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IMPLIED WARRANTY CLAIMS UNDER THE MAGNUSON-MOSS WARRANTY ACT: RESOLVING FIFTY YEARS OF UNCERTAINTY

Stephen E. Friedman

Abstract
This Article addresses whether Congress intended for consumers to bring implied warranty claims on consumer products under the Magnuson-Moss Warranty Act in all instances or only when a defective product is covered by a written warranty. The question, unresolved almost fifty years after the Act’s passage, is of great practical importance because consumers who bring claims under the Act are eligible for attorneys’ fees and other potential advantages not available to plaintiffs bringing warranty claims under state law. This Article analyzes the two current approaches courts have taken to address the issue: a broad approach where consumers can bring a claim for any implied warranty, and a narrow approach where courts only permit an implied warranty claim under the Act where a written warranty is offered. This Article concludes that neither is consistent with the Act’s language and purposes, and proposes a different approach. Courts should permit implied warranty claims under the Act only for consumer products covered by written warranties but should do so without regard to which supplier in the distribution chain gave the warranty. This approach would provide more consumer protection than the current predominant approach while also respecting the central importance of written warranties to the Act.

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I. INTRODUCTION

We are nearing the fiftieth birthday of the Magnuson-Moss Warranty Act ("the Act"), which was signed into law on January 4, 1975.¹ The Act was described at the time as "one of the most significant pieces of consumer legislation" ever passed by Congress.² After almost half a century, however, we still lack clarity on an important issue relating to implied warranties and the Act.

The Magnuson-Moss Warranty Act does not require a supplier³ to offer a written warranty on a consumer product, but when a supplier chooses to do so there are significant consequences.⁴ The Act calls for clear disclosure of the written warranty terms and requires written warranties to provide meaningful protection for consumers.⁵ With respect to implied warranties, "[o]f particular significance is the basic floor of warranty protection" established by the Act when a written warranty is offered.⁶ The Act ensures this floor of protection by prohibiting a supplier from disclaiming implied warranties when the supplier offers a written warranty or service contract on a consumer product.⁷

The unanswered question this Article addresses is whether a consumer can bring an action under the Act for breach of a state law

³ "Supplier" is the relevant term used in the Act and is defined broadly as "any person engaged in the business of making a consumer product directly or indirectly available to consumers." Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 101(4), 15 U.S.C. § 2301(4).
⁴ See infra Part III (describing the operation of the Act).
implied warranty (i.e., the implied warranty of merchantability\(^8\) or the implied warranty of fitness for a particular purpose\(^9\) provided for in the Uniform Commercial Code) if there is no written warranty. The Act expressly provides consumers a private right of action for damages for a failure to comply with a written warranty, an implied warranty, or a service contract.\(^{10}\) What is not clear, even after nearly half a century, is whether a consumer can bring an action under the Act for breach of any implied warranty on a consumer product or whether the consumer can bring such an action only against a supplier who offers a written warranty or service contract. In other words, when the Act provides a right of action for failure to comply with an implied warranty, is it referring to any implied warranty on a consumer product or referring only to the implied warranties that the Act makes a fixed and non-excludable part of a consumer’s warranty rights when a supplier offers a written warranty or service contract?

The issue is significant. A consumer gains substantial potential benefits by bringing a claim under the Magnuson-Moss Warranty Act. One of the most important of these is that, unlike a state law plaintiff, a consumer who prevails in a claim under the Act is eligible for an award of attorneys’ fees.\(^{11}\)

Courts have developed two main approaches to implied warranty claims under the Act. In the first approach, a consumer can bring a claim for any implied warranty on a consumer product under the Act regardless of whether a written warranty or service contract was involved.\(^{12}\) Because this approach brings an enormous swath of implied warranty claims with the scope of the Act, I will refer to it as “the broad approach.”

Several courts have rejected the broad approach and developed a narrower one. These courts permit an implied warranty claim under the Act only when a written warranty is offered.\(^{13}\) Further, these courts permit a consumer to bring a claim under the Act only against the supplier who gave the written warranty and no other supplier in

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11. See infra notes 59–60 and accompanying text.
Because this approach significantly limits the scope of implied warranty claims that can be brought under the Act, it can be referred to as “the narrow approach.” This approach has become predominant, though not clearly so, in recent years. That neither approach has been fully accepted after nearly fifty years is the consequence of a badly drafted statute, an unenlightening legislative history, and a subsequent lack of congressional interest in clarifying the matter.

This Article rejects the two current approaches as inconsistent with the Act and its legislative history. It argues that courts should adopt a different approach to dealing with implied warranty claims under the Act. The proposed approach adopts the narrow approach’s focus on the necessity of a written warranty but does so in a less stringent fashion. In this approach, the focus is on whether the consumer product is covered by a written warranty and not on which supplier in the distribution chain gave the warranty. A consumer could sue a retailer of a consumer product even if that retailer did not offer a written warranty so long as the consumer product was covered by a written warranty from the manufacturer.

While it might be tempting to call this the “middle approach,” that would be misleading. This approach does not lie midway between the two current approaches. Instead, it accepts the core facet of the narrow approach that a written warranty or service contract is an essential requirement of an implied warranty claim under the Act. However, this approach does not require that the supplier being sued have offered that written warranty. The key is that the consumer product involved is covered by a written warranty or service contract, not that a particular supplier being sued offered such a warranty or service contract. This approach focuses on the consumer’s expectations related to the consumer product as opposed to a consumer’s understanding about the technicalities of the chain of distribution. It thus

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15. This assumes that the retailer has not chosen to properly disclaim the relevant implied warranty. If the retailer did not offer a written warranty, it would have every right to do so. The number of retailers selling new consumer products in an “as-is” fashion is probably not large. See, e.g., Bolom v. Brunswick Corp., 453 F. Supp. 3d 1206, 1227 (D. Minn. 2020) (“Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’ . . . .”).
provides a greater measure of protection than the narrow approach while respecting the primacy of written warranties in the Act’s enforcement scheme. This Article will refer to this approach as the “narrow-plus approach.”

The Article proceeds as follows. Part II provides some background on the Act. Part III presents an overview of the Act, with particular emphasis on the sections most relevant to this Article. Part IV addresses the current unsettled status of the issue in the courts. Part V focuses on aspects of the language and legislative history of the Magnuson-Moss Warranty Act to demonstrate serious deficiencies with the two current approaches and to argue that the narrow-plus approach is better supported by the language and purposes of the Act than either of the other two approaches.

II. BACKGROUND OF THE MAGNUSON-MOSS WARRANTY ACT

The Magnuson-Moss Warranty Act was Congress’ response to several concerns.16 The decades prior to the introduction of the legislation had been marked by an explosive growth in the availability of consumer products. That growth had been accompanied by “a growing concern of the American consumer with the quality and durability of many of those products.”17

Legislation was needed to deal with written warranties on consumer products that had “confused and misled the American consumers”18 and to “make warranties understandable to consumers.”19 A key goal of the legislation was to enhance consumer understanding of the terms of written warranties, as “[t]here [was] a great need to generate consumer understanding by clearly and conspicuously disclosing the terms and conditions of the warranty and by telling the

19. Id.
consumer what to do if his guaranteed product becomes defective or malfunctions.”

A second motivation for Congress was the need to ensure minimum warranty protection for consumers receiving written warranties. Legislation was necessary to make sure that the basic protection of an implied warranty arising under state law could not be stripped away through a written warranty. Of particular concern was the widespread practice at the time of suppliers issuing a limited written warranty “while simultaneously disclaiming implied warranties . . . .” Consumers were realizing too late that the impressive-looking written warranties they had been given “with the filigree border bearing the bold caption ‘Warranty’ or ‘Guarantee’ [were] often of no greater worth than the paper [they were] printed on.” Such written warranties often operated to disclaim the implied warranties of merchantability and fitness for a particular purpose, leaving consumers with little meaningful protection. An old saying described this state of affairs: “The bold print giveth and the fine print taketh away.”

Thus, there was a need to prohibit written warranties from disclaiming implied warranties to ensure a baseline of warranty protection when a written warranty was offered.

A third purpose of the legislation was to ensure warranty performance. Even when the consumer understood the terms of the written warranty and there was no disclaimer, the consumer still faced the problem of warrantors who simply did not “live up to the promises” they made in those warranties. The legislation was intended to ensure performance by providing for reasonable attorneys’ fees for successful plaintiffs, thus making court action feasible. Making court actions more likely was also hoped to encourage the development by suppliers of “workable informal dispute settlement procedures for the expeditious settlement of consumer complaints.”

Fourth, and finally, legislation was needed to enhance product reliability. Legislation that standardized and clarified warranty terms would enable consumers to effectively comparison shop for more reliable consumer products. The establishment of a minimum standard for “full” written warranties would help inform consumers which

20. Id. at 7.
21. Id.
23. Id.
25. See id. at 7–8.
warrantors were willing to stand behind their products, and warrantors offering such full warranties would be incentivized to improve product quality.\textsuperscript{26}

The next Part of the Article describes how the Act addresses those needs.

