A REVIEW OF ADMIRALTY, U.C.C. AND MAGNUSON-MOSS LAW RELATING TO RECREATIONAL BOAT SALES, WARRANTY ISSUES AND REPAIRS

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I. INTRODUCTION

The world of boat sales has changed remarkably over the last several decades. Recreational boats have become mass-marketed consumer products. This was not always so. At the beginning of the 20th century, vessel ownership in the United States could probably be summarized as follows: Large ships, barges and tugs were owned by commercial shipping interests. Smaller sailing and motorized craft were owned by fishermen. A few wealthy people owned large pleasure yachts. Ownership of motorboats was limited to those who lived along the coast or on large lakes. Those working in the manufacturing and agricultural sectors, which not so long ago made up much of the American economy, often lacked the leisure and disposable income to enjoy pleasure craft. The inexpensive rowboat, canoe or "johnboat" served a lot of recreational fishermen and waterfowl hunters.

The last few decades have seen a migration to all three U.S. coasts, where recreational boating is popular. The rise of a credit economy has enabled people to buy boats the same way they buy automobiles—by financing the purchase. Whereas in the old days one might buy a boat directly from a builder, today's boat dealers operate much as their counterparts in the automobile industry. They buy this year's model from a boat manufacturer and sell it to the consumer public.

Even so, boats are not the same as automobiles. Just about everyone needs an automobile, whereas boats for the most part fall into the category of luxury goods. To be sure, small motorboats are still used by fishermen and in other working applications. But a great many are purchased these days for leisure purposes. Pleasure boats are expensive; a relatively inexpensive motorboat costs as much as an ordinary car. Prices upwards of $50,000 are not at all unusual for medium-sized pleasure craft.[1] Whereas most people know what to expect from a car purchase—they have owned or at least operated automobiles before—many people buy expensive pleasure craft without really knowing what they are getting into. Boat purchases often accompany major life changes, such as retirement. The purchaser typically approaches the boat purchase with a range of hopes and expectations, some of which may be realistic and others less so. And in nearly every case, the purchaser is spending a lot of money and has correspondingly high expectations of quality and reliability.

[1] Prices in the six figure range are common in the cases discussed in this paper.

As anyone who has spent much time with boats (or boat litigation) will know, these expectations are sometimes frustrated. A pleasure boat has been described as "a hole in the water in which you pour money," a description which sometimes fits. Since as a general rule there is more of an emotional investment in a boat purchase than a car purchase, the boat purchaser's reaction to problems with his much-anticipated purchase may be equally emotional, escalating quickly into a legal confrontation with the dealer and manufacturer.

Litigation involving boats always raises, at least potentially, questions of maritime law. A contract for the sale of a boat is not a maritime contract, and for the most part breach of warranty claims arise from sales contracts and are therefore not governed by maritime law. That said, boat sale and boat defect cases are often at the frontier between maritime and land-based law, with the applicable law not always being completely clear depending on the particular facts of the case.

This paper will work through the typical recreational boat purchase process, starting with the initial contract of sale and proceeding from there. It will review the applicable law at each stage in the process, particularly with respect to difficulties which often arise. As will be seen, state sales law predominates to the exclusion of maritime law. Another body of federal law, namely the Magnuson-Moss Warranty Act, also comes into play here and there.

II. THE BOAT PURCHASE

The first formal stage of a recreational boat purchase is usually the "purchase agreement" or "contract of sale." As with most major purchases, buying a boat is not simply a matter of cash changing hands and the buyer walking out with the merchandise. More commonly, the buyer will sign a contract in which he or she promises to buy the boat at a stated price.

It is worth reviewing the cast of characters at this initial stage. The buyer is typically a consumer. The seller? With respect to new boats at least, the "seller" is usually a boat dealer. Boat dealers are, at the risk of sounding obvious, in the business of selling boats. They are usually "independent," in that they are not confined to any single boat brand.[2] A typical dealer will sell several lines of recreational vessel, and it is not unusual for a dealer to move around between brands depending on the local market.

[2] E.g. Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349, 351 (Tex. App. 14th Dist. 2003); State ex rel. Bunting v. Koehr, 865 S.W.2d 351 (Mo. 1993); Sea Ray Boats, Inc. v. Pleasure Marine, Inc., 1988 WL 138206 at *2 (Tenn. App. 1988).

The boat itself will have been built by a "manufacturer" or "builder" at a plant somewhere else. In the usual case, a boat manufacturer will build the basic component of the boat—the hull—at its own factory, and equip the hull with other equipment—most importantly engines—procured from other sources. Boat manufacturers typically have standing arrangements with major marine engine manufacturers, many of which are themselves subsidiaries of automotive engine manufacturers (Mercury, Yamaha and Honda come to mind). The manufacturing process consists for the most part of molding the hull (usually out of fiberglass) and fitting it with propulsion, steering gear and other essential equipment. As delivered by the factory, a boat will come equipped with engines and a steering wheel, but may not have some of the electronics and other ancillary equipment one might expect to find aboard a boat.

How does the boat get from the manufacturer to the dealer? Arrangements vary widely depending on the manufacturer. There is usually some form of dealership agreement which allows the dealer to sell the manufacturer's product and hold itself out as an authorized provider of warranty service.[3] Many manufacturers put dealers through some form of screening process, to ensure that they are financially responsible and have the equipment and personnel needed to maintain and repair the manufacturer's product.

Boat manufacturers usually get paid "up front"; that is, they sell inventory to dealers and get paid for it regardless of whether the boats then sell to consumers. Thus a dealer takes a certain risk that a boat might not sell, or might sell for less profit than the dealer hopes to realize. Dealers often finance their annual inventory purchases through a financing arrangement—typically a "floor plan" arrangement under which a financing company takes a security interest in the dealer's entire inventory.[4]

The terms of most manufacturer-dealer sales are "F.O.B. plant," meaning that the boats are delivered at the manufacturer's plant rather than the dealer's premises.[5] The dealer must therefore pay the cost of freight to its showroom, although the manufacturer will often make the actual shipping arrangements out of convenience.[6]

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[3]See, e.g., Boat Town U.S. A., Inc. v. Mercury Marine Division Of Brunswick Corp. , 364 So.2d 15, 16 (Fla.App. 1978).

[4] See, e.g., In re B & B Marine Sales & Service, 133 B.R. 99 (Bkrtcy. N.D. Ohio 1991).

[5] See, e.g, Charia v. Cigarette Racing Team, Inc., 583 F.2d 184, 188 (5th Cir. 1978); Koepp v. Peters, 193 F. Supp. 296, 297 (E.D. Wis. 1961*); Boat Town*, 364 So. 2d at 18.

[6] E.g. *Charia*, 583 F.2d at 188.

Boats are assigned a serial number called a "hull identification number," or "HIN."[7] The HIN serves much the same purpose as the familiar vehicle identification number or "VIN"—it provides a master number for tracking the product's ownership. Each manufacturer is usually assigned an alphabetical abbreviation, which will form the first few digits of the HIN; the remaining digits refer to the boat model, the number of the individual hull (usually in sequence of manufacture for that model), and the year of manufacture. The manufacturer also issues a document called a "manufacturer's statement of origin" (usually abbreviated "MSO"), which serves as the initial title document for the boat.

The MSO will often recite the fact that a boat has been manufactured for a particular dealer; if not, it can be endorsed to state that title to the boat has transferred to the dealer. In many cases, however, the MSO will be sent to the dealer's floor plan financing company, to be held until the dealer has paid its own financing charges out of the proceeds of the sale.[8]

To add another dimension of complexity, some boat builders use regional distributors, who in turn sell to local dealers.[9]

So to return to our typical boat sale transaction, we have a boat dealer who has presumably purchased inventory from several manufacturers, financing the inventory purchases through some form of floor plan financing arrangement. Should the dealer make a sale, a portion of the profit will go to the financing company, who must be paid before the original MSO will be handed over.

Assuming the buyer has found a boat to his liking, the next step will be a sales contract. The dealer will usually have a form entitled "purchase agreement," "sales contract," "contract to buy and sell watercraft," etc. These contracts are usually not overly detailed, the main terms being the identity of the boat to be purchased and the price to be paid. Depending on the circumstances, the buyer may be asked to deposit earnest money pending completion of the sale. The buyer is likely to need financing, unless he has a great deal of ready cash at hand. As is the

[7] See 33 C.F.R. § 181.23 et seq.

[8] See, e.g., Hampton Bank v. River City Yachts, Inc., 528 N.W.2d 880, 884 (Minn. App. 1995). For an illustration of the floor plan financing arrangement in the context of a misbehaving dealer, see State Bank of The Lakes v. Kansas Bankers Surety Co., 328 F.3d 906 (7th Cir. 2003).

[9] For an example of a dispute involving internecine arrangements between a manufacturer, a regional dealer and a commissioned salesman, see Jurgensen v. Albin Marine, Inc., 216 F. Supp. 2d 524 (D. Md. 2002).

case with automobile purchases, the buyer may provide his own financing, or the dealer may be able to arrange it.

As noted above, manufacturers often sell a basic product and do not outfit boats with all of the equipment which may ultimately be required. Equipment needs are affected by local navigating conditions and user preferences. The type of lake, river or ocean bottom, for example, will affect the user's choice of anchor. The user's need for sophisticated navigation and communications equipment will depend on whether the boat is to be used on a relatively small lake or in the open sea. Dealers often perform a service known as "commissioning,"[10] in which the boat is outfitted to the buyer's needs and preferences. Commissioning may include the addition of electronics, anchors and associated equipment (usually referred to as "ground tackle"), and safety equipment (life jackets, flares and so on). The additional equipment to be installed by the dealer, and the additional price due from the buyer, will usually be spelled out in the contract of sale.

