly ruled on by an Anglo-Canadian court. However, the privity problem would seem readily overcome by recourse to the doctrine of collateral contract: *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484 (C.A.); *Shanklin Pier Ltd.* v. *Detel Products Ltd.*, [1951] 2 K.B. 854; *Ranger* v. *Herbert A. Watts (Quebec) Ltd.*, (1970), 10 D.L.R. (3d) 395 (Ont. H.C.), aff'd (1971), 20 D.L.R. (3d) 65 (Ont. C.A.). In a specific guarantee context, see *Haley* v. *Ford Motor Co.*, (1966), 57 D.L.R. (2d) 15 (Alta. A.D.), aff'd (1967), 60 W.W.R. 497 (Sup. Ct.), and *Duhamel* v. *Lanrol Motors (1960) Ltd. and Chrysler Canada Ltd.*, Quebec, Superior Court, May 5, 1971, in C.C.H. Canadian Sales and Credit Law Guide, Vol. I, par. 21-027 *et seq.*, although there were special factors present in the first case and the second case comes from a civil law jurisdiction. American courts have long held express manufacturers' warranties enforceable: see e.g., *Henningsen* v. *Bloomfield Motors Inc.*, 161 A.2d 69 (1960, N.J. Sup. Ct.) and *Seely* v. *White Motors Co.*, 403 P.2d 145 (1965, Cal. S.C.), and authorities discussed therein. An express warranty would seem equally enforceable even where the consumer does not discover it until some point of time subsequent to the purchase, provided he assumed at the time of purchase that he was buying guaranteed goods: see G.H. Treitel, *The Law of Contract*, 3rd. ed., (Stevens and Sons: London 1970), at p. 66. Under s. 58 (8) of the Manitoba *Consumer Protection Act*, R.S.M. 1970, c. C200, as amended 1971, c. 36, s. 8 and s. 62 of the Quebec *Consumer Protection Act 1971*, certain claims made by a merchant about his goods are deemed to be express contractual warranties. However, it seems clear from the wording of both provisions that they apply only to claims made by a dealer to a customer in the course of advertisements, negotiations, etc. leading to a contract of sale and thus not to claims by a manufacturer.

Where repair is not possible or it is expected that it cannot be timely made, the supplier has an option to replace the goods or refund the consumer his purchase money. One would have thought that here the option should clearly rest with the purchaser. Where the supplier concedes that repair is not possible, or cannot be timely made, or where this has not in fact been done within the prescribed delays, the consumer should be given the option of having the goods replaced or getting his money back. The latter is tantamount to cancellation of the transaction and the prospect of it should act as a spur to the supplier to effect timely repairs. Moreover, if the consumer has bought a "lemon" or a product with a design weakness, getting a replacement of the same model may not be much consolation to him. The supplier is required to repair, etc., "within a reasonable time". It is obviously difficult to define what this may be as it will be different from one product line to another, one kind of defect to another, and may be affected by considerations such as labour strikes which interfere with the provision of the necessary parts or services. However, it would seem useful to set some outside limit in order to give the requirement some precision and "bite". For example, in Saskatchewan, *The Agricultural Implements Act, 1968* [33] in sales of new farm implements requires a prescribed contract of sale form to be used which contains detailed clauses setting out precise time delays governing the repair obligations of both the vendor and the general provincial distributor in the event of the supply of a defective product. This legislation dates back to depression days. Its very detailed warranty rules do not seem to have created problems, and the buyer's right of rejection and refund after the stated time delays has not elicited massive complaints of injustice by suppliers, notwithstanding that the goods in issue are often big-ticket items. How widely the Act has been invoked by consumers, on the other hand, is not known.

The Saskatchewan rules are probably too detailed to be emulated closely in a set of general guidelines but it would seem to be reasonable and practicable to state that a supplier is under a duty to repair "within a reasonable time but not exceeding [e.g. 30 days]". This proposal closely follows provisions in the *Song-Beverly Consumer Warranty Act* [34] passed in California in March, 1971, where a 30 day repair period is imposed. While in relation to the duties

[33] 17 Eliz. II, S.S. 1968, c. 1, as amended.