III. Overview of the Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty Act does not apply to all transactions. It applies only when consumer products are at issue.\textsuperscript{27} The Act defines consumer products as “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . . .”\textsuperscript{28}

The Act does not require that any consumer product be warranted.\textsuperscript{29} However, when a supplier does give a written warranty on a consumer product, several important consequences are triggered under the Act. Many of these consequences relate to full and clear disclosure of a written warranty’s terms.\textsuperscript{30} The Act lays out Congress’ reasons for these disclosure requirements, which are “to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products[.]”\textsuperscript{31}

To effectuate those purposes, the Act requires warrantors who offer written warranties to “fully and conspicuously disclose in simple and readily understood language the terms and conditions of [the written] warranty” to the extent required by the Federal Trade Commission (FTC).\textsuperscript{32} The Act identifies possible items for disclosure\textsuperscript{33} and the FTC has promulgated regulations to effectuate those disclosures.\textsuperscript{34} Those FTC regulations require disclosure of nine specified terms in a single document,\textsuperscript{35} including a clear description of what is covered

\textsuperscript{26} See id. at 8.
\textsuperscript{28} Id. § 2301(1).
\textsuperscript{29} See id. § 2302(b)(2).
\textsuperscript{30} See id. § 2302(a).
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} See id. § 2302(a)(1)–(13).
\textsuperscript{34} See 16 C.F.R. § 701.3 (2015). The FTC has also promulgated a full set of rules, regulations, statements, and interpretations to effectuate the Act. See 16 C.F.R. §§ 700.1–.12 (2015).
\textsuperscript{35} See 16 C.F.R. § 701.3(a)(1)–(9) (setting forth items for disclosure).
and excluded by the warranty\textsuperscript{36} and "[a] statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty[]."\textsuperscript{37} The Act also directs the FTC to prescribe rules to ensure that any written warranty terms are made available to the consumer before the sale of the consumer product.\textsuperscript{38}

The Act divides written warranties into two classes. It requires suppliers who offer written warranties to designate their written warranties as either "full" or "limited" and to state the warranty’s duration.\textsuperscript{39} This requirement enables a consumer to quickly determine whether the warranty falls into the more desirable "full" warranty category or the less desirable "limited" warranty category and to comparison shop accordingly based on that designation and the warranty’s stated duration.

Section 108 of the Act ensures a basic level of warranty protection by requiring that any state law implied warranties remain part of the protections a consumer receives with a written warranty.\textsuperscript{40} The section prohibits any supplier who either offers a written warranty or enters into a service contract with a consumer from disclaiming any implied warranties.\textsuperscript{41} Efforts to do so are "ineffective for purposes of [the Act] and State law."\textsuperscript{42} As a result, when a written warranty is offered (or a qualifying service contract is provided), the implied warranties that arise under state law become fixed as part of the warranty protections and are not subject to the usual rules on disclaimers.\textsuperscript{43} These implied warranties become a baseline protection for a consumer receiving a written warranty or service contract on a consumer product.

The statute also sets forth additional minimum requirements for any written warranty the supplier designates as "full." A warrantor offering such a warranty must remedy a defective or non-conforming consumer product without charge and within a reasonable amount of time.\textsuperscript{44} A full warranty may not limit the duration of any implied

\begin{itemize}
\item \textsuperscript{36} See id. § 701.3(a)(2).
\item \textsuperscript{37} Id. § 701.3(a)(3).
\item \textsuperscript{38} See 15 U.S.C. § 2302(b)(1)(A). The FTC has done so. See 16 C.F.R. § 702.3(b)(1)(A)–(D).
\item \textsuperscript{39} See 15 U.S.C. § 2303(a).
\item \textsuperscript{40} See id. § 2308(a).
\item \textsuperscript{41} See id.
\item \textsuperscript{42} Id. § 2308(c).
\item \textsuperscript{43} See U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM’N 2022) (providing for disclaimer of implied warranties of merchantability and fitness for a particular purpose).
\item \textsuperscript{44} See 15 U.S.C. § 2304(a)(1).
\end{itemize}
warranty on the consumer product and it may only limit or exclude consequential damages for breach of warranty if the relevant language "conspicuously appears on the face of the warranty." Further, a warrantor offering a full warranty must permit a consumer to elect a refund or replacement for a defective or malfunctioning part or product after a "reasonable number" of failed efforts to fix the problem. As a result, a written warranty, particularly one designated as a full warranty, must provide meaningful, specified protections for the consumer.

Section 110 of the Act, like section 108, is particularly significant for this Article. Section 110 provides the Act's enforcement mechanisms. Section 110 is also one of two sections (the other being section 102) that provides an explicit statement of Congressional intent. Section 110(a) begins by declaring it was congressional policy "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms." Section 110(a) includes provisions related to such informal dispute settlement procedures. It calls on the FTC to prescribe rules setting forth the minimum requirements for these procedures. Section 110(a) also provides that a warrantor who creates an appropriate dispute settlement procedure can require a consumer to first resort to that procedure before bringing a court action if the warrantor includes such a requirement in its written warranty.

Section 110 also addresses the government's power to enforce provisions of the Act. Section 110(b) makes violations of the Act an unfair method of competition for purposes of government enforcement. Section 110(c) provides for federal court jurisdiction for government actions to restrain warrantors from making deceptive warranties on consumer products or for failure to comply with requirements under the Act.

Section 110(d) turns to private rights of action, and this provision is at the heart of the question this Article addresses. Section 110(d)
provides that, subject to first proceeding with any qualifying dispute resolution process established by the warrantor and after allowing the warrantor to cure any defect, a “consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief” under the Act.\textsuperscript{53} The Act defines “consumer” as a buyer of any consumer product, any person to whom the product is transferred during its warranty period, or anyone else entitled by the terms of the warranty or State law to enforce the warranty obligations.\textsuperscript{54}

Section 110(d) also sets forth some important benefits to bringing a claim under the Act as opposed to bringing a state law claim for the same breach. A consumer can bring an action under the Act in state court but can also bring a claim in federal district court in certain circumstances when diversity jurisdiction would not provide a basis for federal jurisdiction.\textsuperscript{55} A claim under the Act may also avoid some of the privity issues a state law plaintiff might encounter. The Act appears to authorize an action by a “consumer” against a “supplier.”\textsuperscript{56} The term “consumer” is, as just noted, quite broad as is the definition of “supplier.”\textsuperscript{57} The scope of these definitions creates the potential for actions under the Act that could not be brought under state warranty law due to privity concerns.\textsuperscript{58} Section 110(d) also includes a potentially much more significant benefit. A consumer who prevails in an action brought under the Act may, at the discretion of the court, be allowed costs and expenses.\textsuperscript{59} Importantly, those costs and expenses

\textsuperscript{53} Id. § 2310(d)(1).

\textsuperscript{54} See id. § 2301(3).

\textsuperscript{55} See id. § 2310(d)(1)(B). The requirements for federal court jurisdiction are set forth in the statute. See id. § 2310(d)(3).

\textsuperscript{56} See id. § 2310(d)(1).

\textsuperscript{57} Compare id. § 2301(3) (defining “consumer”) with id. § 2301(4) (defining “supplier”). “Supplier” is the relevant term used in the Act and is defined broadly as “any person engaged in the business of making a consumer product directly or indirectly available to consumers.” Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 101(4), 15 U.S.C. § 2301(4).

\textsuperscript{58} Whether and to what extent the provisions of the Act impact state law privity rules is beyond the scope of this Article but has been well addressed elsewhere. See, e.g., Janet W. Steverson, The Unfulfilled Promise of the Magnuson-Moss Warranty Act, 18 LEWIS & CLARK L. REV. 155, 183–91 (2014).

include attorneys’ fees.\(^{60}\) This is a crucial benefit not available to a plaintiff bringing an implied warranty claim under state law.

IV. JUDICIAL EFFORTS TO RESOLVE THE QUESTION

Caselaw is thin on the question of whether the implied warranties referred to in the private right of action created in section 110(d) are all implied warranties or only the implied warranties described earlier in the Act. Few cases directly discuss the question, and no clear consensus has emerged, though the narrow approach appears to be slightly ascendant.

A 1980 opinion from a federal district court in Illinois, Skelton v. General Motors Corp.,\(^ {61}\) provided a thoughtful analysis of the Act. Although the question this Article addresses was not squarely before the court, much of the court’s discussion is consistent with the arguments this Article puts forth. The persuasive authority of this case is admittedly diminished because the opinion was reversed by the Seventh Circuit Court of Appeals.\(^ {62}\) However, the grounds for reversal did not address the aspects of the opinion most relevant to this Article.