Commissioning, it might be noted, is somewhat unique to the boating industry. There are of course a bewildering variety of options available to the car buyer, but most of these are installed at the factory. Dealer-installed options are usually fairly limited in the case of cars, whereas boat dealers often provide some of the most important equipment for the boats they sell.

After receiving the sales price, the dealer must typically discharge some obligations similar to those of an automobile dealer. First, the dealer must pay off its floor plan financier and obtain the original MSO for the boat in question. Separate title documents may also be required for outboard engines. The dealer will then execute a bill of sale for the vessel and (if applicable) its outboard engines. The dealer will typically also attend to registration of the boat in the buyer's name, through whatever state agency is responsible for titling and registration of watercraft. There may also be a process of "warranty registration," in which the dealer provides the manufacturer with information about the retail purchaser; that way the manufacturer will have a record of the retail purchase should the buyer later request warranty service.

This of course assumes there is some form of manufacturer's limited warranty for the boat. As well be made evident later on, a prudent boat dealer will have made clear in its contract of sale, first, that the dealer disclaims all forms of warranty imaginable; and second, that the only

[10] Defined as "to man, equip, and place a vessel in service after she has been laid up." W.A. McEwen & A.H. Lewis, ENCYCLOPEDIA OF NAUTICAL KNOWLEDGE p. 99 (Cornell Maritime Press 1953).

warranty for the boat is the limited warranty provided by its manufacturer. In most instances, the relevant warranty documents will be packaged with the boat, along with the owner's manual and other similar information.

Once the boat has been commissioned by the dealer and titled in the buyer's name, the sale is over and the buyer is off to enjoy his new boat purchase. The relationship between the buyer and dealer, however, is seldom over at that point. At a minimum, the buyer is likely to bring the boat back for routine maintenance; more often, the buyer will have various complaints, hopefully of a minor nature, which will be brought to the dealer for correction. And in the cases that come to our attention as lawyers, the buyer becomes dissatisfied with the boat and with the efforts of the dealer, and in most cases also the manufacturer, to respond to his complaints. In such cases the discretionary nature of the boat purchase almost seems to fuel the buyer's ire against the builder and dealer; the boat is the buyer's "lifetime dream," which has been cruelly shattered by the unscrupulous dealer and callous manufacturer.

We will proceed with a study of the various laws applying to the boat owner's various complaints.

III. THE BOAT SALE CONTRACT

The first and most important observation is that boat sale contracts are not themselves governed by maritime law. The admiralty jurisdiction of the federal courts applies to, among other things, maritime contracts.[11] Although the rule has been criticized,[12] it is well-settled that contracts for the sale of vessels are not maritime contracts.[13] Warranty claims founded on a contract of vessel sale are therefore not governed by maritime law, but instead by state sales law.[14] A number of courts have treated vessels as "goods" subject to the local enactment of Article Two of the Uniform Commercial Code.[15] Needless to say, given the non-maritime

[11] DeLovio v. Boit, 7 Fed. Cas. 418 (C.C.D. Mass 1815).

[12] It was described as a "petrified rule" in Jack Neilson, Inc. v. Tug Peggy, 428 F.2d 54, 58 (5th Cir. 1970)

[13] See Hatteras of Lauderdale, Inc. v. Gemini Lady, 853 F. 2d 848, 850 (11th Cir. 1988); Magnolia Ocean Shipping Corp. v. Mercedes Maria, 1982 AMC 731 (4th Cir. 1981); The Ada, 250 F. 194 (2d Cir. 1918).

[14] East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 874, 872 n.7, 106 S. Ct. 2295, 2303 n.7 (1986).

[15] E.g. Hozie v. Highland Light, 1998 A.M.C. 2829 (C.D. Cal. 1997); Fortin v. Ox-Box Marina, 557 N.E.2d 1157, 1990 A.M.C. 2866 (Mass. 1990); Burris v. Lake Wylie Marina, Inc., 330 S.E.2d 559 (S.C. App. 1985); Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 264 S.E.2d 768 (N.C. App. 1980); Neri v. Retail Marine Corp., 30 N.Y.2d 393, 334 N.Y.S.2d 165, 1974 AMC 797 (N.Y. 1972).

character of a boat sale contract, disputes over whether either party must go through with the contract are clearly outside of maritime jurisdiction.[16]

Furthermore, warranty claims flowing from such contracts also fall outside of maritime jurisdiction. In *Grand Banks Fishing Co. v. Styron*,[17] a seller allegedly warranted that a vessel was "free from any major defect." After going through with the purchase based on this warranty, the buyer had the vessel hauled, only to discover that there were many defects to her hull and machinery. Costly repairs were required to "put her in the condition in which she was represented to be" by the seller.[18] The court dismissed the libellant's breach of warranty claims as being outside admiralty jurisdiction. Those claims flowed from a contract of vessel sale, which is not a maritime contract. Similarly, in *Industrial Equipment & Marine Services, Inc. v. M/V Mr. Gus*,[19] the court held that a counterclaim for breach of " implied and express warranties as to the fitness of the vessel," again in connection with a contract of sale, was outside admiralty jurisdiction.

The United States Supreme Court seems to have endorsed this view in *East River Steamship Corp. v. Transamerica Delaval, Inc*.[20] In an oft-cited footnote, the Court observed that "[s]ince contracts relating to the construction of or supply of materials to a ship are not within admiralty jurisdiction [citations omitted], neither are warranty claims grounded in such contracts."[21]

Thus the disgruntled boat owner, who may have heard something about "admiralty law" and is intrigued that it may apply to his sea-going purchase, finds that his claim is actually governed by the same law as applies to his recent lawnmower purchase. As will be shown, most of the law governing the buyer's complaints will be furnished by the local enactment of Article Two of the Uniform Commercial Code.

Before launching into a blow-by-blow review of the typical boat warranty dispute, it is worth considering the terms and conditions of the contract. As noted above, the dealer and buyer

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[16] For an example of jurisdictional issues in a "dispute as to the parties' rights and obligations" under a typical sales agreement, see the unpublished case of Clements v. Preston, 2005 WL 3371084, *6 (S.D. Ala. 2005). The District Court dismissed, first, because the dispute did not meet the amount in controversy requirement for diversity jurisdiction, and second, because the dispute involved a non-maritime contract and was therefore outside admiralty jurisdiction.

[17] 114 F. Supp. 1 (D.C. Me. 1953).

[18] Id. at 2.

[19] 333 F. Supp. 578, 580 (S.D. Tex. 1971).

[20] Supra note 6.

[21] 476 U.S. 872 n. 7, 106 S. Ct. 2303 n. 7.

will typically enter into some kind of sales agreement. Money changes hands and title transfers. Somewhere along the line, the buyer will probably be handed a limited warranty document. This warranty is of considerable value to the buyer, since it is typically issued by the manufacturer rather than the dealer. The dealer sees the limited warranty as the one and only warranty on the boat.

A. DEALER'S WARRANTIES

Like it or not, however, the dealer is still the seller and, absent some contrary action, will be liable in the same manner as any other merchant in the business of selling goods. A merchant seller impliedly warrants that his goods are "merchantable."[22] With respect to boats, that means the product must "pass without objection in the trade under the contract description" and be "fit for the ordinary purposes for which such goods are used." As one notable commentator has observed, "'merchantable' is not synonymous with 'perfect.'"[23] A buyer's idiosyncratic objections to a boat will not necessarily prove that it is not merchantable. In *Bayliner Marine Corp. v. Crow*,[24] the plaintiff's complaints that a boat could not exceed twenty-five knots were held not to establish a breach of the merchantability warranty; the plaintiff failed to prove that "a significant portion of the boat-buying public would object to purchasing an offshore fishing boat with the speed capability" of the boat in question.[25]

The implied warranty of merchantability arises from nothing other than the dealer's status as a merchant dealing in boats. If the dealer "has reason to know any particular purpose" which the buyer may have in mind for the boat, the dealer has probably also given an implied warranty that the boat is "fit for such purpose."[26] This warranty is sometimes misused in court practice. Complaints invariably include a claim for breach of the warranty of fitness for a particular purpose, as if its omission might result in dire consequences to the pleader. But what was the boat supposed to be fit for? Usually there is some vague suggestion that the boat was not fit for what people typically use boats for, i.e. boating. But it is the warranty of *merchantability* which requires that goods be fit for their "ordinary" purpose. The warranty of fitness for a *particular* purpose requires something more than a promise that the goods are fit for their typical use.

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[22] U.C.C. § 2-314(1). Note that an individual *not* in the business of selling boats (such as a dentist) does not give any warranty of merchantability. Smith v. Stewart, 233 Kan. 904, 667 P.2d 358 (1983).
[23] James J. White & Robert S. Summers, 1 UNIFORM COMMERCIAL CODE § 9-13(a) at p. 673 (5th ed. 1996).
[24] 257 Va. 121, 509 S.E.2d 499 (1999).
[25] 509 S.E.2d at 503.
[26] U.C.C. § 2-315.

To illustrate the distinction, we might imagine a buyer who wanted a boat for waterskiing. A dealer who was aware of this and recommended a certain model has probably warranted its fitness for that particular purpose.[27] If the boat he sells is seaworthy and runs properly, it probably complies with the warranty of merchantability. But if it turns out the boat is better suited for fishing and not especially good for waterskiing, the dealer will have breached his warranty of fitness for a particular purpose—even though there is nothing objectively "wrong" with the boat and it is in fact quite suitable for a variety of other purposes.

