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Jeffrey W. Deaver

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## NOTES

### PRODUCTS LIABILITY IN NEW YORK: SECTION 2-318 OF THE U.C.C.— THE AMENDMENT WITHOUT A CAUSE

#### INTRODUCTION

Rarely in the law do log jams of doctrine develop as often as in the area of products liability. Depending on the facts of a particular case, a plaintiff seeking redress for personal injury or property damage can bring as many as six causes of action: strict liability in tort,<sup>1</sup> misrepresentation,<sup>2</sup> negligence,<sup>3</sup> breach of implied warranty of merchantability,<sup>4</sup> breach of express warranty,<sup>5</sup> and breach of warranty of fitness

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1. In most jurisdictions strict liability in tort is a common-law action, the generally accepted version of which is found in § 402A of the Second Restatement of Torts: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." Restatement (Second) of Torts § 402A (1965). Although New York has adopted a similar version, it applies to bystanders as well as to users and consumers, and it places a duty on the latter two parties to use reasonable means to discover the defect and to avoid their own harm. *Codling v. Paglia*, 32 N.Y.2d 330, 342-43, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973).

2. In a misrepresentation suit, usually a common-law action, liability attaches when a misrepresentation of a material fact by the seller results in injury, even though the seller did not make the statement negligently or fraudulently. Restatement (Second) of Torts § 402B (1965); see *Hauter v. Zogarts*, 14 Cal. 3d 104, 114, 534 P.2d 377, 383, 120 Cal. Rptr. 681, 687 (1975).

3. A negligence action to redress a product-caused injury is based on the manufacturer's common-law duty of due care in making and marketing goods that are potentially harmful. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). See generally Noel, *Manufacturers' Liability for Negligence*, 33 Tenn. L. Rev. 444 (1966).

4. Breach of implied warranty of merchantability is a statutory action permitted by the Uniform Commercial Code. "Where the buyer has accepted goods . . . he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach . . . [and, in some cases,] incidental and consequential damages . . ." U.C.C. § 2-714 (1977). The implied warranty existed in New York prior to the adoption of the Code. See *Schwartz v. Macrose Lumber & Trim Co.*, 50 Misc. 2d 547, 551-53, 270 N.Y.S.2d 875, 882-83 (Sup. Ct. 1966), *rev'd on other grounds*, 29 A.D.2d 781, 287 N.Y.S.2d 706 (1968), *aff'd* 24 N.Y.2d 856, 248 N.E.2d 920, 301 N.Y.S.2d 91 (1969). The plaintiff buyer who

for particular purpose.<sup>6</sup> Of these actions, two are the most widely used means for protecting plaintiffs from personal injury or property damage<sup>7</sup> caused by the non-negligent conduct of a seller or manufac-

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proves a breach of warranty may recover the difference between the value of the nonconforming goods received and the contract price, U.C.C. § 2-714 (1977), as well as incidental and consequential damages. *Id.* §§ 2-714 to -715. In addition to breach of warranty, the definition of nonconformity also includes faulty method of tender or any other failure to comply with the terms of the contract for sale. *Id.* § 2-714 official comment 2. In a breach of implied warranty case, the plaintiff contends that the goods are nonconforming because they do not meet certain minimum standards of quality that all such goods should possess. The Code requires that "[g]oods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any." *Id.* § 2-314(2). Additionally, the provision on implied warranty states that the serving of food or drink for value is a sale, *id.* § 2-314(1), and that warranties can arise from course of dealing or usage of trade. *Id.* § 2-314(3).

5. An action for breach of express warranty is premised on an affirmative assertion of quality by the seller. U.C.C. § 2-313 (1977); see *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 437-38, 347 A.2d 253, 264-65 (1975).

6. Breach of the warranty of fitness for a particular purpose occurs when the product fails to perform a specific function for which the plaintiff bought it, and when the seller had reason to know the plaintiff's intended use. U.C.C. §§ 2-315, -714 (1977); see *Newmark v. Gimbel's Inc.*, 102 N.J. Super. 279, 286-87, 246 A.2d 11, 15-16 (1968), *aff'd*, 54 N.J. 585, 258 A.2d 697 (1969). Additionally, one commentator has suggested that, because some manufacturers know to a substantial certainty that a percentage of users will be harmed by their products, the act of marketing such a product resembles an intentional tort. Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 Ind. L. Rev. 797, 799-800 (1977).

7. A distinction exists between economic loss on the one hand and property damage and personal injury on the other. When the buyer's sole complaint is that the product does not meet a level of quality he had been led to expect, he suffers economic loss, and damages may be recovered for loss of benefit of the bargain, reliance expenses, cost of replacement and repair, lost profits, and similar harm that is not overly speculative. J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 405 (2d ed. 1980). Economic loss has been termed "insufficient product value." Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L. Rev. 917, 918 (1966). Property damage is harm to property other than the defective product itself. See *Mid Continent Aircraft Corp. v. Curry County Spraying Serv.*, 572 S.W.2d 308, 316-17 (Tex. 1978) (Pope, J., dissenting). For example, when a defective television catches fire and destroys a home, the destruction of the television is economic loss; the destruction of the house is property damage. Few courts allow economic losses to be recovered through strict liability. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 16-19, 403 P.2d 145, 150-52, 45 Cal. Rptr. 17, 22-24 (1965); *Steckmar Nat'l Realty & Inv. Co. v. J I Case Co.*, 99 Misc. 2d 212, 214, 415 N.Y.S.2d 946, 948 (Sup. Ct. 1979). Strict liability in all versions permits recovery for both property damage and personal injury. *Codling v. Paglia*, 32 N.Y.2d 330, 342-43, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973) (personal injury and property damage); *John R. Dudley Constr., Inc. v. Drott Mfg.*

turer;<sup>8</sup> breach of implied warranty of merchantability and strict tort liability.<sup>9</sup> Because strict liability developed from breach of warranty, they are remarkably similar. The availability of breach of warranty, however, depends on such elements as the requirement of notice,<sup>10</sup> the effectiveness of disclaimers,<sup>11</sup> a statute of limitations that may bar plaintiff before he is injured,<sup>12</sup> and to some extent the requirement that only those in contractual relation with the defendant<sup>13</sup> can sue.<sup>14</sup> While these elements may be appropriate in a commercial

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Co., 66 A.D.2d 368, 371, 412 N.Y.S.2d 512, 514 (1979) (property damage); Restatement (Second) of Torts § 402A (1965) (personal injury and property damage). Although the primary warranty remedy under the Code is recovery for economic loss, the statute specifically allows personal injury and property damages as elements of consequential recovery. See *supra* note 4: Under the Code, the buyer may recover consequential damages caused by the seller's breach, whether he retains the faulty goods, rejects them, or revokes acceptance. U.C.C. §§ 2-711 to -714 (1977). Consequential damages include personal injury and property damage. *Id.* § 2-715(2)(b). This recovery, however, is subject to the limitation that the breach be one of warranty, rather than, for example, manner of tender. *Id.* A prior portion of the section allows the buyer to recover damages for any breach, provided the buyer's loss resulted from "requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented." *Id.* § 2-715(2)(a). Thus, it might be argued that personal injury and property damage are recoverable under § 2-715(2)(a) even absent a breach of warranty if the harm was foreseeable at the time of contracting, the buyer was unable to prevent the injury, and there was a proximate relation between the breach and the harm. See *Deutsch Relays, Inc. v. Giffords Oil Co.*, 105 Misc. 2d 524, 525-26, 432 N.Y.S.2d 448, 448-49 (Sup. Ct. 1980) (careless delivery of oil, rather than its unmerchantable nature, resulting in fire actionable under Code).

8. Strict liability actions may be maintained only against one in the business of selling products, rather than a onetime or other noncommercial seller. *Coutu v. Otis Elevator Co.*, 58 A.D.2d 131, 132, 395 N.Y.S.2d 754, 756 (1977); *Mead v. Warner Pruynt Div.*, 57 A.D.2d 340, 343-44, 394 N.Y.S.2d 483, 485 (1977); *Nickel v. Hyster Co.*, 97 Misc. 2d 770, 773, 412 N.Y.S.2d 273, 276 (Sup. Ct. 1978); *Queensbury Union Free School Dist. v. Jim Walter Corp.*, 91 Misc. 2d 804, 809, 398 N.Y.S.2d 832, 835 (Sup. Ct. 1977); Restatement (Second) of Torts § 402A (1965). Under the Code, the implied warranty of merchantability exists only if the defendant is a "merchant," a term defined as one in the business of selling or with some special expertise in the goods. U.C.C. § 2-104 (1977). Thus, one who makes an occasional sale is not considered to be a merchant within the meaning of the section. *McGregor v. Dimou*, 101 Misc. 2d 756, 759-60, 422 N.Y.S.2d 806, 809-10 (Civ. Ct. 1979).