Skelton involved a claim against a carmaker for allegedly substituting one type of transmission for a different type in its cars over several years.\(^ {63}\) The plaintiffs sued under the Act for violations of written and implied warranties.\(^ {64}\) The claim involved a written warranty as defined by the Act, but the representations about the type of transmission used in the cars were not found in that document.\(^ {65}\) Instead, the relevant representations were made in other written materials, including “brochures, manuals, consumer advertising and other forms of communications[,]”\(^ {66}\) A key issue facing the court was whether a claim for breach of a written warranty under the Act could be based only on the written warranty document or whether the court could

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60. See id.
63. See Skelton, 500 F. Supp. at 1183.
64. See id.
65. See id.
66. Id.
consider representations made in other written material as part of a claim under the Act. 67

The court viewed the existence of a particular type of written warranty as a requirement to trigger coverage of the Magnuson-Moss Warranty Act but determined that once the Act was triggered the court could consider other written representations. 68 The court noted that the Act “only regulates transactions involving written warranties” as that term is defined in the Act. 69 The court concluded, however, that “once a consumer is involved in such a transaction,” the consumer should be able to bring a claim for violations of other written representations. 70 The court stated that although the term “written warranty” was defined clearly in the Act’s section on definitions, the term “written warranty” had a broader meaning in other places in the Act. 71 For the court, the “written warranty” described in the private right of action created in section 110(d) was broad enough to cover all written promises and not just those in the document meeting the Act’s definition of “written warranty.” 72 The court concluded that “[a] narrower reading of the Act would elevate form over substance and would frustrate” Congress’ purpose. 73 That purpose was to “promote consumer understanding” and “insure certain basic protection for consumers purchasing consumer products which have written warranties[.]” 74 According to the court, a consumer should not be expected to distinguish among the documents in the pile of materials given to the purchaser of a car. 75

The court did not directly address the necessity of a written warranty as a condition of an implied warranty claim for two reasons. First, as noted, there was a written warranty so it was not necessary

67. See id. at 1187 ("Instead, this case would turn on whether the representation was made in a formal warranty or in written documents which could fairly be construed as part of a formal warranty.").
68. See id. at 1190.
69. Id. at 1191.
70. Id.
71. See id. at 1187–88 (comparing section 101(6) with section 110(c)(2)(B) of the Act which appears to contemplate a "written warranty" being created by the use or misuse of the words "guaranty" or "warranty" in situations that do not involve the types of representations necessary to create a written warranty as that term is defined); 15 U.S.C § 2310(c)(2)(B).
73. Id. at 1191.
74. Id. at 1189 (quoting 119 Cong. Rec. 968 (1973)).
75. See id. at 1190.
to discuss this issue.\footnote{See id. at 1183.} Second, the court held that the alleged substitution of transmissions was not a breach of the implied warranty of merchantability, which merely requires goods to be "fit for the[ir] ordinary purpose."\footnote{Id. at 1191; see also U.C.C. § 2-314 (Am. L. Inst. & Unif. L. Comm’n 2022) (describing implied warranty of merchantability and relevant considerations).} However, the court strongly suggested in dicta that a claim for breach of an implied warranty under the Act requires a written warranty.\footnote{See Skelton, 500 F. Supp. at 1187, 1190.} The court stated that section 110 “creates a broad federal cause of action for breach of implied warranties, at least for consumers who receive written warranties.”\footnote{Id. at 1191 (citing 15 U.S.C. § 2310(d)(1)).} The court emphasized that the Act “only regulates transactions involving written warranties as the term is narrowly defined in section 101(6)”\footnote{Id.} and noted that although the language of section 110 might seem broad enough to include an implied warranty in the absence of a written warranty, the legislative history suggested that this was not Congress’ intent.\footnote{See id. at 1190.}

This opinion made several important points. First, it recognized the necessity of a written warranty, as that term is defined in the Act, to trigger the application of the Act.\footnote{See id.} It was thus an early adopter of the narrow approach. Second, the court addressed and resolved the ambiguity by looking at the purposes of the Act, the most salient of which was to “insure certain basic protection for consumers purchasing consumer products which have written warranties.”\footnote{Id. (quoting 119 Cong. Rec. 968 (1973)).} The court focused as well on the consumer perspective. Consumers, the court noted, would not be able to distinguish between the importance of representations in a warranty document as opposed to those in other written materials, and Congress did not intend consumers to have to make this type of “artificial distinction.”\footnote{Id. at 1190.}

The district court’s decision was reversed, though this reversal did not negatively impact the aspects of the district court’s opinion most relevant to this Article. The Seventh Circuit Court of Appeals held that the district court had gone too far with its reading of “written warranty” and reversed the district court’s decision on that ground.\footnote{See Skelton v. Gen. Motors Corp., 660 F.2d 311, 312, 320 (7th Cir. 1981).} The court held that the concept of a written warranty was crucial to
the Act and that the term had to have a “single, precise meaning” throughout the Act.\textsuperscript{86} That single precise meaning had been set forth in what the court described as a “meticulously worded” definition of that term.\textsuperscript{87} According to the Seventh Circuit, Congress did not intend to discard that careful definition for an undefined “document” or “pile of written documents” that the district court urged.\textsuperscript{88} The court worked through each instance of ambiguity regarding the term “written warranty” that the district court had identified and concluded that they were not “real or substantial” enough to warrant rejecting the clear definition of “written warranty” provided for in the Act.\textsuperscript{89} To the contrary, for the Seventh Circuit, the statutory scheme demonstrated “the importance of providing a clear, carefully circumscribed meaning to the term ‘written warranty’” throughout the Act.\textsuperscript{90}

The Seventh Circuit was likely correct in determining that “written warranty” referred to the same thing each time it was used throughout the Act. The trial court did go too far in that regard. However, the Seventh Circuit left intact two key premises from the district court opinion. Nothing in the Seventh Circuit’s opinion undermines the notion that a written warranty as defined by the Act is the key to coverage of the Act (though, as noted, the issue was not directly raised). Second, the Seventh Circuit determined that there was no ambiguity in the definition of “written warranty.”\textsuperscript{91} But there is, as discussed later, significant ambiguity in the term “implied warranty.”\textsuperscript{92} Where ambiguity exists it remains appropriate to consider the Act’s key purpose—protecting consumers receiving written warranties—to resolve ambiguity.

Approximately a decade after the Seventh Circuit’s decision in Skelton came an explicit and expressly articulated judicial embrace of the broad approach. In McCurdy\textit{ v. Texar, Inc.}, a 1991 Florida state appellate court concluded that a claim for breach of an implied warranty could be brought regardless of whether a written warranty or service contract had been given.\textsuperscript{93} The court was able to reach that determination, however, only by disregarding the definition of

\begin{itemize}
\item \textsuperscript{86} \textit{Id.} at 322.
\item \textsuperscript{87} \textit{Id.} (citing \textit{Skelton}, 500 F. Supp. at 1190).
\item \textsuperscript{88} \textit{Id.} (citing \textit{Skelton}, 500 F. Supp. at 1190).
\item \textsuperscript{89} \textit{Id.} at 320.
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{See id.} at 322 (citing \textit{Skelton}, 500 F. Supp at 1190).
\item \textsuperscript{92} \textit{See infra} Part V.B (discussing ambiguity of the term “implied warranty”).
\item \textsuperscript{93} \textit{See McCurdy\textit{ v. Texar, Inc.}, 575 So. 2d 299, 300 (Fla. Dist. Ct. App. 1991).}
\end{itemize}
“implied warranty” and by focusing on just a single subsection of the Act.94

McCurdy involved a Magnuson-Moss Warranty Act claim for breach of an implied warranty on an “allegedly defective boat”.95 The trial court had held that the Act did not apply because the boat manufacturer had given no written warranty on the boat.96 The appellate court rejected that analysis and found that the implied warranty claim could be brought even in the absence of a written warranty.97

The court based its conclusion on the seemingly broad language of section 110(d). The court focused on the language in that section creating a right for a consumer to sue under an implied warranty.98 The court, in citing this language, italicized the subsection as follows: “a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.”99

This language, according to the court, “quite clearly[.] encompasses implied warranties which are obviously not in writing[.]”100 The court quoted heavily from the language in an American Law Reports article to the extent that section 110(d) “has not only provided a means of enforcing the substantive requirements of the Act, but also has established a federal cause of action for breach of an implied warranty which has arisen under state law even if no written warranty was involved.”101

Of the three other secondary sources the court relied on in reaching its conclusion,102 two were quite equivocal. For instance, one of the law review articles the court cited merely states that the Act “appears to” be available even in the absence of a written warranty being

94. See id. at 300–01.
95. Id. at 300.
96. See id.
97. See id. at 300–01.
99. McCurdy, 575 So. 2d at 300 (quoting 15 U.S.C. § 2310(d)).
100. Id.
102. The court relied on two law review articles and one additional treatise. See id. at 301.
The treatise cited by the court does not clearly support the court’s position. That treatise states that a claim can be brought under the Act even if the only claim is for breach of an implied warranty and that there is no need to allege a failure to comply with a written warranty to bring a claim for breach of an implied warranty. But this is not the same as saying that no written warranty or service contract need be offered, only that there need not be a breach of such a written warranty or service contract to bring a claim for breach of an implied warranty.

The court held that a claim could be brought under the Act in the absence of a written warranty. The court, somewhat ironically, exercised its discretion and refrained from awarding attorneys’ fees, thus depriving the plaintiff of a key advantage under the Act.

The Iowa Supreme Court appeared to follow the same broad approach in a 1996 decision. In Hyler v. Garner, the court considered a claim against, among others, a retailer of RVs. The consumer who purchased an RV from the retailer sued for breach of implied warranty under the Act. The retailer argued that it had not made any “warranty enforceable under the Magnuson–Moss Act because the Act only applies to written implied warranties.”

The court rejected the argument, noting “[t]he Act provides remedies for breach of an ‘implied warranty,’ . . . and the term ‘implied warranty’ includes any ‘implied warranty arising under state law’.”