In practice, the dealer generally prefers not to give any warranty at all; the dealer's objective is to substitute its own liability on the sale for a limited warranty from the manufacturer.[28] The dealer then gets paid by the manufacturer to repair or replace any defective components. But is this limited warranty really part of the contract of sale? In many jurisdictions, limitations or exclusions received after the fact may not make it into the contract. As stated in a lead South Carolina U.C.C. case, "[a]ccording to the prevailing interpretation of the Uniform Commercial Code, a disclaimer printed on a label or other document and given to the buyer at the time of delivery of the goods is ineffective if a bargain has already arisen."[29]

To cite one early example of this principle applied in the context of a boat sale, in *Dougall v. Brown Bay Boat Works & Sales, Inc.,*[30] the court refused to enforce the terms of an express warranty printed on the back of an Evinrude owner's manual:

> We are not persuaded here that the warranty found on the back cover of the Evinrude brochure played any part in the transaction giving rise to the sale. There is no evidence that the warranty was delivered to plaintiff at the time of the sale or that he was told that the sale was subject to warranties contained in the manual of instructions. Since disclaimer of the warranty is in the nature of an affirmative defense, it would seem that defendant had the obligation to establish that it was delivered at the time of sale and constituted an integral part of the transaction. We

[27] In *Crow*, the dealer knew the buyer wanted to use the boat for offshore fishing and "discussed the boat's speed in this context." However, the dealer did not know as of the sale "that a boat incapable of traveling at 30 miles an hour was unacceptable to Crow." 509 S.E.2d at 503-04. The dealer was therefore held not to have violated the implied warranty of fitness for particular purpose. Id. at 504. In First New England Financial Corp. v. Woffard 421 So.2d 590, 596-97 (Fla. App. 5 Dist. 1982), it was established that the seller "knew of [the buyer's] particular purpose and that [the buyer] was relying on the seller's judgment in choosing the best yacht for that purpose, i.e., crossing oceans as opposed to weekend lake sailing." This gave rise to a warranty that the boat was fit for that purpose.

[28] See, e.g., Rokicsak v. Colony Marine Sales & Service, Inc., 219 F. Supp. 2d 810, 813 (E.D. Mich. 2002).

[29] Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina, 286 S.C. 272, 277, 333 S.E.2d 67, 70-71 (1985).

[30] 287 Minn. 290, 178 N.W.2d 217 (1970).

> cannot agree that the circumstances surrounding the delivery of the brochure to the purchaser remotely approached the dignity of an express agreement.[31]

Thus if the dealer enters into a contract of sale without so much as mentioning the existence of a limited warranty, the dealer is probably exposed to U.C.C. Article Two's usual warranty liability. To protect itself, the dealer should draft its standard sales contract to disclaim the implied warranties and make it clear that the only warranty on the boat is the limited warranty provided by the manufacturer.[32] Several specific requirements must be met. First, in order to disclaim the implied warranty of merchantability, the dealer must "mention merchantability" and the disclaimer must be "conspicuous."[33] Capitalized provisions to this effect on the back of a boat purchase agreement were held sufficient to disclaim the warranty of merchantability in *Rokicsak v. Colony Marine Sales & Service, Inc.*[34]

The dealer should be also be careful not to make any "express" warranties of any kind about the boat. Otherwise a disclaimer that might be effective under state sales law will be invalidated by the Magnuson-Moss Warranty Act.[35] The Magnuson-Moss Act applies to warranties on "consumer products," defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."[36] We may as well get out of the way the fact that this definition of consumer products includes "boats," at least those sold for predominately recreational purposes.[37]

Section 108 of the Magnuson-Moss Act provides that no "supplier" may disclaim or modify an implied warranty if the supplier "makes any written warranty to the consumer with respect to such consumer product," or "enters into a service contract with the consumer which applies to such consumer product."[38] "Supplier" is defined as "any person engaged in the business of making a consumer product directly or indirectly available to consumers."[39] Dealers

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[31] 178 N.W.2d at 222-223.

[32] C.f. *Rokicsak*, supra note 28 at 813. For a very short opinion upholding a boat dealer's clear disclaimer of warranties in a purchase contract, see Family Boating & Marine Centers of Florida, Inc. v. Bell, 779 So.2d 402 (Fla. App. 2 Dist. 2000)

[33] U.C.C. § 2-316(20).

[34] Supra note 28 at 815. See also Lee v. R & K Marine, Inc., 165 N.C. App. 525, 598 S.E.2d 683, 685-86 (2004) (capitalized disclaimer on reverse side of purchase agreement relieved boat dealer of merchantability warranty).

[35] 15 U.S.C. § 2301 *et seq.*

[36] 15 U.S.C. § 2301(1).

[37] See Kemp v. Pfizer, Inc., 835 F. Supp. 1015, 1024 (E.D. Mich. 1993) (citing Federal Trade Commission guidelines including "boats," along with "automobiles" and "small aircraft," as examples of consumer products).

[38] 15 U.S.C. § 2308(a).

[39] 15 U.S.C. § 2301(4).

are included.[40] A "service contract" is defined as "a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product."[41] Thus in order to disclaim implied warranties, the dealer had better not warrant anything about the boat or enter into any kind of repair or maintenance contract. All of that should be left to the manufacturer.

B. MANUFACTURER'S WARRANTIES; PRIVITY

A manufacturer's warranties depend heavily on whether the applicable law requires privity of contract in order for implied warranties to arise. As noted above, in most instances the manufacturer sells to a dealer, not directly to the public. If the manufacturer has not sold anything to the consumer--if there is no "privity of contract" between the consumer and the manufacturer--how can the manufacturer have warranted anything to the consumer?

In this regard, section 2-318 of the U.C.C. offers states three "alternatives" on the issue of when third parties may benefit from a manufacturer's express or implied warranties. Of these alternatives, two are clearly limited to personal injury cases.[42] The third alterative allows any person who "may reasonably be expected to use. . . the goods and who is injured by the breach of warranty" to sue the manufacturer. The purpose of this alterative was apparently to make the U.C.C. consistent with revisions to the Restatement of Torts which extend the doctrine of strict products liability beyond personal injury to physical damage to property.[43] The alternative did not, however, "expressly authorize recovery for direct economic loss," and seemed intended, like the Restatement, to "abolish[] the privity requirement only in cases of property damage and personal injury."[44]

Even so, many jurisdictions have interpreted 2-318 as doing away with any requirement of contractual privity, even in cases involving only economic loss.[45] In the South Carolina case of *Gasque v. Eagle Machine Co., Ltd.*,[46] for example, "damages in the form of diminution in value of the defective product and consequential economic loss" were held to be within the ambit

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[40] See Ismael v. Goodman Toyota, 106 N.C. App. 431, 417 S.E.2d 290, 293-94 (1992).
[41] 15 U.S.C. § 2301(8).
[42] Alternatives A and B refers to "natural persons" who are "injured in person" by the breach of warranty. U.C.C. § 2-318.
[43] RESTATEMENT (SECOND) OF TORTS § 402A (1965).
[44] White & Summers, supra note 23, at § 11-5, p. 748-49.
[45] For a good recent discussion of the status of the privity doctrine, see Hyundai Motor America, Inc. v. Goodin 822 N.E.2d 947 (Ind. 2005).
[46] 270 S.C. 499, 503, 243 S.E.2d 831, 832 (1978).

of U.C.C. § 2-318.[47] Thus in South Carolina, as in many other states, a remote manufacturer becomes subject to exactly the same implied warranties as the dealer who actually sells the boat. Other jurisdictions reject implied warranty claims for economic loss if the privity requirement is not satisfied. In *Marshall v. Wellcraft Marine, Inc*.,[48] an Indiana court rejected a boat warranty claim against a manufacturer law because the applicable law (that of Florida) required privity of contract. Similarly, in *Richard W. Cooper Agency, Inc., v. Irwin Yacht & Marine Corp.*,[49] the North Carolina Court of Appeals rejected a boat buyer's implied warranty claims against a remote manufacturer based on the lack of privity, although it allowed express warranty claims.[50]

These diverging privity rules can make choice of law important in boat warranty cases. The U.C.C. provides that, where a transaction bears a "reasonable relationship" to the law of two states, the parties may agree that the law of either state will govern their transaction.[51] Otherwise, the local U.C.C. "applies to transactions bearing an appropriate relationship to this state."[52] In other words, the law of the forum is likely to apply unless the parties have chosen otherwise or the transaction has lacks an appropriate relationship to the forum state. Most of the boat cases seem to apply the law of place whether the plaintiff purchased the boat.[53] In *Marshall v. Wellcraft Marine, Inc.*, a federal judge in Indiana granted summary judgment on the plaintiffs' implied warranty claims against a remote manufacturer, because Florida, the state where the plaintiffs purchased their boat, required privity of contract to enforce an implied warranty claim.[54]

Assuming privity is no obstacle to the buyer, how does the "remote" manufacturer get the terms and conditions of its limited warranty into the contract--other than by hoping that the dealer sees to it (something the dealer evidently failed to do in *Dougall*[55])? Here the manufacturer finds some solace in the provisions of the Magnuson-Moss Act. Ordinarily a

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[47] See also JKT Co., Inc. v. Hardwick, 274 S.C. 413, 417, 265 S.E.2d 510, 512 (1980) (in *Gasque* "we recognized that lack of privity would not defeat a remote vendee's breach of warranty action seeking damages for purely economic loss").

[48] 103 F.Supp.2d 1099, 2000 A.M.C. 2865 (S.D. Ind.1999).

[49] 46 N.C. App. 248, 264 S.E.2d 768 (1980)

[50] 264 S.E.2d at 770-771.

[51] U.C.C. § 1-105.

[52] Id.