9. For the sake of brevity, these two causes of action will be referred to as "strict liability" and "breach of warranty."

10. U.C.C. § 2-607(3) (1977).

11. *Id.* § 2-316.

12. *Id.* § 2-725.

13. The relationship created between the parties to a contract is defined as "privity." Gillam, *Products Liability in a Nutshell*, 37 Or. L. Rev. 119, 131 (1958).

14. See U.C.C. § 2-318 Alternative A (1977). The majority of states require some degree of privity prior to suit. [1981] 1 Prod. Liab. Rep. (CCH) ¶¶ 4016-17. Privity is often a condition precedent to a breach of warranty suit to recover economic loss pursuant to a sales contract. *E.g.*, *Dudley v. Bayou Fabricators, Inc.*, 330 F. Supp.

sales context, they are usually held not to be proper in a personal injury suit by a consumer.<sup>15</sup> Strict liability is thus unencumbered by them.<sup>16</sup>

The coexistence of these two causes of action does not pose a serious threat to a just resolution of a personal injury claim based on products liability as long as there is some basis for determining when each action is appropriate. Under the traditional rule requiring privity in a breach of warranty suit,<sup>17</sup> a distinction existed that could be clearly recognized by the jury, the bench, and the bar: Anyone proximately injured by a product could sue in strict liability, but only buyers could sue in breach of warranty. When the New York Legislature amended the Uniform Commercial Code in 1975<sup>18</sup> to allow breach of warranty actions by anyone who might foreseeably use, or be affected by, a product, however, the causes of action became almost wholly duplicative in the products liability context. Nevertheless, there remain differences that are significant enough to affect the outcome without any relation to the injury suffered or the merits of the case. At a time when the need for a unified, coherent doctrine of products liability has been increasingly recognized,<sup>19</sup> this redundancy in the law has led to inconsistent, illogical, and confused results.

788, 791 (S.D. Ala. 1971); *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 280-81, 329 A.2d 28, 30-31 (1974); *Necktas v. General Motors Corp.*, 357 Mass. 546, 549, 259 N.E.2d 234, 235-36 (1970); *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 348-50, 432 N.Y.S.2d 132, 133-35 (Sup. Ct. 1980); *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 246-47, 472 P.2d 816, 817 (1970); *Texas Processed Plastics, Inc. v. Gray Enters.*, 592 S.W.2d 412, 415 (Tex. Civ. App. 1979). *But see* *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810 (Wyo. 1980) (economic loss recovery absent privity is permitted).

15. *E.g.*, *Caruth v. Mariani*, 11 Ariz. App. 188, 192-3, 463 P.2d 83, 87 (1970); *Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373, 381-82 (Iowa 1972); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1364-65 (Okla. 1974); *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 304, 405 P.2d 624, 626 (1965); *Howes v. Hansen*, 56 Wis. 2d 247, 255-57, 201 N.W.2d 825, 828-29 (1972).

16. *See* Restatement (Second) of Torts § 402A (1965).

17. *Gimenez v. Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 393-94, 191 N.E. 27, 28 (1934); *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928); *Redmond v. Borden's Farm Prods. Co.*, 245 N.Y. 512, 512, 157 N.E. 838, 838 (1927); *Chysky v. Drake Bros.*, 235 N.Y. 468, 472-73, 139 N.E. 576, 578 (1923).

18. Act of Aug. 9, 1975, ch. 774, 1975 N.Y. Laws 1208 (codified at N.Y.U.C.C. § 2-318 (McKinney Supp. 1980-1981)).

19. *See* Model Uniform Product Liability Act introduction (Proposed Official Draft 1979), reprinted in 44 Fed. Reg. 62,714, 62,714 (1979); Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 Forum 251, 252-55 (1978) [hereinafter cited as Birnbaum I]; Dickerson, *Was Prosser's Folly Also Traynor's? or Should the Judge's Monument be Moved to a Firmer Site?*, 2 Hofstra L. Rev. 469, 481-83 (1974) [hereinafter cited as Dickerson I]; Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. Rev. 643, 648-54 (1978) [hereinafter cited as Epstein I]; James, *Products Liability*, 34 Tex. L. Rev. 192, 227-28 (1955); Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort*

This Note briefly examines the development of breach of warranty and strict liability, concluding that the two causes of action are nearly identical. It then discusses how the 1975 amendment to the Code impedes the development of products liability law in New York, and suggests that the amendment be excised. Finally, in proposing a solution, this Note weighs the two causes of action on the scales of current public policy and argues that this policy in New York can best be effected through the further development of strict liability and the elimination of breach of warranty as a cause of action for product-related harms.

### I. THE QUINTESSENTIAL PRODUCTS LIABILITY CONTESTANTS: STRICT LIABILITY IN TORT VS. BREACH OF WARRANTY

Prosser called strict liability a "freak hybrid . . . of tort and contract."<sup>20</sup> Insofar as such a characterization implies that strict liability protects both substantive tort and contract rights, its validity is questionable.<sup>21</sup> To the extent, however, that Prosser's characterization

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*Products Liability Theory*), 11 Akron L. Rev. 697, 708-09 (1978); Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 Stan. L. Rev. 713, 714-15 (1970).

20. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 800 (1966) [hereinafter cited as Prosser I]. "Courts extended the basis for liability in products liability cases beyond negligence. In making the extension they borrowed the concept and terminology of 'implied warranty' from the law of sales . . ." Redfield v. Mead, Johnson & Co., 266 Or. 273, 285, 512 P.2d 776, 781 (1973) (Denecke, J., concurring).

21. Dean Prosser himself observes: "This duty [of a seller of goods], while it arises out of the relation created by the contract, is not identical with the contract obligation, but is merely a part of the general responsibility, sounding in tort, which is placed by the law upon anyone who stands in such a relation that his affirmative conduct will affect the interests of another." W. Prosser, *Handbook of the Law of Torts* 632 (4th ed. 1971) (footnote omitted). Even prior to the adoption of strict liability, courts often recognized that what they called breach of warranty in a non-privity situation was in fact a new tort action. Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942). "Liability in such a case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life." *Id.* Historically, implied warranty arose solely as a means to assure that the buyer of goods received his bargain, evolving primarily through the "law merchant," a specialized body of law dealing with commercial practices of the marketplace in England in the Middle Ages. C. Rembar, *The Law of the Land* 70 (1980). The warranty was implied in the sense that the parties understood that the goods be of a certain quality even if the contract did not define the level of quality. In Gardiner v. Gray, 171 Eng. Rep. 46 (K.B. 1815), the court reasoned that the purchaser "cannot without [express] warranty insist that [the item purchased] be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill." *Id.* at 47; accord *Crystal Coca-Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 169, 317 P.2d 1094, 1097 (1957); *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 72-73, 269 P.2d 413, 416-17

describes the historical development of strict liability, it is accurate. Prior to the move toward strict liability in the 1960's, courts around the country, confronted with a typical product defect situation in which the defendant could not be proven negligent, characterized the action as breach of warranty and allowed the plaintiff to state a claim, whether or not he was in privity with the defendant.<sup>22</sup> The