105. See id.
106. The other law review article cited by the court does support the court’s position. See Robert C. Denicola, The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case, 44 FORDHAM L. REV. 273, 296 (1975) (taking the position that a “warrantor offering no written warranty at all” is still subject to suit under section 110(d)).
107. See McCurdy, 575 So. 2d at 300.
108. Id. at 301.
110. See id. at 866.
111. See id.
112. Id. at 875.
113. Id. (citing 15 U.S.C. § 2301(7)).
The court thus found no language in the Act limiting the definition’s applicability to written warranties.\textsuperscript{114}

Somewhat surprisingly, neither \textit{McCurdy} nor \textit{Hyler} adequately considered the Act’s definition of the crucial term “implied warranty.” \textit{McCurdy} did not refer to it at all while the court in \textit{Hyler} quoted only a few words of it—“any implied warranty arising under State law”—leaving off key limiting language.\textsuperscript{115} The full definition includes important limitations. An implied warranty “means an implied warranty arising under State law (as modified by sections 108 and 104(a) of this title) in connection with the sale by a supplier of a consumer product.”\textsuperscript{116}

That definition was addressed, albeit briefly, by the federal district court for Minnesota in an opinion disagreeing sharply with \textit{McCurdy} and adopting the narrow approach. The court in \textit{McNamara v. Nomeco Building Specialties}\textsuperscript{117} held that a claim for breach of the implied warranty of fitness for a particular purpose could not be brought under the Act in the absence of a written warranty.\textsuperscript{118} The court noted a “dearth of authority” and identified as the only fully relevant authorities the ones discussed in \textit{McCurdy} as well as the \textit{Skelton} district court and Seventh Circuit opinions.\textsuperscript{119}

Given this "paucity of controlling or persuasive authority," the court addressed the matter as one of first impression, describing it as an issue of “pure statutory construction.”\textsuperscript{120} The court began its analysis with section 110(d)—the same section the \textit{McCurdy} court looked to—and observed that "by its express terms [this section] allows actions to be commenced ... for the breach of an implied warranty."\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{114} See \textit{id.} The retailer also argued that it was not a “warrantor” under the Act. The court rejected that argument as well. It held that the retailer was a warrantor both by virtue of having assumed the manufacturer’s written warranty (and so was a person “who gives ... a written warranty”) and by virtue of being liable for breach of the implied warranty of merchantability and fitness for a particular purpose (and so was obligated under an implied warranty). See \textit{id}.
\item \textsuperscript{115} Compare \textit{McCurdy v. Texar, Inc.}, 575 So. 2d 299, 300–01 (Fla. Dist. Ct. App. 1991) (never mentioning the definition of “implied warranty”), with \textit{Hyler}, 548 N.W.2d at 875 (only mentioning “implied warranty” as “including any ‘implied warranty arising under State law’”).
\item \textsuperscript{117} See \textit{McNamara v. Nomeco Bldg. Specialties, Inc.}, 26 F. Supp. 2d 1168 (D. Minn. 1998).
\item \textsuperscript{118} See \textit{id} at 1175.
\item \textsuperscript{119} \textit{id} at 1172.
\item \textsuperscript{120} \textit{id} at 1173.
\item \textsuperscript{121} \textit{id} at 1172.
\end{itemize}
The language, according to the court, "would appear to allow the sort of claim that the Plaintiffs have present here; namely, a free standing cause of action, under Magnuson–Moss, for the alleged breach of the implied warranty of fitness for a particular purpose."122

The court then turned to section 108. After noting that this section prohibits the disclaiming of an implied warranty when a written warranty is offered, the court identified “some tension between the[... intendments] of section 110 and that of section 108(a).123 The tension is made more acute by virtue of the definition, which links the sections together.

_McNamara_ briefly addressed that point. After quoting the definition of “implied warranty,” the court stated that section 108 “makes it unlawful for a supplier to ‘disclaim’ an[] implied warranty if there is a conjoined written warranty.”124 The court correctly asserted that “[q]uite clearly, Section [108] does not encompass all ‘implied warranties,’ but only those relat[ed] to [a consumer] product[] which ha[s] an accompanying written warranty.”125 Reading the statute to interpret section 110 to support a free-standing breach of implied warranty claim would render “the limitation prescribed in the definition ... and the limitation in Section [108]” as “superfluous.”126

A handful of other cases have addressed the matter directly, though none with even as much analysis as was found in _McCurdy_ and _McNamara_. The United States District Court for Minnesota, the court that decided _McNamara_, has twice cited that opinion favorably in general support of the narrow approach. The first of the cases, _Anderson v. Newmar Corp._, noted, although the issue was not squarely before the court, that “[t]he Act enforces written warranties (and implied warranties made in connection with written warranties).”127

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122. _Id._
123. _Id._
124. _Id._ at 1174.
125. _Id._
126. _Id._ The court’s analysis took a bit of a strange turn. The court concluded that given that there was no written warranty, the implied warranty of fitness for a particular purpose could be disclaimed. Rather than look to the Illinois Commercial Code to determine the appropriate way to disclaim a warranty of fitness for a particular purpose, the court stated that an implied warranty is disclaimed when it is “disowned, repudiated, or renounced.” _Id._ The court concluded that the supplier had “denied the Plaintiffs’ entitlement to an implied warranty and, in that respect, [the supplier had] ‘disclaimed’ any such implied warranty.” _Id._
127. _Anderson v. Newmar Corp._, 319 F. Supp. 2d 943, 948 (D. Minn. 2004). No implied warranty claims were brought under the Act in this case.
The more recent opinion, *Bollom v. Brunswick Corp.*, supports the narrow approach somewhat more explicitly. The court held that a claim against a boat retailer could not proceed under the Act because the retailer had not given a written warranty on the boat. The manufacturer had given a written warranty, but this was insufficient to sustain a claim against the retailer. The court cited *McNamara* for the proposition that a plaintiff cannot bring an implied warranty claim under the Act in the absence of an "adjoining written warranty." Once again, however, the issue was not squarely before the court. The boat retailer had not issued a written warranty and had properly disclaimed any implied warranties, thus negating the consumer's claim against it. The claim against the manufacturer was also defective because although there was a limited warranty there was no demonstration that the implied warranty had actually been breached.

Two additional cases reached different conclusions from each other. The first one supports the narrow approach. In *Gross v. Shep Brown's Boat Basin*, the New Hampshire federal district court held that a written warranty was required under the Act for a breach of an implied warranty claim. The court granted a boat retailer's motion for summary judgment on a claim that had been brought against the retailer under the Act. The court stated that "[t]he Act applies only if a supplier has issued a written warranty." Because the retailer had not issued such a warranty, the consumers' claim could not be maintained.

In contrast, a federal court in Florida indicated that the matter was not so clear and appeared to take a more neutral approach. The court in *In re Aquaventure International Corp.* addressed a claim under

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129. See id. at 1227–28.
130. See id. at 1224.
132. See id. at 1224.
133. See id. at 1223 ("Plaintiffs have provided no evidence from which a jury could glean the amount of their general damages to a reasonable probability. Any calculation of a particular amount of general damages would be wholly speculative.")
135. See id. at *2.
136. See id. at *3.
137. Id. at *2.
138. See id.
the Magnuson-Moss Warranty Act that had been brought against the retailer of a battery backup system for breach of an implied warranty. The retailer filed a motion to dismiss the claim because the complaint did not adequately allege that the retailer issued any written warranties to the consumer. The court noted the authority and arguments for both the narrow and broad approaches and, given the uncertainty over the issue, refused to grant the motion to dismiss based on the lack of a written warranty. This case illustrates just how unsettled the issue remains.

Neither the broad approach nor the narrow approach has carried the day, though perhaps the narrow approach is slightly ascendant. The cases discussed above illustrate the unsettled state of affairs. Of these cases, it appears that two—McCurdy v. Texar, Inc. and Hyler v. Garner—lean fairly strongly towards the broad approach, though the more recent of these cases is over twenty-five years old.

On the other side of the ledger, McNamara v. Nomeco Building Specialties, Anderson v. Newmar Corp., Bollo v. Brunswick Corp., and Gross v. Shep Brown's Boat Basin appear to favor the narrow approach, though sometimes just in dicta. To the extent it retains its continuing vitality, the district court opinion Skelton v. General Motors Corp. also leans towards the narrow approach. Most of these cases are more recent than those favoring the broad approach. Bollo, for instance, is a 2020 decision. In fact, McNamara, the case with the most fulsome discussion of the issue, was decided in 1998 and so is more recent than any of the three cases discussed that favor the broad approach. On the other hand, three of these five cases were decisions of a single court, the Federal District Court for Minnesota.

Perhaps the uncertainty is best reflected by the opinion in In re Aquaventure International Corp., in which the court simply recognized the competing authorities and arguments and decided that the issue had not been sufficiently settled to warrant a grant of a motion to dismiss. As discussed in the next part of the Article, the reason that neither approach has carried the day is that each conflicts with the language or purposes of the Act in various ways. Given what is at stake, consumers should have a clear answer as to their rights under the Act.

V. THE NARROW-PLUS APPROACH BEST EFFECTUATES THE LANGUAGE,
PURPOSES, AND SPIRIT OF THE ACT

This Part of the Article discusses five aspects of the Act to show that neither the narrow approach nor the broad approach fits with the statute’s language and purposes. This discussion demonstrates that the narrow-plus approach best harmonizes these discrete points into a coherent and cohesive whole.

Analysis of the Magnuson-Moss Warranty Act comes up against some significant obstacles. The language of the Act “has been variously described as ‘disappointing,’ ‘opaque,’ and a product of ‘poor drafting.’”142 The legislative history is of limited help, as well. The passage of the Act was a “long journey”143 and reviewing the legislative history has been described as the “legal equivalent of an archaeological dig” through several years worth of a multitude of legislative proposals.144 These impediments call for a certain modesty of interpretation and make avoidance of extreme positions, such as the current broad and narrow approaches, prudent.