[53] E.g. *Marshall*, 103 F.Supp.2d at 1113; Robinson v. American Marine Holdings, Inc., 2002 WL 873185 (E.D. La. 2002). *Robinson* does not rely on the U.C.C. choice of law provision, but instead applies the Restatement of Conflict of Laws and state choice of law cases to what appears to have been predominately a warranty case.

[54] 103 F. Supp. 2d at 1112-14.

[55] Supra note 30.

sword in the consumer's hand, the Act arguably relaxes the manufacturer's obligation to communicate the terms of its limited warranty to the retail consumer. The Act provides that the Federal Trade Commission "shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him."[56] Those rules would appear to preempt contrary state disclosure laws. According to 15 U.S.C. § 2311(c), a state law requirement "which relates to . . . disclosure with respect to written warranties," and which is "within the scope of" but not "identical to" section 2302 "or a rule thereunder" is not applicable to a written warranty complying with section 2302 and the FTC's implementing regulations. In other words, FTC regulations govern warranty disclosure, at least as to consumer goods.

FTC regulations distinguish between the "seller's" obligation to provide the warranty to consumers, and the "warrantor's" obligation to "[p]rovide *sellers* with warranty materials necessary" for those sellers to meet their disclosure obligations. "Providing a copy of the written warranty with every warranted consumer product" is one of the means by which the warrantor can discharge its obligation to provide retail sellers with the materials necessary to "make the text of a limited warranty readily available for examination by the prospective buyer."[57]

Compliance with these FTC regulations will obviously protect a manufacturer against charges of violating the Magnuson-Moss Act by failing to disclose a limited warranty.[58] It further appears that compliance will counter the argument that warranty limitations appeared in a "post-sale" disclaimer. In *Zabit v. Ferretti Group, USA*,[59] the plaintiff claimed that he received the manufacturer's warranty on his $589,000 yacht "after or at the time of delivery and after the time of sale." He therefore argued that certain limitations in that warranty were ineffective. The court rejected the plaintiff's argument, noting, among other things, that the Magnuson-Moss Act "imposes different rules on sellers and warrantors," and that the "warrantor," here the boat manufacturer, had delivered a copy of its limited warranty to the seller along with the yacht.[60]

While this is of some help, it must be remembered that the Magnuson-Moss Act forbids a supplier from disclaiming or modifying implied warranties in a written warranty, other than to

[56] 15 U.S.C. § 2302(b)(1)(A).
[57] 16 CFR § 702.3(b)(1)(i)(A) (emphasis added).
[58] See, e.g., Plagens v. National RV Holdings, 328 F. Supp. 2d 1068, 1076 (D. Ariz. 2004).
[59] 2006 WL 3020855 (N.D. Cal. 2006).
[60] 2006 WL 3020855 at *4.

limit the implied warranty to the same duration as the express warranty.[61] Thus, assuming the manufacturer is subject to implied warranty liability under the applicable state's privity law, the manufacturer cannot disclaim implied warranties in its limited warranty.

To sum up, if all goes as planned, the selling dealer will have disclaimed all warranties of any kind on the boat in favor of the manufacturer's limited warranty. The manufacturer has no implied contract with the buyer, except in states like South Carolina which have entirely dispensed with contractual privity requirements. The manufacturer will, however, have issued a limited warranty to accompany its product. That warranty will typically contain a number of limitations which will receive more discussion later on. For example, manufacturers typically warrant only the part of the boat they actually construct. Separately warranted components (most notably engines) are usually excluded from the manufacturer's "overall" warranty.

We move on to the aftermath of the boat sale and a discussion of the warranty issues that typically arise.

IV. ACCEPTANCE, REJECTION AND REVOCATION

Let us assume the buyer finds something wrong with his boat. The legal steps he should take depend on whether he has "accepted" the boat. It should be noted here that boat purchasers are often not sophisticated "commercial men" and seldom behave the same as merchants dealing in goods. In theory, any tender of goods should be inspected right away, and either accepted (subject to a possible breach of warranty later on) or rejected. Consumers, having purchased a boat, are usually going to take it away and put it to some use. If problems arise, the buyer's first reaction is usually to ask the dealer to correct them. In bad cases, this leads to a steadily deteriorating relationship between the dealer and buyer (sometimes with the manufacturer involved as well), and, ultimately, to a lawyer getting involved on the buyer's behalf. By then, the buyer has been in possession of the boat for a while, and has probably put it to considerable use.

Generally speaking, under the UCC one is either entitled to "reject" non-conforming goods and be rid of them, or else one has "accepted" them and is stuck with them subject to a breach of warranty claim. Since the buyer may prefer getting out of the deal altogether over collecting warranty damages, an important question is often whether the buyer has accepted the boat, and if so, whether the buyer has done so irrevocably.

[61] 15 U.S.C. § 2308.

A. WHAT CONSTITUTES ACCEPTANCE?

"Acceptance" can occur either by an affirmative act, or by a failure to reject. In either case, the buyer is entitled first to a "reasonable opportunity to inspect the goods." After such opportunity, the buyer can affirmatively accept by "signif[ing] to the seller that the goods are conforming or that he will retain them in spite of their non-conformity."[62] He can also accept the goods by inaction if he "fails to make an effective rejection."[63]

Under this standard, the fact that money has changed hands or that title has passed to the buyer does not equate to acceptance. The buyer remains entitled to inspect the goods. In *First Nat. Bank of Litchfield v. Miller*,[64] buyers who refused to take delivery of a boat after it performed unsatisfactorily on two test rides were held not to have accepted it by previously signing an installment contract.[65] On the other hand, in *Mesalic v. Fiberfloat Corp.*, a buyer who made the final payment on a boat whose construction he had commissioned, and who after a sea trial gave the seller (in this case the manufacturer) a "punch list" of repairs and requested that the boat be transported to his home state, "can be said to have accepted the vessel, albeit on the condition that the requested repairs be made."[66]

As noted above, acceptance can also by the buyer's act "inconsistent with the seller's ownership."[67] In *Tonka Tours, Inc. v. Chadima*,[68] the buyer's authorization of repairs (apparently by someone other than the seller) after receiving and inspecting a boat was held inconsistent with its later attempt to reject.[69]

B. REJECTION; RIGHT TO "CURE"

A boat buyer's initial power to reject the purchase is broad; under the U.C.C., a buyer may reject goods which "fail *in any respect* to conform to the contract."[70] As noted above, the buyer retains the right to reject after delivery and until he has had an opportunity to inspect the good. Rejection, however, must be within a "reasonable" time after delivery, and is ineffective

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[62] UCC 2-606(a).
[63] 2-606(b).
[64] 97 Conn. App. 388, 904 A.2d 1282 (2006).
[65] 904 A.2d at 1286-87. See also In re Dorado Marine, Inc., 321 B.R. 581, 586 (Bankr. M.D. Fla. 2005), in which a "final sea trial" was held to be delivery, but that the buyer subsequently rejected the boat.
[66] 708 F. Supp. at 642 n. 2.
[67] U.C.C. § 2-606(c).
[68] 354 N.W.2d 519 (Minn. App. 1984)
[69] Id. at 521.
[70] U.C.C. § 2-601 (emphasis added).

unless the buyer "seasonably notifies" the seller.[71] Thus an "unseasonable" attempt at rejection means the buyer has accepted the goods. What is "reasonable" or "seasonable" will depend heavily on the facts. In *Don's Marine, Inc. v. Haldeman*,[72] rejection was held proper after the buyer had possession of a boat for thirty days, but had only used it on eight days. The buyer had requested a "quiet, smooth and dry ride," and according to the court it was "not unusual for one to take thirty days to determine whether or not a boat would meet a specified standard in order to accept or reject the same."[73]

Whether an attempt at rejection has even occurred can also be a subject of dispute, since consumers will seldom say anything along the lines of "I hereby reject this boat." According to some cases, a buyer's expression of dissatisfaction, without more, is not an effective rejection.[74]. On the other hand, a statement that a buyer "does not want the boat" on its third and final sea trial qualifies as a rejection.[75]

If the buyer has possession of the rejected goods, he must hold them "at the seller's disposition for a time sufficient to permit the seller to remove them." § 2-602(2)(b). Furthermore, the seller has a right to "cure" whatever nonconformity prompted the buyer's rejection, assuming "the time for performance has not yet expired."[76] Furthermore, if the seller had reasonable grounds to believe the tender would be acceptable, he may "have a further reasonable time to substitute a conforming tender."[77] The seller must "seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery."[78] Thus the buyer's right to reject for any non-conformity is not an absolute escape from the contract; assuming the deadline to deliver the boat has not passed, the seller can still cure the non-conformity by fixing it or delivering another model of the same boat.[79]

Where a boat sale contract has a fixed delivery date, the seller may obviously cure before that date or (if he reasonably believed the boat he delivered would be accepted) a reasonable time

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[71] U.C.C. § 2-602(1).
[72] 557 S.W.2d 826 (Tex. Civ. App. 1977).
[73] Id. at 829.
[74] See, e.g., Plantation Shutter Co., Inc. v. Ezell, 328 S.C. 475, 492 S.E.2d 404, 407 (Ct. App. 1997)
[75] *Dorado Marine*, 321 B.R. at 586.
[76] U.C.C. § 2-508.
[77] U.C.C. § 2-508(2).
[78] Id.
[79] Thus in Marlowe v. Argentine Naval Commission, 808 F.2d 121 (D.C. Cir. 1986), the court held that a seller had received its opportunity to cure when it could have delivered a conforming airplane within the time remaining for delivery. 808 F.2d at 124-25.

after that. How many recreational boat sale contracts include a delivery date? The dealer, frankly, is more interested in nailing down the closing date, which is when the money changes hands. Absent a specific delivery date, Section 2-309(1) of the U.C.C. states that "[t]he time for shipment or delivery . . . shall be a reasonable time." Put another way, the dealer probably has a reasonable time after closing to deliver a conforming boat.[80]