[34] Chap. 1333, California Stats., 1971, enacted as Title 1.7, Part IV, Division III, Cal. Civil Code.

of replacement or refund, the example of goods has been taken, the same concepts seem readily applicable to services. If a defective service cannot be rectified within a reasonable time not exceeding 30 days, the consumer should have the option of having the entire service re-executed, or as is likely to prove more desirable from his point of view, demand a refund of money paid, less a reasonable allowance for net benefits obtained. In the case of residential buildings, replacement of something which in its particulars may well be unique does not seem an apposite concept. However, a refund of money paid less compensation for use does seem appropriate where the building cannot be made defect-free within the prescribed delay. It must be recalled that a non-excludable implied obligation of merchantability in all consumer transactions both as between seller and buyer,[35] and as between manufacturer and buyer if a doctrine of strict products liability were to be adopted in Canada, would in itself largely produce this consequence. Repair, replacement or refund should be the only remedies arising under a written warranty. Actions for personal injuries or loss of profits etc. should be left to be resolved under general legal principles governing the obligation of a seller and a manufacturer to supply a merchantable product.

The third duty of the supplier under S. 3074 is to repair etc., "without charge". The Bill goes on to state that the warrantor shall not impose any duty other than notification (of the need for repair) upon any person as a condition of securing repair unless the warrantor can demonstrate that such a duty is reasonable. In determining whether such additional duties are reasonable, the Bill requires that "the magnitude of the economic burden necessarily imposed upon the warrantor (including costs passed on to the purchaser) shall be weighed against the magnitude of the burdens of inconvenience and expense necessarily imposed upon the person guaranteed". This clause is altogether too cumbersome and vague to be acceptable. From hearings on the Bill it becomes evident that the purpose of the provision is to try to meet the problem of transportation charges where a product requires repair. The problem arises in this way. To require a supplier to pick up from the consumer for repair very small items which could easily be transported back by the consumer himself to the point of sale

[35] See Ontario, s. 29(a), *The Consumer Protection Act, 1966*, S.O. 1966, c. 23, as amended 1971, c. 23, s. 2; Manitoba, s. 58, *The Consumer Protection Act*, R.S.M. 1970, c. C200; British Columbia, s. 21A, *Sale of Goods Act*, R.S.B.C. 1960, c. 344, as amended 1971, c. 52, s. 1.

creates excessive expense for the supplier which will only have to be passed on to all his customers so that all suffer in order to meet the unreasonable demands of some of their number. On the other hand, always to require a consumer to bring or send the goods back to the point of sale or, worse, to the manufacturer, would often create quite unreasonable burdens on him, particularly with large items. A case of this cited in Congressional hearings was that of a well-known grand piano manufacturer who in his guarantees required the customer to ship the piano back to the factory at his own expense in order to have any repair effected.[36]

If this problem is the object of this provision in S. 3074, the Bill would be better advised to proceed directly to the question. First, it seems reasonable that in the case of items that can easily be brought back by the consumer personally to the point of sale (*not* to the manufacturer's premises), or can be mailed to the manufacturer, by means of the ordinary post, or where the manufacturer does not provide service facilities in the province, to the retailer, then in these circumstances, the supplier should not be placed under an obligation to arrange for transportation or meet transportation charges. Similarly, if the consumer has moved away from the place at which he made the initial purchase and is not within a similar distance of another service facility of the supplier, he should be required to meet transportation costs. In all other cases, i.e., where the goods are large or the supplier is remote, it would seem reasonable to place this burden on the supplier. These criteria are, of course, too crude in their present form to be adopted as such as statutory standards, but nevertheless the policy objectives seem clear and their incorporation into statutory standards not beyond the range of legislation.[37]

Two other preconditions to warranty work commonly imposed by manufacturers but not included in S. 3074 should be mentioned. One relates to scheduled maintenance work during the period of the warranty. Sometimes it is provided that this work must be done by the selling dealer (at the consumer's expense). Provided that the consumer does follow regular maintenance procedures and can produce reasonable proof of this, the statutory "full" guarantee norms should not permit a dealer or manufacturer to "tie" a consumer to him for this work. This is anti-competitive and cannot be justified on any objective business grounds. Often also, guarantee clauses pertaining to maintenance requirements go on to provide

[36] *Hearings on S. 3074, op. cit.*, n. 5, at pp. 261-262.

[37] *Cf.* the *Song-Beverley Consumer Warranty Act, op. cit.*, n. 34.

that, in the event of the consumer failing to observe prescribed maintenance schedules, the whole warranty is voided. This clause is altogether too draconian to be acceptable in a guarantee purporting to meet the statutory "full" guarantee norms. If a consumer fails to change the engine oil in his car, this should not disqualify him from having a defective rear wheel bearing rectified under warranty. At most, failure to observe prescribed maintenance schedules should disqualify a consumer only from warranty protection in relation to those parts of a product that may possibly be affected by his default. The statutory norms should permit a "maintenance" precondition to warranty performance only to this extent.

The second precondition invariably imposed by manufacturers is that the warranty work must be undertaken by one of the manufacturer's authorized dealers. In theory, such a requirement is anti-competitive, but in this case, objective business considerations, such as the need for the manufacturer to supervise the quality and cost of warranty work, in the interests both of himself and of consumers generally, who may have to bear a share of any over-all increase in warranty costs, favour permitting this precondition.

