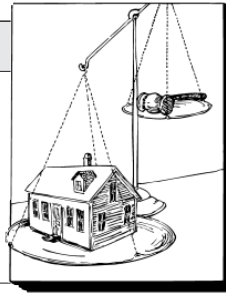


Are You Building “Consumer Products?”

by Perry Safran and Douglas McClanahan



The Magnuson-Moss Warranty Act provides a federal remedy to consumers with breach of warranty claims arising from the sale of consumer products. The act preserves the right to sue under state law, and also allows the recovery of attorney's fees if the consumer prevails.

Builders operate in a gray area between real estate and consumer products. Can a construction project — or materials and equipment that are a part of the project — come under the jurisdiction of the Magnuson-Moss Warranty Act?

The answer depends on the *who* and the *what* of the particular situation. *Who* refers to the parties of the contract; *what*, to the contract itself.

Parties to the agreement. The act requires the party bringing the action to be a “consumer,” the purchaser of the consumer product. The defendant, on the other hand, must be a “supplier,” a person in the business of directly or indirectly providing consumer products.

What's in the contract? The subject matter of the contract is a more difficult issue. The contract must be for a “consumer product” broadly defined as property normally used for “personal, family, or household purposes.”

If the contract governs an over-the-counter transaction, such as the purchase of an air conditioner, furnace, or other appliance, then these products are covered by the act. Projects like roofing repairs or installing storm windows are also covered by the act if the contract is for materials and services. If the contract is for a “substantial addition,” however, such as installing a pool or garage, the building materials are probably not covered.

Put it to the test. To determine whether a project is “substantial,” courts look to the intention of the parties. To aid courts in this task, a Federal Trade Commission advisory opinion proposes this test: If the prod-

uct of a contract has a separate function from the realty, it is personal property subject to the act. For example, if the parties sought a final product such as new electrical wiring — a product in which the building materials are integrated into the project — the building materials are *not* covered by Magnuson-Moss. Similarly, a new sink is not covered if it is included in a project to replace water supply lines.

The sink is covered, however, if the contract is for “materials and services” — to wit, the sink. Likewise, a contract contemplating the purchase of component materials, such as light fixtures or a garage door opener, would be covered by Magnuson-Moss.

The fact that the consumer product may later become a fixture (a part of the real property) does not change its initial status as a consumer product. For instance, a hot water heater is a consumer product covered by the act when sold new. However, if the contract is for the purchase of an existing house, fixtures such as hot water heaters would not be covered by the act because the equipment is integrated into the structure at time of sale. Case law indicates that “at time of sale” refers to the time of the contract, not when payment is due.

Since the Magnuson-Moss Warranty Act provides for a breach of warranty action that allows for the award of attorney's fees, it has become an attractive remedy to homeowners who qualify as plaintiffs (remember the *who* and the *what*). To avoid an action under the act, contract for the sale of real property, not personal property, and make sure the terms of your contract define a product that includes materials and services as integral parts, not components. ■

Perry Safran is an attorney with Safran Law Offices in Raleigh, N.C. Douglas McClanahan, law clerk, is a law student at the Campbell Univ. School of Law, Buies Creek, N.C.