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(1954); 2 A. Pearson & H. Fenwick, *Benjamin's Treatise on the Law of Sale of Personal Property* 938, 958-59 (3d ed. 1888). When plaintiff seeks redress under strict liability for personal injury caused by a product, the presence or absence of a contract is irrelevant. *Langford v. Chrysler Motors Corp.*, 373 F. Supp. 1251, 1254 (E.D.N.Y.), *aff'd*, 513 F.2d 1121 (2d Cir. 1975); *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 33 Colo. App. 99, 108, 517 P.2d 406, 411-12 (1973); *Center Chem. Co. v. Parzini*, 234 Ga. 868, 868, 218 S.E.2d 530, 531 (1975); *John R. Dudley Constr. Inc. v. Drott Mfg. Co.*, 66 A.D.2d 368, 371, 412 N.Y.S.2d 512, 514 (1979); *Steckmar Nat'l Realty & Inv. Corp. v. J I Case Co.*, 99 Misc. 2d 212, 214, 415 N.Y.S.2d 946, 948 (Sup. Ct. 1979); *Restatement (Second) of Torts* § 402A (1965). Moreover, some courts have characterized the plaintiff's action as seeking consequential damages instead of enforcing the bargain. *Anglo E. Bulkships Ltd. v. Ameron, Inc.*, 460 F. Supp. 1212, 1213 (S.D.N.Y. 1978); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 561-63, 209 N.W.2d 643, 653 (1973); *Milau Assoc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 488-89, 368 N.E.2d 1247, 1251, 398 N.Y.S.2d 882, 886 (1977). Similarly, strict liability is rarely allowed as a means to recover for economic loss. *See Seely v. White Motor Co.*, 63 Cal. 2d 9, 16-19, 403 P.2d 145, 150-52, 45 Cal. Rptr. 17, 22-24 (1965). *But see Schiavone Constr. Co. v. Elgood Mayo Corp.*, N.Y.L.J., Sept. 19, 1980, at 6, col. 3 (Sup. Ct. Sept. 15, 1980), *aff'd*, 81 A.D.2d 221, 439 N.Y.S.2d 933 (1981). The *Schiavone* decision extends the holding of *John R. Dudley Constr., Inc. v. Drott Mfg. Co.*, 66 A.D.2d 368, 412 N.Y.S.2d 512 (1979), in which a strict liability action was allowed when the only harm was to the product itself. *Id.* at 372, 412 N.Y.S.2d at 514. The basis for such decisions may be the potentially expanded scope of strict liability implicit in *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), in which the Court held that a cause of action in strict liability is available to those incurring "injury or damages." *Id.* at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 470 (emphasis added). But economic loss cannot be recovered under the Code absent privity. *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 348-50, 432 N.Y.S.2d 132, 134-35 (Sup. Ct. 1980).

22. *E.g.*, *Mannsz v. Macwhyte Co.*, 155 F.2d 445, 451 (3d Cir. 1946); *Vaccarezza v. Sanguinetti*, 71 Cal. App. 2d 687, 689-90, 163 P.2d 470, 472 (1945); *Naumann v. Wehle Brewing Co.*, 127 Conn. 44, 46-47, 15 A.2d 181, 181-82 (1940); *Nemela v. Coca-Cola Bottling Co.*, 104 S.W.2d 773, 775 (Mo. App. 1937); *McSpedon v. Kunz*, 271 N.Y. 131, 136-37, 2 N.E.2d 513, 514-15 (1936). Other courts allowed recovery either without specifically describing the cause of action or describing it as a form of negligence. *E.g.*, *Lynch v. International Harvester Co.*, 60 F.2d 223, 224 (10th Cir. 1932); *Employers' Liab. Assurance Corp. v. Columbus McKinnon Chain Co.*, 13 F.2d 128, 128 (W.D.N.Y. 1926); *Roettig v. Westinghouse Elec. & Mfg. Co.*, 53 F. Supp. 588, 590-92 (E.D. Mo. 1944); *see Jefferson Standard Life Ins. Co. v. Watson*, 242 Ala. 181, 183-84, 5 So. 2d 639, 641 (1942). However, in the nineteenth century the doctrine of caveat emptor often precluded warranty suits even by those in privity when the buyer had an opportunity to inspect the product. *See Barnard v. Kellogg*, 77 U.S. 383, 388-89 (1870); *Hamilton, The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133, 1160 (1931).

characteristics of a warranty action made it most suitable for remedying product-caused harms: Culpability was irrelevant<sup>23</sup> (warranty liability thus was "strict"); the harm involved defective goods;<sup>24</sup> and for liability to attach, the defendant must have been a merchant.<sup>25</sup>

The application of a breach of warranty theory when the plaintiff was not a buyer, however, created conceptual problems because traditionally, without a contractual relationship—privity<sup>26</sup>—between the plaintiff and defendant, there could be no sales warranty suit.<sup>27</sup> Thus, when a buyer was injured, he could sue his immediate seller for the harm.<sup>28</sup> Should a non-buyer sue any seller, or a buyer sue a seller from whom he had not directly purchased the product, however, the privity "citadel" had precluded recovery.<sup>29</sup> Recognition that this developing cause of action was not a true sales warranty but a new

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23. W. Prosser, *supra* note 21, at 636.

24. U.C.C. § 2-102 (1977) ("Unless the context otherwise requires, this Article applies to transactions in goods . . ."). "Goods" include all things movable at the time of identification, excluding money in which the price is to be paid, investment securities, and choses in action. *Id.* § 2-105(1).

25. A merchant is one who deals in goods of the kind involved in the sale, who represents himself as having specialized skill or knowledge with respect to such goods, or employs one who does. *Id.* § 2-104(1). A merchant seller can be a corporation or other business entity. *Id.* §§ 1-201(28), (30), 2-104. Under the Restatement version of strict liability, the defendant can be liable only if he is in the business of selling. Restatement (Second) of Torts § 402A (1965).

26. See *supra* note 13. A distinction is usually drawn between vertical and horizontal privity. W. Keeton, D. Owen & J. Montgomery, *Products Liability and Safety* 136 (1980). True vertical privity exists only between a purchaser and the person from whom he bought the goods. Thus, when an injured consumer, who has purchased from a retailer, seeks to sue the manufacturer for breach of warranty, the suit will be barred in those jurisdictions following the rule requiring vertical privity. See *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 352, 432 N.Y.S.2d 132, 136 (Sup. Ct. 1980). Horizontal privity, on the other hand, seeks to determine to which parties, in some relationship with the buyer, the warranties given by the seller extend. W. Keeton, D. Owen & J. Montgomery, *supra*, at 136. Those jurisdictions recognizing a broad concept of horizontal privity will allow the suit on the ground that the plaintiff, by virtue of his relationship with the buyer, was in privity with him and received the same warranty of merchantability. The plaintiff in such a case is deemed to stand in the shoes of the buyer. Most jurisdictions hold that horizontal privity exists among family members and between purchasers and those living in their households. [1981] 1 *Prod. Liab. Rep.* (CCH) ¶ 4017. See generally *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974).

27. *Gimenez v. Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 393, 191 N.E. 27, 28 (1934); *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928); *Redmond v. Borden's Farm Prods. Co.*, 245 N.Y. 512, 512, 157 N.E. 838, 838 (1927); *Chysky v. Drake Bros.*, 235 N.Y. 468, 472, 139 N.E. 576, 578 (1923).

28. *Hoover v. Peters*, 18 Mich. 50, 54-55 (1869).

29. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099, 1110-11 (1960) [hereinafter cited as Prosser II]. Dean Prosser characterized the privity requirement as a citadel because it was an insurmountable obstacle to recovery by remote consumers who were unable to prove negligence on the part



tort action might have solved the problem. Judge Cardozo's 1916 *MacPherson v. Buick Motor Co.*<sup>30</sup> decision eliminated the requirement of privity in negligence suits for product-caused harms.<sup>31</sup> It could have been argued, therefore, that because this "breach of warranty" suit was in essence a tort-based action, privity was not a necessary element. Yet rather than adopt such an approach, courts retained the "language technic"<sup>32</sup> of breach of warranty<sup>33</sup> and chipped away at the privity requirement, eliminating it in areas of food,<sup>34</sup> then products related to the body,<sup>35</sup> then all products.<sup>36</sup> By

of the manufacturer. Because a warranty action was possible only when there was privity between the parties, such consumers were, therefore, precluded from any remedy. *Id.*; see Prosser I, *supra* note 20, at 800.

30. 217 N.Y. 382, 111 N.E. 1050 (1916).

31. *Id.* at 389, 111 N.E. at 1053. The existence of the privity requirement in tort actions can be traced to *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), in which the court held that, absent privity, there could be no contract-based action for misfeasance. *Id.* at 403. However, the decision was misinterpreted by later courts as holding that no tort liability was possible in the absence of privity. *W. Keeton, D. Owen & J. Montgomery, supra* note 26, at 42; *W. Prosser, supra* note 21, at 622.