There are several other matters which are not presently covered at all by the S. 3074 standards but which ought to be included. The first is the transferability of warranties. If a supplier has warranted a product for a particular period, it would seem of no consequence to him who owns the product during this period. A warranty has an economic value and it should be possible for a buyer, who has after-all paid a consideration for it, to realise it by charging for it on a subsequent sale. Also, in the case where A buys a product as a gift for B, there is no reason whatever why B should be prevented from enforcing the warranty. Many warranties today are transferable but this practice should be translated into statutory standards defining full warranties. Mr. Miles W. Kirkpatrick, Chairman of the F.T.C., so recommended in hearings before the House of Representatives Committee on Interstate and Foreign Commerce in 1970.[38] This position is also in line with proposals for a doctrine of strict products liability to third parties where such a doctrine includes liability for economic loss.

Another matter that should be dealt with is the problem of the owner of warranted goods who moves locales, or when travelling with his goods encounters problems normally covered by the

[38] *Warranties and Guaranties, Hearings Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce*, 91st Cong., 2nd Sess., Ser. No. 91-79 (1970), at p. 72.

warranty. Again, best warranty practice today permits him to have repairs made in these cases at any dealer authorized by the manufacturer of the product to undertake warranty work. Subject to the rules on transportation charges suggested above, the statutory norms for full guarantees should embody these rights.

Another deficiency in the S. 3074 standards is that they appear only to make the person actually issuing the guarantee liable on it. But as Mr. Kirkpatrick pointed out in evidence,[39] often retailers hold out the manufacturer's guarantee as an inducement to the consumer. Moreover, in many cases, the manufacturer may be located at a considerable distance from the point of sale, and may indeed export from another country. In either case, he will not be readily accessible to the consumer. Finally, there is an ineluctable and perfectly reasonable tendency on the part of the consumer to look to the much more tangible person who actually sold him the product for satisfaction if the product proves unsatisfactory. In many cases, he will in fact be the person designated or authorised by the manufacturer to provide the warranty service. Many existing warranties already make both the manufacturer and retailer legally liable under the guarantee. If legislation defining "full" guarantees is to embody best guarantee practice, then this principle of joint and several liability ought to be adopted.

In complying with the foregoing statutory standards, a supplier ought to be permitted in his warranty to spell out in a detailed way how he intends to apply the standards. Without in any way binding a court by his "interpretation" of the standards, he should nevertheless be allowed, for example, to state what work on a product he will not regard as coming within the category of "defects" (e.g., particular routine maintenance matters).

One final matter in relation to S. 3074, although it does not strictly go to the question of statutory standards, is the provision in the Bill pertaining to disclaimer of warranties. Implied warranties can be limited to the duration of express warranties of reasonable duration. This provision is curious. On the necessary assumption that terms implied by law are by nature reasonable, it is difficult to see what point is served by allowing them to be limited to the duration of express terms of reasonable duration. In both cases, a court will have to decide what is reasonable. In this article, the writer has referred to the need for the law to underwrite consumer transactions at least to the extent of requiring a supplier of goods and services to measure up to a minimum obli-

[39] *Ibid.*, at p. 61.

gation of supplying something which is merchantable. Proposals for the non-exclusion of the implied term as to merchantability in contracts of sale and the introduction of a doctrine of strict products liability already recognize such a need. To the extent that the present provision in S. 3074 may enable the supplier to derogate from these minimum obligations, it is undesirable.[40] However, one concession that could properly be made in this context is to require a consumer, faced with defects in a product rendering it unmerchantable, to allow the manufacturer or his dealer the prescribed delays to attempt to rectify the defects. It may be recalled that under the general law relating to the implied term as to merchantability in contracts of sale, unmerchantability, under the rule in *Jackson* v. *Rotax Motor and Cycle Co.*,[41] gives the consumer an immediate right of rescission. However, in the full guarantee situation, where the manufacturer or his dealer must necessarily have a repair facility, and has in the guarantee informed the consumer of this, and what steps have to be taken to utilize this facility, it seems reasonable to expect the consumer to give the supplier a limited opportunity to repair the goods before rescinding the contract.

Two issues remain to be examined in relation to warranties:

(a) how is a consumer to be informed of his rights;

(b) how are these rights to be enforced?