Part V.A addresses the language and structure of the statute to better understand the Act’s meaning. This discussion shows that Congress likely intended a private right of action only for breaches of those implied warranties described in earlier sections of the statute and that a written warranty or service contract on the consumer product at issue is required to trigger the Act’s coverage. Part V.B continues this discussion by analyzing the ambiguous definition of “implied warranty” and setting forth how that definition best fits with the narrow-plus approach. Part V.C focuses on a key Congressional policy of the Act—the informal resolution of disputes out of court—that would not be served by the broad approach but is served by the narrow-plus approach. Part V.D addresses another aspect of the Act, specifically its voluntary nature. This component of voluntariness by which a warrantor can choose whether to be subject to the Act or not, is not consistent with the broad approach but is consistent with both the


144. Skelton, 500 F. Supp at 1184.
narrow and narrow-plus approaches. Part V.E sets forth some sections of the Act that undermine a “pure” narrow approach and discusses how those sections and some language in the legislative history support the narrow-plus approach.

A. The Structure of the Act, the Legislative History, and the Narrow-Plus Approach

As previously discussed, the language of section 110(d) of the Act provides apparent statutory support for the broad approach. That subsection creates a private right of action for a consumer “damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title ... or under a written warranty, implied warranty, or service contract ...”. The language is in the disjunctive—a claim may be brought for a breach of a written warranty or a breach of an implied warranty.

It is important, however, not to overread that “or.” To be sure, a claim can be brought for either a breach of a written warranty or a breach of an implied warranty under the Act. A claim for breach of an implied warranty under the Act does not require an accompanying claim for breach of any written warranty. But that is different from saying that a claim for breach of an implied warranty can be brought in the absence of the existence of a written warranty or service contract on the defective consumer product. The “or” does not carry that much weight. Further analysis is needed to determine which consumer product implied warranties Congress had in mind for this private right of action.

The ambiguity requires considering sources other than the actual language. Examining the “structure of the section of the statute as well as the design of the statute can help discern the meaning of the statute.” Section 110 in context is best understood as creating the mechanisms for enforcing the Act’s system of protections for consumers buying or considering buying consumer products covered by written warranties.

Section 110 appears, of course, after sections 101 through 109. Those sections establish and govern the duties and obligations of

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those who offer written warranties or service contracts.\textsuperscript{147} For instance, after the definitions of section 101, section 102 provides for clear disclosure of the terms of a written warranty.\textsuperscript{148} The Act explicitly provides the reasons for these disclosure requirements as being “to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.”\textsuperscript{149}

Other sections bolster protections for consumers when written warranties are given. Section 103 calls for a supplier to designate a written warranty as full or limited.\textsuperscript{150} Section 104 provides the minimum standards for written warranties designated as “full” warranties.\textsuperscript{151} Some of those minimum standards are geared towards protecting any implied warranties that might have arisen. For example, section 104(a)(2) prohibits a warrantor from limiting the duration of implied warranties when a full warranty is offered.\textsuperscript{152} Section 105 permits a warrantor to sell a consumer product with both full and limited written warranties but requires them to be properly described in the written warranty.\textsuperscript{153} Section 106 addresses service contracts—\textsuperscript{154} the offering of which prevents a service contractor from disclaiming implied warranties\textsuperscript{155} Section 107 permits a warrantor to designate (presumably in the written warranty) representatives to perform duties under the written or implied warranties.\textsuperscript{156} Section 108 blocks the ability of a written warrantor to disclaim or modify implied warranties.\textsuperscript{157} And section 109 addresses FTC rulemaking to effectuate the statute.\textsuperscript{158} All of these sections establish a system for protecting consumers who buy or are considering buying products covered by written warranties.

Section 110 then turns to remedies. Section 110 is best understood as creating the means for enforcement of the rights and obligations established and described in the sections preceding it as

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{147} See 15 U.S.C. §§ 2301–2309.
\item \textsuperscript{148} See id. § 2302.
\item \textsuperscript{149} Id. § 2302(a).
\item \textsuperscript{150} See id § 2303(a)(1)–(2).
\item \textsuperscript{151} See id. § 2304.
\item \textsuperscript{152} Id. § 2304(a)(2).
\item \textsuperscript{153} See id. § 2305.
\item \textsuperscript{154} See id § 2306.
\item \textsuperscript{155} See id. § 2308.
\item \textsuperscript{156} See id § 2307.
\item \textsuperscript{157} See id. § 2308(a).
\item \textsuperscript{158} See id § 2309(b).
\end{itemize}
\end{footnotesize}
opposed to introducing new bases for claims.\textsuperscript{159} Section 110’s focus on creating enforcement mechanisms is illustrated not only by its placement within the larger statute but also by its internal structure.

The section sets forth a panoply of enforcement mechanisms. Section 110(a) addresses the creation of informal out-of-court dispute resolution procedures.\textsuperscript{160} The next two subsections turn to government enforcement. Section 110(b) makes violations of the Act an unfair method of competition for purposes of government enforcement.\textsuperscript{161} Section 110(c) provides for federal court jurisdiction for actions by the government to restrain warrantors from making deceptive warranties on a consumer product or failing to comply with requirements under the Act.\textsuperscript{162} And then, section 110(d) makes it possible for consumers to enforce warranty rights by creating a private right of action.\textsuperscript{163} Section 110 provides a range of enforcement mechanisms and should not be read as introducing new rights or claims other than those already described or outlined in previous sections of the statute.

Even were “implied warranty” not a defined term it would be possible to argue that the “implied warranties” referred to in section 110(d) are only those described in preceding sections of the statute. The fact that, as discussed in the next subpart, “implied warranty” is defined with explicit reference to two key earlier sections (sections 108 and 104(a)) further strengthens the argument.\textsuperscript{164}

The legislative history is not particularly illuminating but it does show that the focus was on written warranties and that Congress was concerned with implied warranties only to the extent that they be protected from disclaimers in written warranties or service contracts. The prefatory language before the operative sections of the statute\textsuperscript{165} describes the statute as an “Act to provide minimum disclosure standards for written consumer product warranties; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection

\textsuperscript{159} See id § 2310.
\textsuperscript{160} See id. § 2310(a)(2).
\textsuperscript{161} See id. § 2310(b).
\textsuperscript{162} See id. § 2310(c)(1).
\textsuperscript{163} See id. § 2310(d)(1)(A)–(B).
\textsuperscript{164} See infra Part V.B.
\textsuperscript{165} It is appropriate to consider a preamble or purpose clause as an indicator of the meaning of a statute. See Bittner v. United States, 598 U.S. 85, 98 n.6 (2023) (“A preamble, purpose clause, or recital is a permissible indicator of meaning.”).
activities; and for other purposes.” 166 Although the term “other purposes” is admittedly broad, the gist of this description of the Act’s purposes focuses on written consumer product warranties. Implied warranties are relevant to the extent that they are part of the “minimum [f]ederal contents standards” for written warranties. 167

Congress intended to protect consumers who purchased consumer products covered by written warranties. Senator Warren Magnuson, presenting the final version of the legislation prior to its approval by the Senate, described what he considered the most important features of the bill. 168 First, the legislation would “require warranties to say what they mean and to mean what they say.” 169 Second, it would require warrantors to designate the warranties as full or limited and for the full warranties to comply with certain minimum standards. 170 Third, the legislation would provide “practical methods of remedying a breach of warranty or service contract obligations” by allowing for attorneys’ fees and “encouraging the development of fair and impartial informal disputes settlement mechanisms[.]” 171

Only after discussing those features did Senator Magnuson mention implied warranties. He noted that “[o]f particular significance is the basic floor of warranty protection” the Act ensures by “prohibiting the disclaimer of implied warranties when consumer products are sold,” 172 Such warranties become fixed and non-excludable as part of a written warranty once they arise under state law. 173 Those are the implied warranties with which the Act appears to concern itself.

Admittedly, these statements from Senator Magnuson do not resolve the matter. Providing attorneys’ fees for breach of an implied warranty in the absence of a written warranty does facilitate the goal of enforcement of warranties and may make it more likely a supplier will address any problems. And the fact that Congress’ focus was on written warranties and on ensuring a baseline level of protection through implied warranties does not foreclose the possibility that the Act would also permit implied warranty claims even in the absence of

167. Id.
169. Id.
170. See id.
171. Id.
172. Id.
173. See id.
But if the statute were really intended to federalize the law of implied warranties in consumer products as opposed to only in the context of written warranties, such an intent would most likely be set out clearly—or at least mentioned—in the legislative history.

Reading section 110(d) as effectuating enforcement of implied warranties only to the extent they arise in the context of a written warranty or service contract is of course most consistent with the narrow approach. Given that the statute strongly suggests, but does not explicitly state, that only such warranties are intended, a somewhat softer interpretation may be appropriate. Such an interpretation is inherent in the narrow-plus approach. That reading posits that what matters is that a written warranty (or service contract) be present in the overall transaction and that the consumer product is subject to such a written warranty or service contract. This, too, honors the primacy of a written warranty in the Act’s mechanism though in a way that reflects the statute’s lack of absolute clarity on the matter. The narrow-plus approach has the virtue of effectuating Congress’ intent to protect consumers who buy consumer goods covered by written warranties to a greater extent than is accomplished in the narrow approach.

B. The Ambiguous Definition of “Implied Warranty” and the Narrow-Plus Approach

As discussed in Part V.A, the Act’s structure strongly suggests that the implied warranties referred to in the private right of action created in section 110(d) are those described in preceding sections of the Act. The definition of “implied warranty” makes this more explicit by cross-referencing two sections in which implied warranties are described as occurring in the context of written warranties or service contracts. Unfortunately, the language of the definition is not as clear as it could be, so some discussion is necessary to try to make sense of it. Additionally, although this discussion illustrates flaws in the broad

174. See Steverson & Munter, supra note 16, at 228 (arguing courts should not focus on some of the Act’s purposes to the exclusion of others in assessing the intent of Congress).