32. The phrase "language technic" means the use of well-known words and phrases to describe and apply legal doctrine. Green, *The Duty Problem in Negligence Cases*, 28 Colum. L. Rev. 1014, 1016-19 (1928). Dean Green described the basic dichotomy, recognized by legal realist philosophers, between the words a court uses to explain its actions and how the court actually leaves the parties after trial or appellate review. By adhering to a familiar language technic, but deciding the case on a basis essentially different from that which the technic describes, courts may produce just results in a given case. This process, however, leads to tension and confusion as future courts and the bar try to reconcile the conflict. *Id.* Professor Kiely has applied Dean Green's theory to the approach of Karl Llewellyn, the moving force behind much of the Code, in analyzing recent developments in strict products liability. Professor Kiely notes that a current "crisis of confidence" (Llewellyn's phrase) has resulted from the differences between the language technic of the Second Restatement § 402A and the philosophy underlying strict liability for products. Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's The Common Law Tradition*, 24 De Paul L. Rev. 914, 914-19 (1975).

33. See, e.g., *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 788, 176 N.W. 382, 388-90 (1920); *Challis v. Hartloff*, 136 Kan. 823, 825, 18 P.2d 199, 201 (1933), *overruled on other grounds*, *Bereman v. Burdolski*, 204 Kan. 162, 170, 460 P.2d 567, 573 (1969) (allowing the defense of contributory negligence that *Challis* had refused); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 616-17, 164 S.W.2d 828, 831-32 (1942); *Mazetti v. Armour & Co.*, 75 Wash. 622, 626, 135 P. 633, 634 (1913).

34. *Mazetti v. Armour & Co.*, 75 Wash. 622, 630, 135 P. 633, 636 (1913); see *H. Melick, The Sale of Food and Drink* 10 (1936). See generally Perkins, *Unwholesome Food as a Source of Liability*, 5 Iowa L. Bull. 6 (1919).

35. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 74, 269 P.2d 413, 418 (1954); *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 1119, 253 S.W.2d 532, 536 (1952); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 246-47, 147 N.E.2d 612, 614 (1958).

36. *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 134-35, 90 N.W.2d 873, 880-81 (1958); see *Deveny v. Rheem Mfg. Co.*, 319 F.2d

the early 1960's, however, most courts recognized that what they called breach of warranty was essentially a tort cause of action to be used when existing tort mechanisms, such as negligence, were unavailable to the plaintiff.<sup>37</sup>

The distinction between the sales law warranty and the tort-based warranty causes of action was clearly delineated in the 1960 New Jersey decision of *Henningsen v. Bloomfield Motors, Inc.*,<sup>38</sup> but it was not until California's 1963 *Greenman v. Yuba Power Products, Inc.*<sup>39</sup> that the tort cause of action broke free from the language of warranty and was termed strict liability.<sup>40</sup> The Second Restatement of Torts, published two years after *Greenman*, included a new section 402A,<sup>41</sup> which is in accord with the *Greenman* holding.<sup>42</sup> Courts around the country followed the leads of California and the Restatement in accepting strict liability,<sup>43</sup> although some retained the older name of warranty in tort or common-law warranty.<sup>44</sup> The Restatement, in fact, recognized the possibility that such terms would be retained, but

124, 129-30 (2d Cir. 1963); *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501, 504 (10th Cir. 1959); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 412-16, 161 A.2d 69, 99-101 (1960); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436-37, 191 N.E.2d 81, 82-83, 240 N.Y.S.2d 592, 594-95 (1963).

37. S. Speiser, *Lawsuit* 308-09 (1980).

38. 32 N.J. 358, 412-15, 161 A.2d 69, 99-101 (1960).

39. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

40. Justice Traynor's majority opinion stated: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

41. Restatement (Second) of Torts § 402A (1965); *see supra* note 1. The original Restatement had no provision for strict products liability. Section 402A of the Second Restatement has an unusual history; its tentative versions paralleled the general development of strict products liability law. The sixth Tentative Draft, in 1961, proposed strict liability for food and similar products. The seventh Tentative Draft, in 1962, expanded the section to include products intended for intimate bodily use. The Final Draft, in 1964, eliminated all such qualifications and extended the protection offered by the section to all products. *Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 918-19 (5th Cir. 1964).

42. *See supra* note 40. The essential difference is that the Restatement version requires a showing that the product is both defective and unreasonably dangerous, while the *Greenman* formulation speaks only of defect. *See supra* note 1. California subsequently chose not to include the "unreasonably dangerous" qualification in its strict liability doctrine. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) (en banc).

43. *E.g.*, *Garthwait v. Burgio*, 153 Conn. 284, 289-90, 216 A.2d 189, 192 (1965); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965); *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441, 446-47 (Ky. 1965); *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 310-11, 405 P.2d 624, 629 (1965).

44. *Lee v. Wright Tool & Forge Co.*, 48 Ohio App. 2d 148, 152, 356 N.E.2d 303, 306 (1975); *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 156, 324 N.E.2d 583, 587 (1974); *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 427-28, 219 S.E.2d 685, 687 (1975).

warned that this "warranty" was to be distinguished from a sales law remedy.<sup>45</sup>

The development of strict liability in New York roughly followed this pattern. Damages for personal injury had long been recoverable in breach of warranty actions.<sup>46</sup> Yet it was not until 1961, with *Greenberg v. Lorenz*,<sup>47</sup> that the Court of Appeals broadly held that privity was not required in a breach of warranty suit for personal injury.<sup>48</sup> In 1963, ironically the same year as *Greenman*<sup>49</sup> in California, the Court of Appeals was given the opportunity to break free of the language technic of warranty and to adopt strict tort. In *Goldberg v. Kollsman Instrument Corp.*,<sup>50</sup> however, the court retained the breach of warranty language, although it recognized that this was essentially the same action that *Greenman* had labeled strict tort.<sup>51</sup>

New York products liability law was complicated in 1964, when the Uniform Commercial Code became effective.<sup>52</sup> This legislation codified the existing sales law warranty action and included recovery for personal injury and property damage, formerly the province of the common-law warranty recognized in *Goldberg*.<sup>53</sup> Thus, by statute, suits brought under the rubric of breach of warranty were to be governed by the Code, which established a number of limitations not previously recognized in the common-law warranty action. Some privity was required: Only the buyer or his family members or guests could sue.<sup>54</sup> Additionally, a seller could disclaim all warranties—even the warranty of merchantability,<sup>55</sup> the basis for most personal injury suits under the Code. The plaintiff, moreover, was required to give timely notice of the breach or else be barred from any Code

45. Restatement (Second) of Torts § 402A comment m (1965) ("There is nothing in this Section which would prevent any court from treating the rule stated as a matter of 'warranty' to the user or consumer. But if this is done, it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods . . .").

46. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436-37, 191 N.E.2d 81, 82-83, 240 N.Y.S.2d 592, 594-95 (1963). Earlier decisions had permitted actions for harms caused by negligently made products. *E.g.*, *General Accident, Fire & Life Assurance Corp. v. Goodyear Tire & Rubber Co.*, 132 F.2d 122, 125 (2d Cir. 1942); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

47. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

48. *Id.* at 200, 173 N.E.2d at 775-76, 213 N.Y.S.2d at 42-43.

49. *See supra* notes 39-40.

50. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

51. *Id.* at 436-37, 191 N.E.2d at 83, 240 N.Y.S.2d at 594-95.

52. Uniform Commercial Code, ch. 553, 1962 N.Y. Laws 1687 (codified at N.Y.U.C.C. §§ 1-101 to 10-105 (McKinney 1964)).

53. *See supra* note 46.

54. N.Y.U.C.C. § 2-318 (McKinney 1964).

55. *Id.* § 2-316(2).

remedy.<sup>56</sup> Finally, the Code's statute of limitations began to run upon the date of the product's tender,<sup>57</sup> not the plaintiff's injury. Thus, if the harm occurred more than the statutory period of four years from the date of tender, the plaintiff was barred from any action under the Code.

Despite the clear statutory language, New York courts were not prepared to hold plaintiffs in personal injury suits to standards applicable to business dealings. Recovery would not be denied solely because the Code elements were not satisfied. Faced with defendants' assertions that the Code required privity for a breach of warranty action, for instance, some courts allowed the plaintiff to state a claim on the basis of the official comments to section 2-318 of the Code: "[T]he section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties . . . extend to other persons in the distributive chain."<sup>58</sup> Similarly, courts determined that holding an injured plaintiff to a timely notice requirement would have precluded recovery and thus was contrary to the public policy of redressing product-caused harms.<sup>59</sup> Furthermore, courts held that the statute of limitations for a breach of warranty cause of action accrued on injury, not upon tender as the Code provided.<sup>60</sup> In so avoiding the Code requirements, courts were essentially basing their decisions on the proposition that what was called breach of warranty was actually another cause of action altogether: a tortious action similar to the strict liability then being applied in other states.<sup>61</sup>

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56. *Id.* § 2-607(3).