The seller's right to cure is particularly important in connection with the Magnuson-Moss Act. Section 110(d) of that Act allows a consumer to bring a civil action against a "supplier" or "warrantor" based on the failure to comply with an obligation under a written or implied warranty."[81] No such action, however, may be brought "unless the person obligated under the warranty . . . is afforded a reasonable opportunity to cure such failure to comply."[82] Thus a plaintiff under the Magnuson-Moss Act "must plead and prove that, *prior to filing suit*, she provided defendant with an opportunity to cure the alleged breach, and that defendant refused to cure it."[83] Compliance with Magnuson-Moss can be very important given the court's discretion under that Act to award attorney's fees.[84]

C. REVOCATION OF ACCEPTANCE; RIGHT TO CURE?

Even if the buyer accepts the boat, the acceptance is not necessarily final. Section 2-608 of the U.C.C. allows a buyer to revoke his acceptance under certain conditions. Most importantly, the non-conformity upon which the revocation is based must "substantially impair[]" the boat's value to the buyer. Thus revocation of acceptance requires a more serious defect than rejection, which, it will be recalled, may be based on any nonconformity. What "substantially impairs" the value of a boat to its owner? In *Fortin v. Ox-Bow Marina, Inc.*,[85] proof that "the starboard engine overheated twice; the bilge pump was defective; there was an array of malfunctioning electrical equipment; and the marine toilet only functioned partially"

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[80] See In re Dorado Marine, Inc. 321 B.R. 581, 586 -587 (Bankr. M.D. Fla. 2005), in which is was held that a seller "could have continued to attempt to cure the defects in the Boat within a reasonable time" after delivery, but made no attempt to do so. In one case it was held that the seller had through the six-month duration of a written warranty to cure defects in a marine engine. Peter Pan Seafoods, Inc. v. Olympic Foundry Co., 565 P.2d 819, 824 (Wash. App.1977).

[81] 15 U.S.C. § 2310(d)(1).

[82] 15 U.S.C. § 2310(e).

[83] Radford v. Daimler Chrysler Corp., 168 F.Supp.2d 751, 753 (N.D. Ohio 2001) (emphasis added). See also Mockabee v. Wakefield Buick, Inc., 298 S.C. 386, 380 S.E.2d 848, 850 (1989) (no opportunity to cure where complaints were nebulous and plaintiff did not take car to service department).

[84] 15 U.S.C. § 2310(d)(2). Attorney's fees are available "unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate." Id. One hopes that this discretion will be used when an owner prevails but is shown to have taken an unreasonable or obstreperous approach to a warranty dispute.

[85] 408 Mass. 310, 316, 557 N.E.2d 1157, 1162, 1990 AMC 2866 (1990)

was held to support the lower court's conclusion that these defects substantially impaired a boat's value to the plaintiff.[86] The court added that "the number of deficiencies and type of nonconformity and the time and inconvenience spent in downtime and attempts at repair" were all relevant to the substantial impairment inquiry.[87]

A buyer's awareness of non-conformities also bears on whether he may revoke acceptance. If the buyer simply did not know about the non-conformity, he may revoke acceptance if it was "reasonably induced" either by "the difficulty of discovery before acceptance" or "the seller's assurances."[88] That is, if the defect was hard to find or it the buyer didn't look for it because the seller said it wasn't there, the buyer may revoke acceptance. On the other hand, if the defect was plain and the buyer somehow overlooked it, he should have no right to revoke.[89]

More frequently, the buyer knew the boat had some defects, but accepted "on the reasonable assumption that its non-conformity would be cured and it has not seasonably been cured."[90] For example, the dealer may assure the buyer that, although the engine may be sputtering now, it will improve with further use and adjustments. If so, the buyer can revoke acceptance if the dealer fails to correct the engine problem in a reasonable time.[91] On the other hand, a buyer might prefer to accept a white boat now than the promised red boat later; if so, the buyer is stuck with the white boat unless the dealer gave him reason to expect a paint job.

Revocation does not require "formal notice" to the seller; instead, "any conduct clearly manifesting a desire of the buyer to get his money back" is sufficient notice of revocation.[92] However, when the buyer's behavior does not indicate a revocation of acceptance and revocation is not alleged in the pleadings, the filing of a lawsuit will not be construed as revocation.[93] Revocation must occur within a reasonable time after the buyer knows or should know of the grounds for revocation.[94] Reasonableness will usually be a question for the jury.[95] The

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[86] 557 N.E.2d at 1162.
[87] Id.
[88] U.C.C. § 2-608(1)(b).
[89] UCC § 2-607(2); See Danjee, Inc. v. Addressograph Multigraph, 44 N.C. App. 626, 262 S.E.2d 665, 669 (1980).
[90] U.C.C. § 2-608(1)(a).
[91] See Adams v. Grant, 292 S.C. 581, 358 S.E.2d 142, 143 (1986).
[92] Performance Motors, Inc., v. Allen, 280 S.C. 385, 186 S.E.2d 161, 168 (N.C. App. 1972), quoting 2 R. Anderson, UNIFORM COMMERCIAL CODE § 2-608:16 at 245 (2d ed. 1971); see also Warren v. Guttanit, Inc., 69 N.C. App. 103, 317 S.E.2d 5, 11 (1984).
[93] Riley v. Ken Wilson Ford, Inc., 109 N.C. App. 163, 426 S.E.2d 717, 723 (1993).
[94] U.C.C. § 2-608(2).

surrounding circumstances, including the complexity of the goods, the sophistication of the buyer and the difficulty of discovering the non-conformity, may all be considered.[96] In *Fortin*,[97] for example, the court held that a revocation of acceptance four months after delivery of a yacht was timely, when the seller kept assuring the buyers that their complaints would be redressed.[98] In *Haldeman*, revocation was held proper when the buyer continued to use the boat for three months while he waited the seller's attempts to cure, and did nothing after revoking his acceptance other than "maintain[ing] the boat with reasonable care" while waiting for the seller to dispose of it.[99] [100] However, in *Wadsworth Plumbing & Heating Co., Inc. v. Tollycraft Corp.*,[101] the plaintiff's retention and utilization of his boat "for thirty-two months before attempting revocation," was held to be untimely, even thought he seller had assured him that repairs would be made. His retention of the boat and use of it "for fishing trips right up to the time of trial" was also held to be inconsistent with the seller's ownership."[102]

Revocation of acceptance must also occur "before any substantial change in the condition of the goods" except one caused by the defects themselves.[103] Given this, a boat owner is well advised to revoke acceptance before the boat becomes subject to a substantial amount of wear and tear from use. Even so, as to automobiles at least, some cases hold that the buyer may continue to use the goods while waiting to see if the seller's assurances of a seasonable cure will be met, and that such ordinary use does not prevent revocation of acceptance even if it results in some depreciation in value.[104]

Does the seller have a right to cure after receiving notice of revocation? The plain text of the U.C.C. affords a right to cure only in response to a rejection, and assuming time remains for a

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[95]Harrington Mfr. Co. v. Logan Tontz Co., 40 N.C. App. 496, 253 S.E.2d 282, 286 (1979).
[96] Id.
[97] Supra note 85.
[98] 1990 AMC at 2873-74.
[99] 557 S.W.2d at 829-830. See also Mockabee v. Wakefield Buick, Inc., 298 S.C. 386, 380 S.E.2d 848 (Ct. App. 1989) the South Carolina Court of Appeals (delay of 22 not "per se untimely," although buyer waived right to revoke by delaying after seller refused to make further repairs). In North Carolina at least, no tender of the goods is required for a valid revocation. Performance Motors, 186 S.E.2d at 168. Thus the fact that a buyer continued to reside in a mobile home "after allegedly revoking or rejecting the unit" did not prevent her from pursuing a revocation remedy. Davis v. Colonial Motor Homes, 220 S.E.2d 802, 805 (N.C. App. 1975). On the other hand, the right to revoke may be waived if, after discovery of the defect, the buyer "ratifies the sale by continuing to use the chattel for his own purposes." Cooper v. Mason, 188 S.E.2d 653, 655 (N.C. App. 1972).
[100] 380 S.E.2d at 849.
[101] 277 Or. 433, 560 P.2d 1080 (Or. 1977)
[102] 560 F.2d at 1081-82.
[103]U.C.C. § 2 -608(2)
[104]Allen v. Rouse Toyota Jeep, Inc., 100 N.C. App. 737, 398 S.E.2d 64, 66 (1990).

proper delivery. Several jurisdictions, however, have concluded "as a matter of public policy" that the seller should be afforded a right to cure before the buyer is permitted to revoke acceptance.[105] In most cases, revocation only occurs after the seller has tried but failed to cure the defect.

D. REMEDIES FOR NON-DELIVERY

A buyer who rightfully rejects or revokes acceptance may recover the price paid to the seller, or any portion thereof.[106] This is often the boat owner's primary objective if his purchase has simply failed to live up to expectations. Assuming, however, that he still wants anything to do with boating, the buyer can also "cover" by purchasing a substitute boat; in that case he can recover the difference between the "cover cost" and the contract price, plus incidental and consequential damages. In *Meshinsky v. Nichols Yacht Sales, Inc.*,[107] for example, a plaintiff who "bought another Cigarette 38" from a different dealer at a higher price was held entitled to cover damages.[108]

The buyer may also opt not to cover, in which case he may recover damages for non-delivery.[109] The usual measure of damages for non-delivery is the difference between the market price of the goods at the time the buyer learned of the breach and the contract price, plus consequential and incidental damages.[110] Thus a boat buyer can introduce evidence of the local market value of the boat had it been delivered as promised, and recover the difference between that value and the contract price.