175. Cf. Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

176. See supra Part V.A.
approach, the ambiguity also counsels for an approach more modest and less stringent than that of the narrow approach.

While the definition of "written warranty" has been described as "meticulously worded," Congress did not take the same care in drafting the definition of "implied warranty." The definition of "written warranty" is 140 words long, and its two subsections carefully delineate the contours of when a written warranty is created. The definition of "implied warranty," in contrast, is shorter and its most notable feature is an ambiguous parenthetical dropped in the middle of the definition. The contrast between the precision of the definition of "written warranty" and the ambiguity of the definition of "implied warranty" may itself provide some indication that the former was meant as the crucial gateway to coverage under the Act.

The definition of "implied warranty" seems intended to limit the scope of the implied warranties contemplated under the Act and to clarify that not all implied warranties arising under state law are covered by the definition. An implied warranty under the Act "means an implied warranty arising under State law (as modified by sections 108 and 104(a)) [of the Act] in connection with the sale by a supplier of a consumer product." The definition restricts the scope of implied warranties to those arising in the sale by a supplier of a consumer product. Additionally, the definition cross-references two sections—section 108 and section 104(c)—each of which addresses implied warranties arising in the context of written warranties or service contracts.

Section 108, the first of the cross-referenced sections, addresses implied warranties when a supplier gives a written warranty or provides a service contract. The section prohibits a supplier from disclaiming an implied warranty if the supplier does either of those two things. Section 108(c) makes any efforts to disclaim, modify, or limit an implied warranty in violation of section 108 "ineffective for

179. See id. § 2301(7).
180. Id. (emphasis added).
181. See id. § 2308.
182. See id. § 2308(a). This section permits, in the case of a "limited" written warranty, a supplier to limit an implied warranty to the duration of a written warranty of reasonable duration, so long as the limitation is conscionable and sufficiently disclosed. See id. § 2308(b).
purposes of this [chapter] and State law." Section 108 thus provides that implied warranties become part of the basic package of protections a consumer receives when they purchase consumer products covered by a written warranty.

The other cross-referenced section also addresses implied warranties in the context of written warranties. Section 104(a) provides the minimum standards for a written warranty designated by the warrantor as a full warranty. Among other things, a full warranty cannot limit the duration of an implied warranty on the consumer product. Section 104(a), like section 108, thus refers to implied warranties in the context of written warranties. The cross-references to sections 108 and 104(a) suggest strongly that the implied warranties referred to in the definition are those described in those sections—implied warranties in the context of written warranties or service contracts.

Such a conclusion is admittedly not without its problems. First, if Congress meant to limit the definition of implied warranties to make clear that not all implied warranties were included, it knew the exact language to do the trick. When Congress wanted to clarify that only implied warranties in consumer product sales were included in the definition of implied warranties, it did so with language that unmistakably expressed this intent. The definition provides that an implied warranty means "an implied warranty arising under State law (as modified by sections 108 and 104(a) [of this title] in connection with the sale by a supplier of a consumer product."

It would have been a simple matter for Congress to have added to or otherwise used this "in connection with" language to show intent to limit the scope of the definition to implied warranties described earlier in the Act. Congress could have said that an implied warranty "means an implied warranty arising under State law in connection with the sale by a supplier of a consumer product in a transaction involving a written warranty or service contract." Had it done so, no ambiguity would remain.

183. Id. § 2308(c).
184. See id. § 2304(a)(1)–(4).
185. See id. § 2304(a)(2). The section also requires that efforts to exclude or limit consequential damages are made in compliance with the relevant rules on disclosure. See id. § 2304(a)(3).
186. See id. § 2304(a)(1)–(4). In the case of section 104(a), the written warranties are those designated as "full." See id. §§ 2303–2304.
187. Id. § 2301(7) (emphasis added).
Further, it is possible to interpret the ambiguous “as modified” language in a manner that supports the broad approach. One excellent commentary takes the position that the phrase “as modified by sections 108 and 104(a)” does not modify or limit the term “implied warranty” but rather modifies the words “under State law.” In this interpretation, the language of the definition reflects the fact that these sections limit state power when it comes to disclaiming implied warranties—in the case of section 108(a)—or limiting their duration—in the case of section 104. This interpretation is “reflected in the fact that the ‘as modified’ language immediately follows the phrase ‘under State law,’ rather than the language ‘an implied warranty[].’”

Given the ambiguity of the language, this interpretation is certainly plausible, but it is ultimately, not sustainable. The grammar argument is not fully persuasive because the “as modified” language could just as readily apply to the longer phrase “implied warranty arising under State law” as it does to “under State law.” That is, it is true that the “as modified” phrase is closer to the words “under State law” than it is to the words “implied warranty” but that does not answer whether the language applies to the last bit of the phrase (“under State law”) or the entire phrase (“implied warranty arising under State law”). The use of the parentheses might even reflect an intent to refer to the larger phrase as opposed to its last three words.

Additionally, it is not clear that the sections cross-referenced actually “modify” state law. That is, a federal statute can of course preempt state law, but that is different from changing it. As section 108(c) shows, section 108 does not modify or change state law. Instead, it makes disclaimers, modifications, or limitations in violation of section 108 “ineffective for purposes of ... State law.” State law is not being changed. While it might be said that in some respects the Act supersedes state law or makes some disclaimers and limitations ineffective, the Act does not modify state law.

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188. See Steverson, supra note 58, at 182–83.
189. See id.
190. Id. at 182.
192. See id. at § 2311(b)(2) (noting that sections 108 and 104(a)(2) and (4) of the Act may “supersede” state law as it relates to State law on consequential damages).
Further, interpreting the language as though the sections of the Act modify state law runs into another problem. If what is being modified by sections 108 and 104(c) of the Act is state law, then the state law being modified would have to be the body of law under which implied warranties arise. This is so because the definition refers to an implied warranty “arising under State law” as modified by sections 108 and 104(a). However, sections 108 and 104(a) do not address when a warranty arises under state law. Section 108 impacts, with respect to implied warranties, a supplier’s ability to disclaim a warranty that has already arisen or to limit the duration of such a warranty, both of which differ from the question of when a warranty arises. Section 104(a) is even more distant from the question of whether a warranty arises as it merely addresses the duration of implied warranties, not whether they arise or not. Because those sections do not govern when a warranty arises, it seems unlikely that the “as modified” language modifies the term “under State law.”

The language must mean something and should not be read as mere surplusage. Congress presumably did not mean to cover implied warranties beyond those created by state law (that is, the Act does not create new implied warranties) and so the language added must be intended to limit the category of implied warranties covered. That is the overall thrust of the definition, which also limits the definition to implied warranties arising in connection with the sale of a consumer product. The language “as modified by” in the definition is odd phrasing, but the word “modify” often carries the sense of a limitation on the word or term being modified. However, the language is quite ambiguous, and no interpretation stands on particularly firm grounds.

The legislative history provides some clues about the definition of implied warranty. The definition was not added until almost the very end of the drafting process. The Senate version, reported out of the Senate Commerce Committee in May 1973, did not define “implied warranty.” It did provide for a private right of action to a purchaser

193. See id. § 2301(7).
194. See Corley v. United States, 556 U.S. 303, 314 (2009) (noting that “one of the most basic interpretative canons” is that a statute should be construed in such a way that all its provisions are given meaning).
195. For example, the second listed definition in Black’s Law Dictionary for “modify” is “[t]o make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate[.]” See Modify, BLACK’S LAW DICTIONARY (11th ed. 2019).
196. See S. REP. NO. 93-151, at 32–41 (1973) (setting forth text of Senate version of the bill as reported out by the Commerce Committee).
for a supplier’s failure to comply with a written warranty, service contract, express non-written warranty, or implied warranty.\footnote{197}{See id. at 38.}

The draft legislation defined “written warranty” and “express warranty” but did not define “implied warranty.”\footnote{198}{See id. at 24, 33, 38 (setting forth defined terms).}

The House version included only a short definition of sorts for “implied warranty.” The version of the legislation reported out from the House Committee on Interstate and Foreign Commerce in June 1974 created a private right of action for a “consumer who is damaged by the failure of a supplier to comply with any obligation under this title, or under a warranty or service contract[.]”\footnote{199}{H.R. REP. NO. 93-1107, at 10 (1974).}

This version of the legislation defined a “warranty” as meaning either a written warranty as defined or “an implied warranty arising under State law.”\footnote{200}{Id. at 2–3.}

This shortened definition of “implied warranty” was in the version of the bill presented by the House to the Senate in October 1974.\footnote{201}{See 120 CONG. REC. 33976 (1974).}

It was not until the December 16, 1974, Conference Report that the current definition was added.\footnote{202}{See H.R. REP. NO. 93-1606, at 2 (1974) (Conf. Rep.).}

The Joint Explanatory Statement of the Committee of Conference does not provide a reason for the new limiting language.\footnote{203}{See id. at 23–43 (Joint Explanatory Statement of the Conference Committee).}