57. *Id.* § 2-725.

58. *Id.* § 2-318 official comment 3; *see* Robert T. Donaldson Inc. v. Aggregate Surfacing Corp., 47 A.D.2d 852, 852, 366 N.Y.S.2d 194, 195-96 (1975); Ciampichini v. Ring Bros., 40 A.D.2d 289, 292, 339 N.Y.S.2d 716, 719-20 (1973); Pimm v. Graybar Elec. Co., 27 A.D.2d 309, 310-11, 278 N.Y.S.2d 913, 915 (1967).

59. *E.g.*, Fischer v. Mead Johnson Laboratories, 41 A.D.2d 737, 737, 341 N.Y.S.2d 257, 258 (1973).

60. *E.g.*, Infante v. Montgomery Ward & Co., 49 A.D.2d 72, 74-75, 371 N.Y.S.2d 500, 502 (1975).

61. The Code specifically allows disclaimers of warranties, N.Y.U.C.C. § 2-316(2) (McKinney 1964), but unlike notice and privity, the enforcement of disclaimers was never a major issue in New York products liability suits brought prior to the adoption of strict liability. The one Court of Appeals case to discuss the applicability of disclaimers, Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973), sidestepped the issue by holding that the injured parties had not seen the disclaimers in question. *Id.* at 124-25, 305 N.E.2d at 754, 350 N.Y.S.2d at 623. Because disclaimers are a part of the contract, the Code's proscription against unconscionable clauses allows courts to nullify any disclaimers that avoid liability for personal injury. N.Y.U.C.C. § 2-302 (McKinney 1964). Moreover, to be successful disclaimers must meet specific formal requirements. *Id.* § 2-316(2). It should be noted, too, that limitations on remedies with respect to personal injury are *prima facie* unconscionable. *Id.* § 2-719(3).

Finally, in 1973, ten years after *Greenman*,<sup>62</sup> the Court of Appeals adopted strict liability in *Codling v. Paglia*.<sup>63</sup> This doctrine, similar to section 402A of the Restatement,<sup>64</sup> holds the manufacturer strictly liable to any person injured by a product if the defect was a substantial factor in bringing about the injury.<sup>65</sup> Because the common-law warranty action had now developed into a full-fledged strict liability cause of action, courts after *Codling* could differentiate between strict tort liability and breach of warranty.<sup>66</sup> They accordingly indicated that all the privity and procedural requirements of the Code should be applied to warranty actions.<sup>67</sup> In 1975, however, the legislature expanded the availability of the breach of warranty action to all those who could foreseeably be affected by the product,<sup>68</sup> thus once again blurring the lines between the actions.

The vehicle for this expansion was the 1966 amendment of the official version of the Code, prompted by the nonuniform alteration of the privity requirement by some states.<sup>69</sup> This alteration had occurred when courts permitted suits by non-purchasers who would otherwise be left without a remedy.<sup>70</sup> The amendment provided for three alternative ways of extending warranty protection beyond the

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62. *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

63. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). The court held that a manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in causing the plaintiff's harm, if the product was being used for an intended purpose at the time of the accident, and if the plaintiff was not contributorily negligent or could not otherwise have averted his harm. *Id.* at 342-43, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

64. *See supra* note 1.

65. *See supra* note 63.

66. The Court of Appeals has recognized that strict liability is a tort- not a warranty-based doctrine. *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 385-86, 348 N.E.2d 571, 576-78, 384 N.Y.S.2d 115, 120-21 (1976).

67. The Court of Appeals has stated that privity is required in a warranty suit, *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 591-92, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 189 (1978), that disclaimers of warranty may be given effect, *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 622-23 (1973) (dictum), and that the statute of limitations accrues upon tender, not upon injury. *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 402-03, 335 N.E.2d 275, 278-79, 373 N.Y.S.2d 39, 43-44 (1975) (dictum).

68. Act of Aug. 9, 1975, ch. 774, 1975 N.Y. Laws 1208 (codified at N.Y.U.C.C. § 2-318 (McKinney Supp. 1980-1981)).

69. Permanent Editorial Board for the Uniform Commercial Code, Report No. 3, at x (Dec. 15, 1966), reprinted in ALI and Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Commercial Code XXXIII, XXXIV (9th ed. 1978).

70. *E.g.*, *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 130 (2d Cir. 1963); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436-37, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 594-95 (1963); *see Gillam, supra* note 13, at 152-55; *Prosser II, supra* note 29, at 1110-11.

buyer.<sup>71</sup> Alternative A is the original section 2-318<sup>72</sup> in effect in New York until 1975.<sup>73</sup> It extends warranty protection to family members and guests in the home who suffer personal injury.<sup>74</sup> Alternative B extends warranty coverage to anyone who could reasonably be expected to use or be affected by the product and who suffers personal injury.<sup>75</sup> Alternative C differs from B primarily in that it is not limited to personal injury.<sup>76</sup> Alternatives B and C are the means by

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71. U.C.C. § 2-318 (1977).

72. U.C.C. § 2-318 (1962) (amended 1966).

73. N.Y.U.C.C. § 2-318 (McKinney 1964).

74. *Id.* The text reads in full: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." *Id.*

75. U.C.C. § 2-318 Alternative B (1977). The text reads in full: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." *Id.* New York's version is slightly different, though apparently identical in substance: "A seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." N.Y.U.C.C. § 2-318 (McKinney Supp. 1980-1981). It should be noted that states with Alternative A or B relax the privity requirement only in personal injury cases; in economic loss cases the requirement still exists. *See* *Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc.*, 57 A.D.2d 993, 995, 394 N.Y.S.2d 744, 746 (1977); *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 348-49, 432 N.Y.S.2d 132, 134 (Sup. Ct. 1980). Although Alternative B is generally considered an expansion of warranty protection, in *Martin v. Drackett Prods. Co.*, 100 Misc. 2d 728, 420 N.Y.S.2d 147 (Sup. Ct. 1979), the court came to the curious conclusion that the amendment represents a partial contraction of seller's liability. It would, therefore, not allow the purchaser's child to recover under Alternative B, for example, because the child was not a foreseeable user. *Id.* at 732, 420 N.Y.S.2d at 150. The court reasoned that, by removing the references to beneficiaries specified in Alternative A, the legislature intended to restrict the warranty protection. *Id.* at 730-31, 420 N.Y.S.2d at 149. This analysis is questionable, however, because a child, as a family member of the purchaser, could reasonably be anticipated to be affected by the product.

76. U.C.C. § 2-318 Alternative C (1977). The text reads in full: "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends." *Id.*; *see* Report No. 3, *supra* note 69, at x, *reprinted in* ALI and Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Commercial Code at XXXIV. Slightly more than one-half of the states have adopted Alternative A, with the remainder equally divided among Alternative B, Alternative C and specialized versions. [1981] 1 Prod. Liab. Rep. (CCH) ¶ 4017; *see* T. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 2-318[A] (1978 & Supp. 1979). Because Alternative A permits suits only by a party in a specified relation with the buyer, some states have further modified their statutes to allow recovery against prior sellers in the chain of

which states can officially use the Code as a form of surrogate strict liability.<sup>77</sup> The Code's official comments clearly imply that the Alternatives were an attempt to move the Code closer to the strict liability doctrine expressed in section 402A of the Restatement.<sup>78</sup>

It is not surprising, therefore, that Alternatives B and C were adopted by those states that either had rejected strict liability in favor of breach of warranty<sup>79</sup> or had used breach of warranty as a form of strict liability before adopting the latter doctrine.<sup>80</sup> The New York Legislature's 1975 adoption of Alternative B,<sup>81</sup> then, was particularly curious since it came two years *after* the Court of Appeals had adopted strict products liability in *Codling*. Adding to this mystery is the scant legislative history that set forth the purpose of the amendment: to provide a remedy for injured recipients of gifts.<sup>82</sup> Such a measure was, however, unnecessary: Because the state had already adopted strict liability, an injured recipient of a defective gift would not be precluded from a remedy due to his lack of privity. If prevented from suing for breach of warranty for any reason, he would still have a strict liability cause of action.<sup>83</sup> Thus, presently in New

distribution. *See, e.g.*, Ark. Stat. Ann. § 85-2-318.2 (Supp. 1981); Va. Code § 8.2-318 (1965). California has not adopted any version of the section. In Texas, the legislature left to the courts the question whether warranty actions could be maintained by those not in privity. Tex. Bus. & Com. Code Ann. tit. 1, § 2.318 (Vernon 1968). Additionally, Alternative B allows only natural persons to bring suit, while Alternative C permits any person, including organizations, to bring a cause of action in breach of warranty. U.C.C. § 2-318 (1977).