From whom can the price and these other damages be recovered? Although the manufacturer is usually perceived as the deeper pocket, it hardly makes sense to hold the manufacturer liable for repayment of the dealer's generally higher retail price. Most cases agree that a "remote manufacturer" is not considered a seller for purposes of the U.C.C. "non-delivery"

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[105] See Tucker v. Aqua Yacht Harbor Corp., 749 F. Supp. 142, 145 (N.D. Miss. 1990); Gulfwind South, Inc. v. Jones 775 So.2d 311, 312 (Fla. App. 2 Dist. 2000) (buyer "had to demonstrate that the dealer had the opportunity to cure the defects, but failed to do so 'seasonably'" before it could revoke acceptance). Note also that the Magnuson-Moss Act requires that the warrantor be given an opportunity to cure, and makes no distinction between rejection and revocation of acceptance. See 15 U.S.C. § 2310(e).

[106] U.C.C. § 2 -711(1).

[107] 110 N.J. 464, 478, 541 A.2d 1063 (1988).

[108] 541 A.2d at 1070.

[109] U.C.C. § 2-711(1)(b).

[110] U.C.C. § 2-713(1).

remedies.[111] The buyer may only recover the price and related non-delivery damages from the retail seller from whom he purchased the goods.

V. BREACH OF WARRANTY

If a buyer accepts a boat and has no grounds for revoking his acceptance, he must pay the contract price of the goods but retains the right to sue for breach of warranty.[112] It is at this stage that the manufacturer enters in earnest. Quite possibly the manufacturer was lurking in the background while the dealer and buyer were arguing over whether the boat would be accepted at all; oftentimes manufacturers assist dealers in trying to get to the bottom of customer complaints. But as noted above, the rejection and revocation of acceptance remedies are available against the dealer only; breach of warranty claims may be asserted against the manufacturer as well.

A. NOTICE OF BREACH

A buyer must give reasonable notice to the seller of any breaches "or be barred from any remedy."[113] Some cases take this requirement very seriously. In *Romedy v. Willett Lincoln-Mercury*,[114] a buyer's claim was held barred when he failed to inspect a vehicle for "four to five days" and failed to notify the seller of an alleged breach "for three weeks."[115] Most cases, furthermore, treat the notice requirement as a "condition precedent" of a breach claim, rather than an affirmative defense for which the seller bears the burden.[116] Whether notice was given within a reasonable time is typically determined by "examining the particular facts and circumstances of each case and the policies behind the notice requirement."[117] These policies are to give the seller the opportunity to cure, to give the seller an opportunity to investigate a breach of warranty claim, and to provide a terminal point for liability in a sales transaction.[118] Some

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[111] See, e.g., Alberti v. Manufactured Homes, Inc., 329 N.C. 727, 407 S.E.2d 819, 823 (1991); Wright v. O'Neal Motors, Inc., 57 N.C. App. 49, 291 S.E.2d 165, 169 (1982).

[112] U.C.C. § 2 -607; HPS, Inc. v. All Wood Turning Corp., 21 N.C. App. 321, 204 S.E.2d 188, 190 (1974).

[113] U.C.C. § 2 -607(3)(a).

[114] 136 Ga. App. 67(1), 220 S.E.2d 74 (1975).

[115] 220 S.E.2d at 75. See also Massey v. Thomaston Ford Mercury, 196 Ga. App. 278, 395 S.E.2d 663, 665 (1990) (warranty claim barred where buyer "waited a year before notifying [seller] of the absence of certain features, which in the normal operation of the vehicle could not be ignored."

[116] Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1102 (11th Cir. 1983); Hawkinson v. A.H. Robins Co., Inc., 595 F. Supp. 1290, 1313 (D. Colo. 1984); Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681, 683 (1981).

[117] *Maybank*, 273 S.E.2d at 684.

[118] Id. at 684-85.

latitude can be afforded the unsophisticated consumer, but it is more common in personal injury cases.[119]

There is some dispute in the cases about what sort of communications qualify as notice of breach. According to one line of cases, the buyer must "notify the seller that the buyer considers the seller legally in breach"; according to another, "almost any complaint will suffice."[120] One South Carolina case described the stricter standard as "the majority view," although it declined to adopt either approach because the buyer had failed to give notice even under the lenient standard.[121]

Relatively few notice cases seem to involve boats. In one, *Smith v. Stewart*, [122]the court held that the buyer gave proper notice of a dry rot condition, where he complained about a fuel leak three days after taking delivery, discovered the dry rot six months later, and filed suit less than a month after discovering the dry rot.

Who gets the notice? The buyer will generally complain to the dealer from whom he purchased the boat. The assumption is that the dealer is an acceptable point of contact for communicating notice to everyone concerned. Many manufacturers prefer exactly that and expect customer complaints to be made, at least initially, to the dealer. If that is what the warranty documents say, there should be no notice issue. But in many cases manufacturers defend on the basis of lack of notice, and the courts appear to be split on whether notice to the selling dealer is sufficient. In *Sullivan v. Young Brothers & Company, Inc.*,[123] (which is cited here only because it involved a boat) a district court asserted, perhaps too confidently, that the "majority of courts" have held that "buyers need only notify their immediate sellers."[124] As there remains a great deal of doubt on this point, buyers are well advised to notify boat manufacturers as well as dealers of serious complaints.[125]

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[119] See id. at 685 (three year delay before providing notice by filing suit held not unreasonable as a matter of law in personal injury case).

[120]See Southeastern Steel Co. v. W.A. Hunt Constr. Co., Inc., 301 S.C. 140, 390 S.E.2d 475 (Ct. App. 1990)

[121] 390 S.E.2d at 478-79.

[122]233 Kan. 904, 667 P.2d 358 (1983).

[123] 893 F. Supp. 1148 (D. Me. 1995), aff'd in part, rev'd in part, 91 F. 3d 242 (1st Cir. 1996).

[124] 893 F. Supp. at 1160. On appeal, the First Circuit found sufficient evidence in the record to support a finding of constructive notice to the manufacturer, and declined to review the lower court's characterization of the majority view on this issue.

[125] For an example of a contrary holding, see Hobbs v. General Motors Corp., 134 F. Supp. 2d 1277, 1284-85 (M.D. Ala. 2001). According to White and Summers, "more recent decisions . . indicate that a non-privity consumer buyer must timely notify a remote manufacturer of alleged defects, at least when the buyer seeks recovery under the [U.C.C.] for economic loss. We concur in this view." White & Summers, supra note 23, at § 11-10(a) p. 776.

The situation is further complicated by the fact that some boat components are separately warranted. If the engine manufacturer is the responsible warrantor, to whom should the notice be directed? In *Malkamaki v. Sea Ray Boats, Inc.*,[126] a Caterpillar engine warranty required the buyer to give "timely notice of a warrantable failure" and to "promptly make the product available for repair."[127] The warranty did not, however, specifically indicate where notice should be sent. The plaintiff had provided notice to Caterpillar's "authorized dealers and repair centers," but not to Caterpillar itself. The court found Caterpillar's warranty ambiguous as to how notice was to be conveyed; construing the notice provisions against Caterpillar, the court held that notice to its dealers and repair centers was adequate.[128]

B. REMEDIES

Having been notified of the alleged breach of warranty, the manufacturer could always just pay damages to the buyer. The U.C.C. defines the buyer's breach of warranty damages as the difference in value between the product as warranted and as accepted.[129] The fact that no immediate damages have resulted does not prevent the buyer from seeking such a "benefit of the bargain" recovery. *Coghlan v. Wellcraft Marine Corp.*,[130] for example, held that boat buyers were in theory entitled to "benefit of the bargain" damages after being sold an otherwise sound boat which, contrary to the manufacturer's promises of all-fiberglass construction, had a deck constructed of fiberglass-encased plywood.[131]

These damages can be quite substantial. In *Boyes v. Greenwich Boat Works, Inc.*,[132] the plaintiff claimed to have been promised a boat capable of, among other things, a top speed of 30 knots with a cruising range of 300 nautical miles.[133] The court refused to exclude expert testimony to the effect that a boat with those performance characteristics would have been worth $100,000 more than the purchase price. "In the usual case," the court agreed, "the purchase price

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Compare this assertion with Halprin v. Ford Motor Co., 107 N.C. App. 423, 420 S.E.2d 686 (1992) (agreeing that majority of courts "have held that buyers need only notify their immediate sellers," but declining to decide issue). See also Annotation, "Necessity that buyer of goods give notice of breach of warranty to manufacturer under UCC sec. 2-607, requiring notice to seller of breach," 24 A.L.R.4th 277 (1983).

[126] 411 F. Supp. 2d 737 (N.D. Ohio 2005).

[127] Id. at 744.

[128] Id.

[129] U.C.C. § 714(2); see also Richard W. Cooper Agency, Inc. v. Irwin Yacht & Marine Corp., 46 N.C. App. 248, 264 S.E.2d 768, 771 (1980).

[130] 240 F. 3d 449 (5th Cir. 2001).

[131] Id. at 453-54.

[132] 27 F. Supp. 2d 543 (D.N.J. 1998).

[133] Id. at 545.

and the fair market value of conforming goods are the same or reasonably close." On occasion, however, the buyer may have "negotiated a very favorable deal," or the seller may have "misperceived the value of what was being promised."[134] Contrast the *Boyes* court's willingness at least to consider such evidence with *Tarter v. MonArk Boat Co.*[135] There the plaintiff testified that his boat "would have had a value of $160,000.00 if it had been as warranted," but that as accepted it was worth only $80,000. Although the court acknowledged that an owner may testify as to the property's value, it found the cost of repairing the vessel to be a more accurate measure of the buyer's loss.[136]

1. EXCLUSIVE REMEDY PROVISIONS

The parties to a sales contract may agree to limit the remedy for breach to "repair or replacement of non-conforming goods or parts."[137] Not surprisingly, most boat manufacturers prefer this remedy over compensating the buyer for the benefit of his bargain, and such limitations are typically upheld.[138] Typically, the manufacturer has some arrangement with the dealer, whereby the dealer is paid an agreed-upon rate to provide warranty service for the manufacturer's boats. This service will frequently involve "boat repair" work.