The legislative history may indicate the reason a fuller definition was added. The lack of a definition for “implied warranty” and the potential confusion caused by such an omission came up during the hearings before a subcommittee of the House Committee on Interstate and Foreign Commerce.\footnote{204}{See Bills to Provide Minimum Disclosure Standards for Written Consumer Product Warranties Against Defect or Malfunction; to Define Minimum Federal Content Standards for Such Warranties; to Amend the Federal Trade Commission Act in Order to Improve Its Consumer Protection Activities; and for Other Purposes: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Com. and Fin. of the Comm. on Interstate and Foreign Com., 93rd Cong. 72 (1973) [hereinafter Hearings on H.R. 20 & H.R. 5021] (discussion between Rep. John S. McCollister and Lewis Engman, FTC chair).}

Representative John McCollister raised the issue during the testimony of Lewis Engman, chairman of the FTC.\footnote{205}{See id. at 71–72.}

Representative McCollister described what he viewed as a “contradiction” in the text of the legislation being discussed.\footnote{206}{Id. at 71.} He noted that the
bill purported to be about providing “minimum disclosure standards for written consumer product warranties, and then in section 110, we proceed to open to the Federal courts not just written warranties, but all sorts of things[,]” including implied warranties.\textsuperscript{207} He pressed the matter further noting that,

the reach of the bill was to written warranties, providing circumstances under which written warranties might be made more intelligible, meaningful, and enforceable, and we are, in section 110, opening to the Federal courts all relating to implied warranties. It seems that makes the bill reach a lot further than what were the intentions to cure the defects in written warranties.\textsuperscript{208}

Chairman Engman noted the lack of a definition of the term “implied warranty” as a factor giving rise to the ambiguity. Engman stated “I am somewhat sympathetic to what you say. I think the committee has a difficult problem here in drafting. You are between the devil and the deep blue sea, perhaps. For example, there is no definition of ‘implied warranty’ in this title.”\textsuperscript{209} Engman noted as well that the question might be addressed by different drafting: “We talk about written warranties, but, as you say, how do we then word an appropriate limitation on disclaimers or implied warranties and the like? It is a tough drafting problem[.]”\textsuperscript{210}

It would, admittedly, not be appropriate to put much weight on this small exchange about the version of the bill that existed at the time. But Representative McCollister did express a view that the legislative text was reaching beyond what Congress intended and Chairman Engman suggested the problem was a drafting challenge exacerbated by the lack of a definition for implied warranties.\textsuperscript{211} Representative McCollister was among the seven House managers on the joint committee that recommended what became the final text of the Act (including the final definition of “implied warranty”).\textsuperscript{212} It is reasonable to conclude that the language may have been added to meet the concerns Representative McCollister had voiced during the hearings. And the testimony does indicate that at least for Representative McCollister, the point of the legislation was to make written

\begin{flushright}
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 72.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\end{flushright}
warranties more “intelligible, meaningful, and enforceable” and not to create rights of action for stand-alone implied warranties.\footnote{213}

The lack of a definition came up again later in the same hearing. It arose during the testimony of a law professor, Fairfax Leary, in an exchange with Representative Samuel Young regarding class actions. Representative Young noted that the section on class actions “extends the right to sue on a consumer product, both on an express warranty, and implied warranty, or a service contract” and that this was “much broader than we are talking about with respect to the minimum standards of a [written] warranty or with respect to a full or limited warranty.”\footnote{214}

Professor Leary’s response seemed to assume that an implied warranty claim would not arise on its own without some other basis provided for under the Act. After discussing the sections focused on disclosure of written warranties, Leary noted that it would therefore “make good sense to say whatever the warranty was, if action is brought under this act, one action should cover the whole field rather than have to have a Federal action on just the disclosure portions and a State action for the rest of the remedy.”\footnote{215}

Representative Young pressed the issue. He noted that “[y]ou are carrying it to implied warranties, which are different from full warranties?”\footnote{216} Professor Leary responded in a way that seemed to link the implied warranties of section 110 with those in section 108: “Yes. Section 108 also has certain limitations on disclaimer of implied warranties[.]”\footnote{217}

Representative Young then suggested amending the statute to address the issue. He stated that: “I am saying the statute might be amended to limit the section to the warranties which are deferred [sic] under the title I section, but not broaded [sic] to include—[.]”\footnote{218} He was interrupted before he could complete the sentence. It appears that Representative Young was suggesting that the statute be amended to make clear that the Act does not create free-standing private rights of action for breaches of implied warranties. Of course, none of this is dispositive, but it signals that the definition of implied

\footnote{214. Id. at 121 (discussion between Rep. Samuel Young and Prof. Fairfax Leary).}
\footnote{215. Id.}
\footnote{216. Id.}
\footnote{217. Id.}
\footnote{218. Id. at 122.}
warranty may have been added in the final stretch of drafting to meet the concerns of Representatives McCollister and Young and to limit the scope of the Act.

In any event, the best that might be said for the definition is that it appears intended as a limitation of sorts, designed to restrict the scope of implied warranties covered in two respects—to those arising in the sale of consumer products, and to those arising in the context of written warranties or service contracts. The cross-reference to sections 108 and 104(a) is loose, but it is there, and it must mean something.

While the definition seems to largely foreclose the broad approach, the existence of some ambiguity in the matter renders the strictness of the narrow approach inappropriate. The purpose of the Act is to a large degree to protect consumers who buy products covered by written warranties. That purpose leads to some tempering of the narrow approach—not so much that we discard the centrality of the written warranty but enough that we permit implied warranty claims against suppliers regardless of who gave that written warranty. This is what the narrow-plus approach calls for.

C. Congressional Policy and the Narrow-Plus Approach

There are three instances in the Act in which Congress explicitly set forth its intent and each one indicates that the Act was directed towards governing written warranties. Two have already been discussed. The first of those is the statement in the prefatory language to the Act that the purpose of the legislation was "to provide minimum disclosure standards for written consumer product warranties; to define minimum federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes." The second instance is in section 102 which sets forth the reasons for the disclosure provisions in that section as being "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products[.]

This subpart addresses the third instance in which Congress stated its intent and that intent is also at odds with the broad approach but consistent with both the narrow and the narrow-plus approaches. Section 110(a) begins by declaring it to be Congress' "policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."\(^\text{221}\) Such a dispute resolution mechanism, however, can only be created if a written warranty is given.\(^\text{222}\) The private right of action of section 110(d) is expressly made subject to section 110(a)(3), a section that addresses the requirements for establishing a dispute resolution procedure.\(^\text{223}\) Congress is unlikely to have announced a crucial policy and then, three subsections later, created a massive class of suits under the Act to which its announced policy would be inapplicable.\(^\text{224}\)

Further, the legislative history indicates that one reason Congress provided for the award of attorneys' fees was to make court action more feasible and thereby encourage warrantors to create informal dispute resolution procedures. The Senate Commerce Committee report explicitly links the award of attorneys' fees with that goal.\(^\text{225}\) The report notes that providing reasonable attorneys' fees "mak[es] consumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable informal dispute settlement procedures for the expeditious settlement of consumer disputes."\(^\text{226}\) Providing attorneys' fees for implied warranty claims in the absence of a written warranty would not further this goal at all because the existence of a qualifying procedure must be outlined in a written warranty and under the broad approach a large swath of implied warranty claims would not involve any written warranty. There is thus a significant mismatch between Congressional policy on the one hand and the creation of a mass of private rights of action to which the policy does not apply.

\(^\text{221}\) Id. § 2310(a)(1).
\(^\text{222}\) See 16 C.F.R. § 701.3(a)(6) (2015); see also Katherine R. Guerin, Clash of the Federal Titans: The Federal Arbitration Act v. the Magnuson-Moss Warranty Act Will the Consumer Win or Lose?, 13 LOY. CONSUMER L. REV. 4, 14 (2001) (noting that the Act requires information on the dispute resolution process to be given with the written warranty).
\(^\text{224}\) See id. § 2310(a)(3)(C)(i)–(ii).
\(^\text{226}\) Id.
It is true, of course, that applying the narrow-plus approach will also give rise to circumstances to which the policy does not apply. That is, in a transaction with a manufacturer’s written warranty, a retailer who does not offer a written warranty would still be subject to a claim under the Act. This retailer would have had no opportunity to establish a qualifying dispute resolution process that would be a prerequisite to a court action. However, Congressional policy is not irrelevant to the transaction because at least one warrantor (the manufacturer) had the opportunity to create an informal dispute resolution process. And unlike the class of “all implied warranties in consumer product sales,” which is vast, the category of “implied warranties in consumer product sales in which a written warranty is offered” is much narrower and so does not make a near nullity of Congress’ expressly stated policy.

D. Voluntariness and the Narrow-Plus Approach

Voluntariness on the part of suppliers is a fundamental aspect of the Act. The statute provides that “[n]othing in this chapter . . . shall be deemed to . . . require that a consumer product or any of its components be warranted.”227 The legislative history shows that Congress took this voluntariness seriously.

The Senate Report, in describing the purpose of the legislation, notes that the bill would enable a “consumer to make more informed product choices and to enable him to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation.”228 And prior to the final vote on the legislation in the House of Representatives, Representative John Moss described the scope of Title I as “appl[ying] to warranties given on ‘consumer products’ but does not require anyone to give a warranty.”229 In other words, whether the Act applies is a matter of choice for a supplier. Had the statute been intended to impose new liability in the form of attorneys’ fees on all merchants who sell consumer goods other than on an “AS-IS” basis, it is doubtful that Representative Moss would have been able to describe the legislation as “a balanced piece of legislation” with “support from both consumers and business.”230

229. 120 CONG. REC. 41405 (1974).
230. Id.
This voluntary aspect of the Act is inconsistent with the broad approach. A supplier does not "choose" to give an implied warranty of merchantability. Such a warranty arises automatically (unless disclaimed) in sales of goods by merchants. In contrast, the narrow approach honors this voluntary aspect fully—only a supplier who chooses to offer a written warranty or service contract would be liable for any action under the Act.