77. *See, e.g.*, *Wilhelm v. Globe Solvent Co.*, 373 A.2d 218, 222 (Del. Super. Ct.), *aff'd in part, rev'd in part*, 411 A.2d 611 (Del. 1977); *Back v. Wickes Corp.*, 378 N.E.2d 964, 968-69 (Mass. 1978).

78. U.C.C. § 2-318 official comment 3 (1977).

79. *See* Del. Code Ann. tit. 6, § 2-318 (1975). Delaware has adopted strict liability only for leases and bailments, not for sales of goods. *Cline v. Prowler Indus.*, 418 A.2d 968, 971, 980 (Del. 1980).

80. Kansas, which enacted Alternative B in 1967, Kan. Stat. Ann. § 84-2-318 (Supp. 1980), adopted in 1976 the strict liability doctrine as set forth in the Second Restatement § 402A. *Brooks v. Dietz*, 218 Kan. 698, 702, 545 P.2d 1104, 1108 (1976).

81. Act of Aug. 9, 1975, ch. 774, 1975 N.Y. Laws 1208 (codified at N.Y.U.C.C. § 2-318 (McKinney Supp. 1980-1981)).

82. Memorandum of Assemblyman Leonard Silverman, 1975 New York State Legislative Annual 110.

83. *Codling v. Paglia*, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973) (strict products liability applies to any user, consumer, or bystander). *See generally* *Robinson v. Reed-Prentice Div.*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In *Atkinson v. Ormont Mach. Co.*, 102 Misc. 2d 468, 423 N.Y.S.2d 577 (Sup. Ct. 1979), the court gave full effect to Alternative B and allowed a suit by an employee of the purchaser. *Id.* at 470-71, 423 N.Y.S.2d at 579-80. The court implied that the statutory provision was necessary in discussing the "sad plight of the innocent victim with no form of redress or available relief," occasioned by the traditional requirement of privity in a products liability suit. *Id.* at 470, 423 N.Y.S.2d at 579. Although the court was bound to apply the statute, its characterization of the plaintiff as helpless was incorrect because, with the advent of

York, a party who suffers personal injury as a result of a defective product may sue in strict tort as well as in breach of warranty even though the plaintiff neither purchased the product from the seller, nor has any other relation to the seller or the buyer.<sup>84</sup>

## II. THE SIMILARITY OF THE DOCTRINES

Courts in most states hold that strict liability and breach of warranty are very similar, if not identical.<sup>85</sup> Only the privity requirement,<sup>86</sup> the several procedural aspects of warranty,<sup>87</sup> and a potentially different standard of liability differentiate the two. In New York, the 1975 amendment to section 2-318 eliminated the privity requirement.<sup>88</sup> Of the remaining differences, however, two might result in a different outcome in certain circumstances. The first is the standard of liability, that is, the level of defectiveness the plaintiff is required to prove. The second is the major procedural distinction, the statute of limitations, which is different in each cause of action.<sup>89</sup>

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strict liability, no plaintiff is precluded from relief on the grounds of absence of privity.

84. *Cerrato v. R.H. Crown Co.*, 58 A.D.2d 721, 721, 396 N.Y.S.2d 716, 717 (1977); *Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc.*, 57 A.D.2d 993, 994-95, 394 N.Y.S.2d 744, 746 (1977).

85. *E.g.*, *Hornung v. Richardson-Merrill, Inc.*, 317 F. Supp. 183, 184 (D. Mont. 1970); *Bachner v. Pearson*, 479 P.2d 319, 326-28 (Alaska 1970); *Sansing v. Firestone Tire & Rubber Co.*, 354 So. 2d 895, 897 (Fla. Dist. Ct. App. 1978); *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 703, 211 N.W.2d 914, 917 (1973); *Pearson v. Franklin Laboratories, Inc.*, 254 N.W.2d 133, 139 (S.D. 1977); *see Wilhelm v. Globe Solvent Co.*, 373 A.2d 218, 222-23 (Del. Super. Ct. 1977); *Parish v. B.F. Goodrich Co.*, 395 Mich. 271, 278-82, 235 N.W.2d 570, 573-75 (1975).

86. *See supra* note 13.

87. *See supra* notes 10-12 and accompanying text.

88. *See supra* note 75.

89. Other procedural distinctions between strict tort and breach of warranty include the allocation of the burden of proof and the choice of applicable law. Their effect on outcome has been minimal, however, because they are rarely litigated. Under the Code, the plaintiff has the burden of proving the breach. N.Y.U.C.C. § 2-607(4) (McKinney 1964). Although the plaintiff also has the burden of proving a defect unreasonably dangerous in strict liability cases, a recent line of cases has introduced a two-prong test in design defect litigation, shifting the burden to the defendant to prove reasonable safety. *See Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978). On the choice of law issue, *see Quadrini v. Sikorsky Aircraft Div.*, 425 F. Supp. 81 (D. Conn. 1977), *aff'd on rehearing*, 505 F. Supp. 1094 (D. Conn. 1981). In *Quadrini*, the court heard a wrongful death action in which the decedent was killed in a helicopter crash in North Carolina, a state that does not recognize strict liability. *Id.* at 88-89. The district court dismissed the strict liability claim because, as a tort action, it accrued in the state of the accident, where strict liability was not available. *Id.* The warranty action was upheld, however, because the substantive law to be applied was that of Connecticut, the place of contracting (where the helicopter was tendered), and that state recognized a breach of warranty cause of action. *Id.* at 90-91. Thus, treating warranty cases under the Code as tort cases, as suggested in *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 591-92, 374 N.E.2d 97, 101-02, 403 N.Y.S.2d 185,



Some New York courts have held the plaintiff to a higher showing of proof in a strict liability action compared with the proof required in a warranty action. When the plaintiff sues for breach of warranty, he is required to show that the product is "unmerchantable."<sup>90</sup> This level of quality is usually considered to be the same as "defective."<sup>91</sup>

189-90 (1978), might result in inequities to either party as a result of the allocation of the burden of proof or the selection of applicable law according to tort principles. This danger is increased by the amendment to § 2-318, which eliminates any clear distinction between the two actions. In some states, other reasons exist for maintaining breach of warranty separate from strict liability. See *Allen v. Parsons*, 555 S.W.2d 522, 523 (Tex. Civ. App. 1977) (successful breach of warranty suit under Code allows recovery of treble damages and attorney's fees under state consumer protection statute). Generally, the same remedies are available in either action, and full recovery is allowed for personal injury in a warranty action. See, e.g., *Titlebaum v. Loblaws, Inc.*, 75 A.D.2d 985, 986, 429 N.Y.S.2d 91, 93 (1980); *McCarthy v. Bristol Laboratories*, 61 A.D.2d 196, 201-02, 401 N.Y.S.2d 509, 513 (1978); *Atkinson v. Ormont Mach. Co.*, 102 Misc. 2d 468, 469-71, 423 N.Y.S.2d 577, 579-80 (Sup. Ct. 1979); *Martin v. Drackett Prods. Co.*, 100 Misc. 2d 728, 730-33, 420 N.Y.S.2d 147, 149-50 (Sup. Ct. 1979). Although there has been some debate as to whether emotional distress recovery should be allowed in a warranty action, this appears to stem from a general reluctance to allow damages not readily verifiable. Thus, when physical injury accompanies the distress, courts often uphold emotional distress awards. See *Kroger Co. v. Beck*, 375 N.E.2d 640 (Ind. Ct. App. 1978) (recovery for loss of enjoyment of food allowed following injury by hypodermic needle in steak). Even when no injury occurs, however, courts occasionally allow recovery, provided there is explicit proof of the manifestations of such emotional distress. *Lemaldi v. De Tomaso of Am., Inc.*, 156 N.J. Super. 441, 383 A.2d 1220 (Law Div. 1978) (plaintiff's expensive sports car so defective that emotional distress recovery would have been allowed on sufficient showing of distress). Punitive damages are recoverable under strict liability, *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), but not usually under the Code, which precludes "penal damages . . . except as specifically provided [by the Code] or by other rule of law." N.Y.U.C.C. § 1-106(1) (McKinney 1964). See generally *Owen, Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258 (1976). A derivative action brought by a spouse for loss of consortium has been allowed in a Code warranty breach suit. See *McCarthy v. Bristol Laboratories*, 61 A.D.2d 196, 198, 401 N.Y.S.2d 509, 511 (1978).