2. REPAIR VS. SALE CONTRACTS

At this point an interesting jurisdictional issue arises. Although it is clear that a contract for the sale of a vessel is not maritime in nature, it is equally clear that a contract to repair a vessel is a maritime contract.[139] Does that mean the *repair* obligations contained in a typical boat warranty are governed by maritime law, such that an action for their breach can be brought under federal admiralty jurisdiction if the buyer is so inclined?

The answer appears to be "no." The case of *Gaster Marine Recovery & Sales, Inc. v. M/V "THE RESTLESS I,"*[140] involved a claim for repairs to a vessel, made pursuant to a brokerage agreement for the sale of the defendant's ship and for the purpose of "enhance[ing] her saleability."[141] The court agreed that there was "no intuitive reason why the same repairs that if made alone would invoke federal admiralty jurisdiction fail to do so if undertaken

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[134] Id. at 553.
[135] 430 F. Supp. 1290 (D.C. Mo. 1977), aff'd, 574 F.2d 984 (8th Cir. 1978)
[136] 430 F. Supp. at 1294.
[137] U.C.C. § 2-719(1)(a).
[138] E.g. Palmucci v. Brunswick Corp. 710 A.2d 1045, 1048 (N.J. Super. A.D.1998)
[139] La Esperanza v. Perez, 1998 AMC 21, 28 (1st Cir. 1997)
[140] 33 F. Supp. 2d 1333 (S.D. Fla. 1998).
[141] Id. at 1334.

pursuant to a sales agreement."[142] However, the brokerage contract was clearly non-maritime, so the question became whether the non-maritime elements of the contract were "'either significant or separable.'"[143] The court found the non-maritime elements neither insignificant nor separable, "because the repairs were undertaken to advance the sale of the 'RESTLESS I' pursuant to the parties' Brokerage Agreement."[144] The case was therefore dismissed.

While *THE RESTLESS I* does not involve a boat warranty, its reasoning certainly seems applicable. The non-maritime aspects of a boat sale contract are hardly insignificant in comparison with the repair obligation, nor do they seem separable from the repair obligation. The remedy of replacement or repair is, after all, part and parcel of the manufacturer's limited warranty, which in turn flows from the dealer's contract of sale. Thus even if the dealer has torn into the boat and attempted (perhaps unsuccessfully) all manner of repair work, we do not have a maritime contract if the dealer's repair efforts were pursuant to the remedy provisions of a boat warranty.

Similarly, the dealer's additional work to "commission" the boat, or fit it out for the buyer's use, are not likely to be considered separate maritime contracts. In *Hatteras of Lauderdale, Inc. v. Gemini Lady*,[145] "extras or customization of the vessel" were held to have been "completed as part of the sale and/or construction of a new vessel," and did not provide any basis for admiralty jurisdiction.[146]

3. EXCLUSIVENESS OF REMEDY

Another frequent issue in boat cases is whether the "repair or replacement" remedy is exclusive of other remedies. The U.C.C. provides that a remedy of this nature is "optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy."[147] Some courts seem to require very specific language in order for a repair or replacement remedy to be exclusive. In *Williams v. Hyatt Chrysler-Plymouth, Inc.*,[148] Chrysler's express warranty promised to "fix without charge . . . any part of this vehicle . . . which proves defective in normal use," and went on to state that "[t]his is the only warranty made by Chrysler Corporation applicable to this vehicle." The court found "no language in the warranty expressly stating that

[142] Id. at 1335.
[143] Id. (quoting Wilkins v. Commercial Inv. Trust Corp., 153 F. 3d 1273, 1276 (11th Cir. 1998).
[144] Id.
[145] 853 F.2d. 848 (11th Cir. 1988).
[146] Id. at 850-51.
[147] § 2 -719(2)(b).
[148] 48 N.C. App. 308, 269 S.E.2d 184 (1980).

such a remedy is exclusive."[149] If a repair or replacement remedy is non-exclusive, then the buyer can choose between having the boat repaired (or even replaced), or keeping the boat and collecting buyer's damages.

Assuming the repair or replacement remedy is exclusive, the next issue is usually whether the remedy "fail[s] of its essential purpose." [150] "Where a seller fails or refuses to effect repairs as required by the terms of a warranty, the warranty can be found to have failed of its essential purpose."[151] As one boat case put it, "[t]he buyer . . . is not bound to permit the seller to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty."[152] After a certain number of tries, the manufacturer must give up trying to repair the boat. The exclusive remedy having failed, the buyer may recover based on the usual U.C.C. remedy.[153]

Whether the seller has been given a reasonable chance is usually a question of fact.[154] In *Abele v. Bayliner Marine Corp.*,[155] however, the plaintiff attempted to revoke acceptance immediately after failure of an engine which had run for 110 hours after having been replaced by the defendant on a previous occasion. The court found as a matter of law that the plaintiff's "refusal to afford the Defendant a second opportunity to repair or replace the boat's engine, over a year after the first repair attempt, and after 110 hours of use, was a failure to give the Defendants a reasonable opportunity to cure."[156]

The "failure of exclusive remedy" issue often merges with the "revocation of acceptance" inquiry. It will be remembered that the buyer may base his revocation of acceptance on the seller's failure, despite past assurances, to cure a nonconformity. The buyer's initial complaints arguably qualify as notice of a breach, especially in states where the lenient notice of breach test

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[149] 269 S.E.2d at 189.
[150] U.C.C. § 2-719(2).
[151] Bailey v. Skipperliner Industries, Inc., 278 F. Supp. 2d 945, 957 (N.D. Ill. 2003).
[152] Tucker v. Aqua Yacht Harbor Corp., 749 F. Supp. 142, 146 (N.D. Miss. 1990) (quoting Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319, 321 (Fla. Dist. Ct. App. 1972). See also Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919, 924 (1980) (buyer "is not required to give the warrantor unlimited opportunities to attempt to bring the item into compliance with the warranty); Bishop Logging Co. v. John Deere Indus. Equipment Co., 455 S.E.2d 183, 191 (Ct. App. 1995) ("[w]here a seller is given a reasonable chance to correct defects and the equipment still fails to function properly, the buyer is deprived of the benefits of the limited remedy and it therefore fails of its essential purpose"); Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993).
[153] *Bailey*, 278 F. Supp. at 957.
[154] Abele v. Bayliner Marine Corp., 11 F. Supp. 2d 955, 961 (N.D. Ohio 1997).
[155] Supra.
[156] Id. at 961-62.

is applied. The dealer's efforts to correct the problem justify the buyer's delay in revoking acceptance; meanwhile each unsuccessful attempt by the dealer to correct the problem bolsters the argument that the exclusive remedy has failed of its essential purpose. At some point the buyer is in a position both to revoke acceptance and claim breach of warranty damages. There is no requirement that the buyer elect between one remedy or the other.[157]

C. LIMITATIONS

In addition to an exclusive remedy provision, most manufacturer's warranties will contain a long list of exclusions and limitations. These should be studied in detail and compared with the facts of each case. There is only room here for discussion of some of the major limitations.

1. DURATION

Most manufacturers' warranties are limited in duration. Such limitations are generally enforced; for example, in *Richard W. Cooper Agency v. Irwin Yacht & Marina Corp.*,[158] the court described the "measure of damages under the express warranty of the defendant Irwin Yacht" as "the cost of repair and replacement in correcting any defects in material or workmanship discovered and proven during the one-year warranty period."[159]

Some additional discussion of the Magnuson-Moss Act is in order, however. One of the basic requirements of that Act is that manufacturers designate their warranties as "full" or "limited," depending on whether the warranty meets "federal minimum standards for warranties." A warranty that meets those standards must be designated "full," whereas one that does not must be designated "limited."[160] The federal minimum standards prohibit a "full" warranty from "impos[ing] any limitation on the duration of any implied warranty on any product."[161] If a warranty is designated as "limited," then "implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on

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[157] Aluminum Line Prods. Co. v. Rolls-Royce Motors, Inc., 66 Ohio St.3d 539, 543, 613 N.E.2d 990, 993 (1993); Abele v. Bayliner Marine Corp. 11 F.Supp.2d 955, 961 (N.D. Ohio 1997).

[158] 46 N.C. App. 248, 264 S.E.2d 768, 771 (1980).

[159] 264 S.E.2d at 771. See also Westinghouse Electric & Manufacturing Co., v. Glencoe Cotton Mills, 106 S.C., 133, 90 S.E. 526 (1916), reversing the lower court for purporting to extend the 30-day limit for latent defects to six years, the statute of limitations for breach of warranty claims.

[160] 15 U.S.C. § 2303.

[161] 15 U.S.C. § 2304(2.

the face of the warranty."[162] In one unreported case, the court refused to enforce the one-year durational term in a boat warranty because the limitation did not clearly apply to implied warranties.[163]

2. CONSEQUENTIAL DAMAGES

As noted above, the buyer's basic U.C.C. remedy is the difference between the market value of the boat had it complied with the applicable warranties, and its actual value. That difference can be small when the buyer's complaints are highly subjective in nature. But the buyer may have other damages of a "consequential" nature; loss of use, interest payments on his boat loan, towage, storage and so on.