The narrow-plus approach also respects the concept of supplier choice. While it is true that under the narrow-plus approach a retailer who does not offer a written warranty could still be subject to an action under the Act, such a retailer has made a voluntary choice concerning the consumer product. The retailer has chosen to sell a consumer product that is subject to a written warranty, and that voluntary act is a sufficient act of choice making imposition of the Act appropriate. After all, a consumer is not concerned with who offers the written warranty but does expect that a consumer product covered by a written warranty will be reliable and that any problems will be remedied. The narrow-plus approach focuses on the decision of the supplier to place in the hands of a consumer a product that is covered by a written warranty even if that supplier did not offer the written warranty.

E. Problems with the Pure Narrow Approach: Narrow-Plus to the Rescue

Most of the discussion in this Article has demonstrated that Congress did not intend to create a private right of action for breach of an implied warranty in the absence of a written warranty or service contract. One possibility might be to simply advocate for adoption of the narrow approach. That approach seems to be slightly ascendant, and, in many instances, the narrow approach is at least as consistent with the language and purposes of the Act described above as is the narrow-plus approach.

This subpart shows that the narrow approach, like the broad approach, does not fit comfortably with the language and purposes of the Act and that a hybrid approach is needed. This subpart discusses

231. The implied warranty of merchantability would arise automatically so long as the supplier is a merchant with respect to goods of the kind involved in the transaction. See U.C.C § 2-314(1) (Am. L. Inst. & Unif. L. Comm’n 2022).

232. This is especially true given that the retailer in this scenario could have disclaimed any implied warranties since it offered a written warranty or service contract. See U.C.C § 2-316 (Am. L. Inst. & Unif. L. Comm’n 2022).
language in the statute that is difficult to reconcile with the narrow approach. This language can, however, be reconciled with the narrow-plus approach. Further, this subpart discusses some indications from the statute and the legislative history that the narrow-plus approach best reflects Congress’ intent.

The “pure” narrow approach does not fit well with the Act’s definition of “warrantor.” That term is defined as “any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.”233 Because the private right of action described in section 110(d) refers to a consumer “damaged by the failure of a supplier, warrantor, or service contractor to comply with” relevant obligations, a warrantor offering only an implied warranty is apparently susceptible to suit.234 This language is difficult to reconcile with the narrow approach. It is, of course, consistent with the broad approach, but as discussed above,235 too much else in the Act is at odds with that approach.

Fortunately, the definition is fully consistent with the narrow-plus approach. Under the narrow-plus approach, a consumer can bring an action under the Act against a warrantor who gives only an implied warranty but not a written one. The term “warrantor” is defined exactly as we would expect it to be if Congress intended for courts to adopt the narrow-plus approach.

Other language in the Act also appears to undermine the “pure” narrow approach and support the narrow-plus approach. Section 110(f) provides that “only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.”236 This language is telling in two respects. First, it assumes that at least one warrantor in the transaction will be providing a written warranty. The statute refers not to “a” warrantor who creates a written warranty, but rather to “the” warrantor who creates a written warranty, indicating at least one such warrantor will be present in a transaction within the Act’s scope.

Additionally, section 110(f) contemplates not only the existence of a written warrantor in the transaction but also the existence of

234. Id. § 2310(d)(1).
235. See supra Part VA–D.
other warrantors who do not offer a written warranty but who may still be subject to consumer claims under the Act. Section 110(f) does not say that only the warrantor who gives the written warranty can be sued under the Act. If it did, that would provide strong—even irrefutable—support for the narrow approach. Section 110(f) says instead that a consumer can sue only the written warrantor to enforce rights arising under the written warranty.237 This language seems to assume the existence of other possible warrantors (i.e., those who do not give a written warranty) who can be sued under the Act for actions arising out of something other than the written warranty, such as for breaches of an implied warranty.

Section 110(f) fits with the narrow-plus approach but does not fit with either the broad approach or the narrow approach. Because the language of section 110(f) seems to assume the existence of a written warranty (by referring to “the” written warranty”) it is not consistent with the broad approach.238 Because section 110(f) seems to assume the existence of warrantors other than the written warrantor being subject to suit, it is not consistent with the narrow approach.239 It is, however, consistent with the narrow-plus approach. In the narrow-plus approach, when the manufacturer gives a written warranty, but the retailer does not, only the manufacturer can be sued under the written warranty. The retailer, however, can be sued for failure to comply with an implied warranty. This state of affairs is consistent with section 110(f).

The legislative history provides additional support for the narrow-plus approach. Section 110(d), as noted, provides a private right of action against a warrantor, service contractor, or “supplier.”240 “Supplier” is broadly defined. It means “any person engaged in the business of making a consumer product directly or indirectly available to consumers.”241 The legislative history emphasizes that this definition is broad enough to include “all persons in the chain of production and distribution of a consumer product including the producer or manufacturer, component supplier, wholesaler, distributor and retailer.”242

237. See id.
238. See id.
239. See id.
240. See id. § 2310(d)(1).
241. Id. § 2301(4).
A statement in the section-by-section analysis found in the Senate Commerce Committee Report suggests that Congress had in mind a scenario in which so long as there is a written warranty in the transaction, any type of warrantor could be subject to a right of action under the Act.\textsuperscript{243} The Senate version of the legislation included non-written “express warranties” among the warranties for a breach of which a purchaser could sue.\textsuperscript{244} However, the legislative history indicates that what was contemplated was a claim for breach of a non-written express warranty in the context of a transaction that includes a written warranty given by a supplier higher up in the distribution chain.\textsuperscript{245} The committee report analysis states that “[i]f a consumer product accompanied by a warranty in writing or service contract in writing has been expressly warranted outside the writing, then the purchaser can enforce the terms of that warranty against the supplier actually making it and recover court costs and reasonable attorneys’ fees.”\textsuperscript{246} This language describes a situation in which a written warranty is present (thus triggering coverage of the legislation). Once this coverage is triggered by the required written warranty, other claims under the legislation are possible, including against the supplier who made only an express non-written warranty.\textsuperscript{247} In other words, the written warranty on the product is a necessary condition for coverage under the legislation but a claim is possible against others in the distribution chain who did not give the written warranty.

The legislative history indicates in another instance that once a written warranty is present in the transaction, other warrantors in the distribution chain may be susceptible to a claim for breach of an implied warranty.\textsuperscript{248} The Senate Commerce Committee Report includes as an example “a salesman selling a consumer product warranted in writing for one year who said: ‘I guarantee that this product will perform perfectly for [five] years[,]’ … If he was not acting as an agent for the retailer or manufacturer in making that statement, only the salesman” would be liable.\textsuperscript{249} The salesperson in this scenario did not give the written warranty (only the express oral warranty), but the product is a “consumer product warranted in writing.”

\textsuperscript{243} See S. REP. No. 93-151, at 38 (1973).
\textsuperscript{244} See id.
\textsuperscript{245} See id. at 20.
\textsuperscript{246} Id. at 24.
\textsuperscript{247} See id.
\textsuperscript{248} See id.
\textsuperscript{249} Id.
presumably by the manufacturer. There are thus two warrantors in this example—the salesperson and the manufacturer. The salesperson can be sued even though they did not give a written warranty. The key is that the salesperson is in the chain of distribution of a transaction that includes a written warranty. The consumer product was covered by a written warranty and that was what mattered. Congress was interested in providing robust protections for consumers who buy consumer products subject to written warranties.

Thus, both the statute and the legislative history provide support for the narrow-plus approach’s position that the consumer product must be covered by a written warranty (and so there must be at least one written warranty) but that so long as it is, claims against other warrantors under the Act are also possible.

VI. CONCLUSION

A review of the Magnuson-Moss Warranty Act’s language and legislative history can only evoke sympathy for courts that have wrestled with whether a written warranty or service contract is necessary to trigger coverage of the Act. Neither the broad approach nor the narrow approach quite fits into the language of the statute or its legislative history. Some aspects of the Act support the narrow approach very well and others that support the broad approach. The advantage of the narrow-plus approach is that it honors all those aspects.

The narrow-plus approach honors the cross-reference in the definition of “implied warranty,” reading it seriously but not rigidly. In this way, consumer expectations concerning consumer products are honored. The narrow-plus approach also honors, again in a not overly rigid way, the Act’s focus on written warranties (or service contracts) as the gateway to coverage under the Act. And because the narrow-plus approach has an aspect of voluntariness (that is, the supplier’s choice to sell a consumer product covered by a written warranty), that facet of the statute is honored as well. It also honors and effectuates congressional intent and policies.

The narrow-plus approach also helps explain and is consistent with other language in the statute. It explains why the Act defines “warrantor” as including one who offers either a written or an implied warranty. Further, it explains the puzzling language of section 110(f) as well.

250. Id.
At its core, the Act is designed to protect consumers who purchase consumer products covered by written warranties. The narrow-plus approach does that in a more generous way than the narrow approach while also respecting the centrality of written warranties to the Act. The narrow-plus approach is well supported by the language and legislative history of the Act in ways that neither of the two current approaches is. Judicial adoption of the narrow-plus approach would effectuate Congress’ intent and honor consumer expectations. It would also, finally, resolve this important issue and provide needed guidance and certainty to consumers, courts, and lawyers practicing in this area.