90. Under the Code, the seller warrants that the product is merchantable, which is in turn defined as, among other qualities, "fit for the ordinary purposes for which such goods are used." N.Y.U.C.C. § 2-314(2)(c) (McKinney 1964); see *Finkelstein v. Chevron Chem. Co.*, 60 A.D.2d 640, 641, 400 N.Y.S.2d 548, 549 (1977); *Schwartz v. Macrose Lumber & Trim Co.*, 50 Misc. 2d 547, 551-53, 270 N.Y.S.2d 875, 882-83 (Sup. Ct. 1966), *rev'd on other grounds*, 29 A.D.2d 781, 287 N.Y.S.2d 706 (1968), *aff'd*, 24 N.Y.2d 856, 248 N.E.2d 920, 301 N.Y.S.2d 91 (1969); *United States Leasing Corp. v. Comerlad Assoc.*, 101 Misc. 2d 773, 777, 421 N.Y.S.2d 1003, 1005 (Civ. Ct. 1979).

91. *J. White & R. Summers, supra* note 7, at 355-56 (apart from "unreasonably dangerous," both standards are the same); *Dickerson I, supra* note 19, at 478 ("unmerchantable" equals legally defective). Implied warranty does not impose a no-fault type of liability even though some courts appear to have held it does. "When machinery 'malfunctions', it obviously lacks fitness regardless of the cause of the malfunction. Under the theory of warranty, the 'sin' is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer in constructing or designing the machinery." *Greco v. Bucciconi Eng'g Co.*, 283 F.

When the plaintiff sues in strict tort, he must prove the product

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Supp. 978, 982 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); *accord* Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 301 F. Supp. 513, 524 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 428 (2d Cir. 1969). However, such broad statements regarding warranty liability are misleading. A distinction must be drawn between express warranties, in which the liability is absolute, and implied warranties, in which the analysis is usually objective. Breach of an express warranty imposes absolute liability in the sense that the breaching party's culpability is irrelevant. To make out a case, the plaintiff need merely show that the product as delivered differs from the product as warranted. U.C.C. §§ 2-313, -714 (1977); *see* McCarty v. E. J. Korvette, Inc., 28 Md. App. 421, 437-38, 347 A.2d 253, 264 (1975); Collins v. Uniroyal, Inc., 64 N.J. 260, 261-63, 315 A.2d 16, 17-18 (1974). In an implied warranty situation, however, the criteria against which a product is to be measured in order to determine its merchantability are vague and objective: If the product is generally fit and within tolerances accepted by the trade even if not in perfect condition, the warranty has not been breached. Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp., 62 A.D.2d 982, 983-84, 403 N.Y.S.2d 322, 325 (1978); *see* U.C.C. § 2-314(2) (1977). In *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965), the court observed: "Some quibbler may allege that this is liability without fault. It is not. . . . [A] plaintiff relying upon the rule must prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains. . . . [T]hen and only then may he recover against the manufacturer of the defective product." *Id.* at 98-99, 133 N.W.2d at 135. Moreover, the plaintiff must show the deviation from the standard is substantial. *See id.* at 97-99, 133 N.W.2d at 134-35; *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982, 983-84, 403 N.Y.S.2d 322, 324-25 (1978); *Portnoy v. Capobianco*, 77 Misc. 2d 817, 819-20, 355 N.Y.S.2d 86, 88 (Sup. Ct. 1974). Therefore, mere failure to perform as hoped is not necessarily a breach of the warranty under § 2-314. *Sam's Marine Park Enters. v. Admar Bar & Kitchen Equip. Corp.*, 103 Misc. 2d 276, 277-78, 425 N.Y.S.2d 743, 744-45 (Civ. Ct. 1980); *see* *Becton v. Firestone Tire Co.*, 38 A.D. 693, 693, 327 N.Y.S.2d 965, 965-66 (1972). The use of comparative fault principles can further limit a defendant's liability. Although some courts do not allow the defense of contributory negligence or comparative fault in a warranty action, *Holt v. Stihl, Inc.*, 449 F. Supp. 693, 695 (E.D. Tenn. 1977), New York's comparative fault statute applies to such actions. N.Y. Civ. Prac. Law § 1411 (McKinney 1976). A second distinction is important in analyzing the threshold of liability in a warranty action—the type of defect. Warranty liability can be said to approach absolute liability when the defect complained of is a "unit" or "manufacturing" defect, as opposed to a design defect. A unit defect is a condition that is contrary to the manufacturer's own intentions and specifications (e.g., a wheel assembly missing a bolt); a design defect is a feature of the product that conforms with the manufacturer's specifications, yet nonetheless renders the product dangerous. *Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 599 n.27 (1980) [hereinafter cited as *Birnbaum II*]; *see* *W. Keeton, D. Owen & J. Montgomery, supra* note 26, at 270. Thus, to prove a unit defect the plaintiff will prevail merely upon showing that the product deviated from the manufacturer's other, non-defective products and that the defect was a proximate cause of the injury. *See* *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978, 982 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); *Titlebaum v. Loblaws, Inc.*, 75 A.D.2d 985, 985-86, 429 N.Y.S.2d 91, 92-93 (1980). On the other hand, if the defect is a design defect, the plaintiff has no existing, non-defective product against which to measure the harm-producing item and so must engage in a showing of what amounts to negligence, by comparing the defendant's conduct in designing, labelling, selling, or attaching warnings with that of a reasonably prudent manufacturer. *Jones v.*

defective,<sup>92</sup> but he may also be required to show that the product is unreasonably dangerous, or some variation of that language.<sup>93</sup> Although this extra burden in strict liability actions is not imposed by all courts and in fact is not required by *Codling*,<sup>94</sup> other courts, possibly following the Restatement formulation, have nevertheless defined strict liability as requiring proof of an "unreasonably dangerous" defect.<sup>95</sup>

It can be argued that (i) since a plaintiff in a warranty suit must prove only "unmerchantability" and (ii) since "unmerchantability" equals "defect," then requiring the plaintiff to prove "defect" plus "unreasonable danger" is to require him to prove more than "unmerchantability" alone. Several courts of other states have eliminated the additional "unreasonable danger" requirement from their strict liability actions, holding that requiring proof of "unreasonably dangerous defect," instead of simply "defect," is overly burdensome to the plaintiff.<sup>96</sup> In terms of jury instructions or the necessary showing for a motion to dismiss or for a directed verdict, it seems reasonable to conclude that requiring a plaintiff to prove that the defect is unrea-

Hutchinson Mfg. Inc., 502 S.W.2d 66, 69-70 (Ky. 1973) (In a design case, "the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care."). Thus, in describing the plaintiff's requirement of proof, courts generally draw distinctions based on the type of defect, whether the plaintiff is suing in strict tort or warranty. See *Reddick v. White Consol. Indus.*, 295 F. Supp. 243, 245-49 (S.D. Ga. 1969); *McMichael v. American Red Cross*, 532 S.W.2d 7, 11 (Ky. 1975); *McGuire v. Nelson*, 162 Mont. 37, 42-45, 508 P.2d 558, 561-62 (1973); *Elliott v. Lachance*, 109 N.H. 481, 484-85, 256 A.2d 153, 155-56 (1969); *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 326-27, 232 A.2d 879, 886 (Law Div. 1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969); *McCarthy v. Bristol Laboratories*, 61 A.D.2d 196, 201-02, 401 N.Y.S.2d 509, 513 (1978); *Dickey v. Lockport Prestress, Inc.*, 52 A.D.2d 1075, 1075-76, 384 N.Y.S.2d 609, 609-10 (1976); *Rainbow v. Albert Elia Bldg. Co.*, 49 A.D.2d 250, 252-53, 373 N.Y.S.2d 928, 930 (1975).

92. *Codling v. Paglia*, 32 N.Y.2d 330, 342-43, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973).