IV. Informing a Consumer of his Legal Rights

All the rights in the world are of no avail to a consumer if he never comes to learn of them. Much well-meaning legislation in the

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[40] It may be argued that to retain a minimum "floor" in guarantee obligations reflected in the requirement of merchantability is to adopt a form of public standard setting, a general policy which was rejected earlier in this article. However, firstly, it is always much easier to set standards *a posteriori* in particular cases than *a priori* in all possible cases. Secondly, even if public standards were attempted to be set, it is most unlikely that it would prove feasible to act in all sectors, which would leave a need for a general, residual principle. Thirdly, the concept of merchantability is a very well-known one in the law and a large body of judicial experience involving interpretations of it is available to be drawn on. Obviously, detailed *a priori* public standards more precisely communicate to a consumer what he is entitled to expect by way of minimum quality than merchantability, but it is doubtful whether the advantages of this added clarity justify the considerable costs involved in securing it.

[41] [1910] 2 K.B. 397 (C.A.); see also, *I.B.M. Ltd.* v. *Shcherban*, [1925] 1 D.L.R. 864 (Sask. C.A.).

past has failed in its purpose because its intended beneficiaries never knew of its existence. An Act of Parliament is not everybody's idea of a *vademecum.*

In relation to all rights which a consumer may have in relation to unsatisfactory merchandise, including statutory warranty rights, it should be possible, in one very short brochure or pamphlet drawn up not by lawyers alone, but by lawyers in consultation with mass communications experts, to summarize these rights in a simple, summary, colloquial form, together with the means of their enforcement, so that at least a consumer would be put on notice of possible claims and told whom to approach for further assistance.

It is envisaged that such a pamphlet would, in the first instance, be the subject of a mass mailing by the State, much as was done recently by the Federal Minister of Health and Welfare in his pamphlet on comparative drug prices, which was posted out with family allowance cheques. Subsequent to this, particularly in relation to big-ticket consumer items and items occasioning a high incidence of consumer complaints, legislation could provide a regulation-making power which would enable regulations to require the suppliers of these items to furnish each consumer with a copy of the advice brochure at the time of sale.

The cost of this in relation to smaller items, even if accompanied by a guarantee, would probably not be justified. The cost may be both disproportionate to the amount involved in the transaction and disproportionate to any real prospects of meaningful recovery by the consumer. Obviously, a strongly pragmatic approach should dictate where the emphasis here is to lie.

V. Enforcement of a Consumer's Rights

The plight of a consumer in relation to the enforcement of warranty rights and other rights is well-known. The writer has argued at length elsewhere [42] that at least three major innovations are called for if a real impact is to be made on this problem:

(a) an enlargement of the Small Claims Court concept;

(b) an enlargement of the concept of voluntary mediation by Commissioners or Registrars of Consumer Affairs to provide for a system of trial by correspondence by expert committee;

(c) the introduction of the class action procedure.

A system of trial by correspondence by expert committee, modelled on that presently in force in Sweden, and administered

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[42] *Private Law Remedies for Misleading Advertising,* (1972), 22 U. of Toronto L.J. 1, at pp. 11 *et seq.*

by Provincial Consumer Protection Bureaus, would seem particularly apt to deal with most warranty complaints. While similar, it is clearly preferable to the grievance-solving procedures presently offered by some manufacturers because the credibility of the latter can never be put beyond doubt. A manufacturer should not be prevented from setting up an informal complaints procedure, but use of it should not be permitted to be made a precondition for invoking state-provided adjudicatory procedures.[43]

An additional measure that might be taken is to require Commissioners of Consumer Affairs who mediate complaints to report to Parliament at least annually, setting out the names of firms against whom any complaints have been received, the number of complaints, and the manner generally in which they were settled. There are few more effective sanctions for business than adverse publicity. Moreover, the consumer is entitled to know which firms his fellow consumers have found it unsatisfactory to deal with. In Australia, for a number of years, the Victorian Government's Consumer Council has adopted this procedure, and it has proved very salutary. The argument from business that this procedure transgresses principles of natural justice by creating potential prejudice while denying a proper hearing of complaints will at least be partly met if a trader who wishes to contest a complaint has the opportunity of a determination by an independent specialist committee as envisaged above.

VI. Conclusion

The warranty proposals developed in this article are intentionally of a relatively simple and straightforward nature, and should require a minimum of administrative effort both in their implementation and in their continuing operation. Given the introduction of imaginative private law enforcement procedures, there is every ground for believing that these measures would go far to meeting the problems which are prevalent in the warranty area today. Their avoidance of complex public law administrative arrangements, even if at the cost of some ideal form of comprehensiveness or effectiveness that more detailed measures might theoretically possess, should meet any arguments of excessive expense, inflexibility or State-involvement in the market-place which some warranty proposals that have been advanced legitimately attract.

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[43] These reforms are discussed in much more detail in the article noted above, n. 42, and will not be re-canvassed here.