Under the U.C.C., the parties may also contract to limit or exclude consequential damages "unless the limitation or exclusion is unconscionable."[164] Such limitations are also permitted by the Magnuson-Moss Act.[165] Most of the courts have upheld limitations on consequential damages, at least in cases involving economic loss.[166] One unsettled issue is whether an otherwise valid consequential damages limitation is lost when the "exclusive remedy" under the warranty fails of its essential purpose. Although there is some authority to the contrary, in South Carolina and North Carolina the failure of an exclusive remedy does not affect a limitation on consequential damages.[167]

3. COMPONENT PARTS

Both the U.C.C. and the Magnuson-Moss Act allow sellers to limit the scope of warranties in ways other than providing an exclusive remedy. Boat manufacturers inevitably wish to limit their responsibility for components they do not actually make. A boat manufacturer does not make engines and will not typically know much about repairing and servicing them. Instead, the manufacturer will design its boat around the basic power output specifications for a marine engine, and assume the engine manufacturer will stand behind its product. Thus most

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[162] 15 U.S.C. § 2308(b).

[163] Erpelding v. Skipperliner Industries, Inc., WL 640966 (D. Minn. 2001).

[164] U.C.C. § 2-719.

[165] According to 15 U.S.C. § 2304(a)(3), an exclusion of consequential damages in a "full" warranty must "appear[] on the face of the warranty." Any warranty that does not meet this and the various other minimum standards for a full warranty must be conspicuously designated as a "limited warranty." 15 U.S.C. § 2303(a)(2).

[166] E.g. Hadar v. Concordia Yacht Builders, Inc., 886 F. Supp. 1082, 1101 (S.D.N.Y. 1995); Tacoma Boatbuilding Co., Inc. v. Delta Fishing Co., Inc., 28 UCC Rep. Serv. 26 (W.D. Wash. 1980).

[167] *Stutts*, 267 S.E.2d at 926 (applying difference in value over warranty remedy but upholding consequential damages limitation); *Myrtle Beach Pipeline*, 843 F. Supp. at 1027 ("better view" is "that the exclusion of consequential damages is a separate inquiry from determining whether a limited remedy failed of its essential purpose").

boat warranties exclude coverage for defects to the engines or other separately manufactured components. The warranty documentation for these other components typically comes along with the boat.

This may make no difference to the buyer initially, assuming the selling dealer can provide warranty service for the engine manufacturer. But it often results in complications later on, assuming the engines cannot be repaired to the buyer's satisfaction. At some point the buyer will be awakened to the fact that a different manufacturer is ultimately responsible for repair or replacement of the defective engines.

There are not many cases on this issue; one of the few, *Zabit v. Ferretti Group, USA*, [168] seemed to conclude that the Magnuson-Moss act allowed a boat manufacturer to exclude separately warranted components from its own warranty.[169]

VI. SOME JURISDICTIONAL REFLECTIONS

It will be obvious from the preceding discussion that boat warranty cases are governed almost entirely by state law plus the Magnuson-Moss Act. Admiralty law governs vessel repair contracts, but not those entombed in boat warranties. It follows that most boat warranty cases cannot be brought in admiralty, even if allegations of improper or defective repair are involved. State court is the safest forum for such cases.

For those determined to bring such cases in federal court, the following jurisdictional bases should be considered:

A. DIVERSITY

A boat warranty case can obviously be brought under diversity jurisdiction, provided the $75,000 amount in controversy requirement can be met and the parties are diverse. In many smaller boat cases, the amount in controversy may be questionable. There will often be diversity between the buyer and the manufacturer, but in many cases the dealer--from whom the price may be recovered in a rejection or revocation of acceptance claim--will be a local business.

B. MAGNUSON-MOSS ACT

The Magnuson-Moss Act affords an independent basis for federal jurisdiction, but is also subject to an amount in controversy requirement of $50,000.[170] Because the plaintiff bears the burden of proving jurisdiction, the court can dismiss a Magnuson-Moss claim if it is established

[168] Supra note 59.
[169] 2006 WL 3020855 at *4.
[170] 15 U.S.C. § 2310 (d)(3)(B),

that the claim is "really for less than the jurisdictional amount of $50,000." [171] The Seventh Circuit has held that the party asserting federal jurisdiction under the Magnuson-Moss Act must allege the cost of the replacement product, minus both the present value of the allegedly defective product and the value that the plaintiff received from the allegedly defective product.[172] Attorneys' fees are not to be considered in calculating the amount in controversy.[173] Claims for punitive damages and the like are also excluded because they are not available for breach of warranty.[174] To the extent such damages would be available under pendent state law claims, they are excluded from the jurisdictional amount.[175]

C. ADMIRALTY

Although warranty complaints of a purely contractual nature are governed by state sales law, admiralty law can apply to certain boat defect claims which sound in tort. Admiralty jurisdiction over maritime torts requires two elements: "the locus of the tort on navigable waters and its nexus with traditional maritime activity."[176] Maritime tort law has been held to incorporate the doctrine of product liability.[177] Thus where a boat defect results in personal injury, the plaintiff can bring a maritime products liability claim in admiralty if she can show, first, that the injury occurred on navigable waters; and second, that it had a sufficient nexus with traditional maritime activity.[178]

Assuming the plaintiff is also the buyer of the boat, U.C.C. remedies such as revocation of acceptance or breach of warranty should be available under supplemental jurisdiction.[179] Damage to the boat alone, however, is not likely to provide an independent basis for admiralty

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[171] Novosel v. Northway Motor Car Corp., 460 F. Supp. 541, 545-6 (N.D.N.Y. 1978).

[172] Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955 (7th Cir.1998); see also Voelker v. Porsche Cars North America, Inc., 353 F.3d 516, 521-522 (7th Cir. 2003); Smith v. Monaco Coach Corp., 334 F.Supp.2d 1065, 1067 (N.D. Ill. 2004).

[173] Saval v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983).

[174] See id. at 1033-35.

[175] Donahue v. Bill Page Toyota, Inc., 164 F.Supp.2d 778, 783 (E.D.Va. 2001); Ansari v. Bella Automotive Group, Inc., 145 F.3d 1270, 1271 -1272 (11th Cir. 1998).

[176] Price v. Price, 929 F.2d 131, 133 (4th Cir. 1991) (citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), Sisson v. Ruby, 497 U.S. 358 (1990); Foremost Insurance Co. v. Richardson, 457 U.S. 668, 102 S. Ct. 2654 (1982)); see also Complaint of Bird, 794 F. Supp. 575 (D.S.C. 1992).

[177] East River S.S. Corp. v. Transamerica Delaval, Inc. 476 U.S. 858, 866 (1986); Frantz v. Brunswick Corp., 866 F. Supp. 527 (S.D. Ala. 1994); Hebert v. Outboard Marine Corp., 638 F. Supp. 1166, 1170 (E.D. La. 1986).

[178] Usually a fairly simple matter. According to one commentator, "an unbroken chain of Supreme Court precedents indicates that most, if not all, accidents involving pleasure boats are properly heard in admiralty." John F. Baughman, "Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States," 90 Mich. L. Rev. 1028, 1029 (1992).

[179] See 28 U.S.C. § 1367.

jurisdiction; "if a product malfunctions causing damage to itself, its purchaser must rely on contract law to maintain a claim for recovery."[180] Some separate injury to a person, or to property other than the boat, is required for a free-standing admiralty tort claim. Thus in *Alloway v. General Marine Industries, L.P.*,[181] no tort claim was available when a yacht sank at the dock due to alleged breaches of warranty. The plaintiffs' only injuries were in the form of economic loss.

Smith v. Mitlof[182]offers an interesting jurisdictional case study. Defendant Mitlof bought a pontoon boat from an aquarium. It was alleged that the aquarium knew the pontoon boat was unstable but represented otherwise to the buyer. The boat capsized with a group of passengers aboard, resulting in admiralty claims against the aquarium for negligent misrepresentation, fraud, breach of contract, breach of warranty, and negligent repair and maintenance.[183] The aquarium moved to dismiss on the grounds that these claims did not give rise to admiralty jurisdiction.

The court agreed that the claims for breach of contract and warranty all related to a contract of vessel sale, and were therefore not governed by maritime law.[184] Turning to the tort claims, the court held that any fraud or misrepresentation would have been based on representations which "took place on land where the contract was consummated."[185] They therefore failed to meet the "situs" requirement for maritime tort jurisdiction.[186] The claims for negligent repair and maintenance, however, did result in injury on navigable waters and were governed by maritime law. As these claims could be asserted in admiralty jurisdiction, the court granted supplemental jurisdiction over the remaining claims and denied the motion to dismiss.[187]

VII. CONCLUSION

Smith v. Mitlof illustrates the fact that maritime tort claims are often intertwined with state law contract claims. Where the presence of such tort claims is relatively clear, the plaintiff who prefers an admiralty forum may proceed without fear. But as this paper has hopefully demonstrated, warranty claims involving only economic loss have no maritime component to

[180] Transco Syndicate No. 1, Ltd. v. Bollinger Shipyards, Inc. 1 F. Supp.2d 608, 610 (E.D. La. 1998). For an interesting discussion of whether plaintiffs had "demonstrated sufficient personal injury beyond harm to the yacht itself" to maintain maritime products liability claims, see *Marshall*, supra note 48, at 103 F. Supp. 2d 1108-1112.
[181] 149 N.J. 620, 641, 642 (1997).
[182] 198 F.Supp.2d 492 (S.D.N.Y. 2002).
[183] Id. at 497.
[184] Id. at 499.
[185] Id. at 500.
[186] Id.
[187] Id. at 501.

them. They are best brought in state court, unless some other jurisdictional basis (such as diversity or the Magnuson-Moss Act) is available.