93. See, e.g., *Merced v. Auto Pak Co.*, 533 F.2d 71, 75-76 (2d Cir. 1976); *Caiazzo v. Volkswagenwerk, A.G.*, 468 F. Supp. 593, 600 (E.D.N.Y. 1979), *rev'd in part on other grounds*, 647 F.2d 241 (2d Cir. 1981); *Wolfgruber v. Upjohn Co.*, 72 A.D.2d 59, 62, 423 N.Y.S.2d 95, 97 (1979), *aff'd*, 52 N.Y.2d 768, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980); *Biss v. Tenneco, Inc.*, 64 A.D.2d 204, 206-07, 409 N.Y.S.2d 874, 876 (1978); *Jerry v. Borden Co.*, 45 A.D.2d 344, 348, 358 N.Y.S.2d 426, 430-31 (1974); *Steinik v. Doctors Hosp.*, 82 Misc. 2d 97, 99, 368 N.Y.S.2d 767, 770 (Sup. Ct. 1975).

94. 32 N.Y.2d 330, 342-43, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973).

95. See *supra* note 93. For the Restatement's language, see *supra* note 1.

96. E.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 213-14 (Alaska 1975); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1161-62, 104 Cal. Rptr. 433, 441-42 (1972); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 176, 406 A.2d 140, 153 (1979); *Azzarello v. Black Bros. Co.*,

sonably dangerous could result in a decision for the defendant when requiring a showing merely of unmerchantability or defectiveness would not.<sup>97</sup>

The second distinction between the causes of action is more significant. The Code offers a potentially longer statute of limitations. If a plaintiff is injured by a product, he has three years from the date of injury to bring an action in strict tort liability.<sup>98</sup> The limitations period under the Code for breach of warranty, however, commences upon tender of the product to the buyer and continues for four years.<sup>99</sup> Thus, if the plaintiff is injured within the first year from tender, the statutory period for a breach of warranty suit will be longer.<sup>100</sup>

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480 Pa. 547, 557-59, 391 A.2d 1020, 1026 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 95-97, 337 A.2d 893, 899-900 (1975).

97. The significance of the "unreasonably dangerous" requirement is illustrated in the recent case of *Vineyard v. Empire Mach. Co.*, 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978). There, the court held that while the absence of a rollover bar rendered an earthmover defective, it was not unreasonably dangerous and thus did not give rise to its manufacturer's strict liability. *Id.* at 505-06, 581 P.2d at 1155-56.

98. N.Y. Civ. Prac. Law § 214 (McKinney Supp. 1980-1981) ("The following actions must be commenced within three years: . . . an action to recover damages for an injury to property; . . . an action to recover damages for a personal injury . . .").

99. N.Y.U.C.C. § 2-725 (McKinney 1964). "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." *Id.*; see *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 819 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Witherell v. Weimer*, 77 Ill. App. 3d 582, 585-86, 396 N.E.2d 268, 271 (1979); *Fazio v. Ford Motor Corp.*, 69 A.D.2d 896, 896, 415 N.Y.S.2d 889, 890 (1979); *Ribley v. Harsco Corp.*, 57 A.D.2d 234, 236, 394 N.Y.S.2d 741, 743 (1977). The Code statute of limitations contains a provision that the cause of action does not accrue at the time of tender if the "warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance . . ." N.Y.U.C.C. § 2-725(2) (McKinney 1964). Although this provision would seem to be a means of applying the discovery rule to breach of warranty actions under the Code, it has uniformly been held that an implied warranty by its very nature cannot extend to future performance. *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1058, 1104 (N.D.N.Y. 1977); *Voth v. Chrysler Motor Corp.*, 218 Kan. 644, 652, 545 P.2d 371, 378 (1976). Thus, unless tolled through common-law rules, which are not abrogated by the Code, N.Y.U.C.C. § 2-725(4) (McKinney 1964), the cause of action accrues upon tender.

100. The following hypothetical illustrates the operation of the two statutes of limitations. The plaintiff purchases a product from defendant on January 2, 1980, which product is properly tendered. On May 15, 1980, the plaintiff is injured due to an actionable defect. The plaintiff may sue in strict liability (or negligence) until May 15, 1983, but he may bring a breach of warranty action until January 2, 1984. If the

This distinction is usually the reason that parties assert that they are beneficiaries of the Code or that they should be afforded some common-law breach of warranty action: They have simply failed to bring their strict liability action within the statutory period.<sup>101</sup> Unlike the substantive difference, which may affect a determination on the merits, this procedural distinction can determine whether the merits of the case will be heard at all.<sup>102</sup>

### III. SECTION 2-318: THE AMENDMENT WITHOUT A CAUSE

If the New York amendment to section 2-318 could be viewed as benign, perhaps it might be relegated to the category of legislative curiosities. In an area of law such as products liability, however, where a need for clarification and reform has been increasingly recognized,<sup>103</sup> the amendment has led to a number of difficulties. First, it raises the question of whether the legislature intended to preempt the field of products liability by the adoption of the Code. Massachusetts and Delaware have opted for such a preemption.<sup>104</sup> These states, however, have expressly rejected strict liability in favor of a breach of

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injury occurred on May 15, 1981, however, the plaintiff may bring a tort action until May 15, 1984, though the warranty action will still be available only until January 2, 1984. Moreover, if the plaintiff is injured on June 1, 1984, he may not bring a warranty action at all, but will have until June 1, 1987, in which to bring a tort action. See *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 403, 335 N.E.2d 275, 278-79, 373 N.Y.S.2d 39, 43-44 (1975). *Victorson* overruled *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), in which the court held the warranty statute of limitations applicable. 37 N.Y.2d at 400, 335 N.E.2d at 276, 373 N.Y.S.2d at 40. At that time, however, strict liability had yet to be adopted in New York, and breach of warranty was the only action available in products liability. Thus, if the injury occurred more than four years after tender, the plaintiff could be barred before any cause of action had accrued. See generally Massery, *Date-of-Sale Statutes of Limitation—A New Immunity for Product Suppliers*, 1977 Ins. L.J. 535; Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C. L. Rev. 663 (1978).

101. See, e.g., *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 590-91, 374 N.E.2d 97, 100-01, 403 N.Y.S.2d 185, 188-89 (1978); *Atkinson v. Ormont Mach. Co.*, 102 Misc. 2d 468, 470-71, 423 N.Y.S.2d 577, 579-80 (Sup. Ct. 1979); *Beninati v. Oldsmobile Div.*, 94 Misc. 2d 835, 837, 405 N.Y.S.2d 917, 918 (Sup. Ct. 1978). For similar holdings in other jurisdictions, see *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (D. Ga. 1974); *Colvin v. FMC Corp.*, 43 Or. App. 709, 604 P.2d 157 (1979); see also *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 277, 512 P.2d 776, 778 (1973) (warranty action under the Code permitted even though strict liability claim barred by statute of limitations).

102. See, e.g., *Branden v. Gerbie*, 62 Ill. App. 3d 138, 140, 379 N.E.2d 7, 8 (1978); *McCarthy v. Bristol Laboratories*, 61 A.D.2d 196, 199, 401 N.Y.S.2d 509, 511 (1978).

103. See *supra* note 19 and accompanying text.

104. *Handy v. Uniroyal, Inc.*, 327 F. Supp. 596, 607 (D. Del. 1971); *Cline v. Prowler Indus.*, 418 A.2d 968, 971 (Del. 1980); *Back v. Wickes Corp.*, 378 N.E.2d 964, 968-69 (Mass. 1978); *Swartz v. General Motors Corp.*, 378 N.E.2d 61, 63-64 (Mass. 1978).

warranty action.<sup>105</sup> In New York, the legislature gave no indication whatsoever that the rule in *Codling* was to be preempted by the Code.<sup>106</sup>

Second, the legislature gave no direction as to what to do with the procedural aspects of the Code when the plaintiff is not a party to the contract. The statute of limitations in sales contracts, for instance, runs from the date of tender of delivery.<sup>107</sup> This rule is based on the logical premise that the breach occurs when defective goods are handed over to the buyer,<sup>108</sup> not when the defect becomes manifest.<sup>109</sup> Thus, the date on which the limitations period commences has no relationship to a non-buying plaintiff or to his injury. Any plaintiff can be precluded from a warranty suit even before the harm occurs.<sup>110</sup> In addition, the legislature has not given any indication as

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105. *Cline v. Prowler Indus.*, 418 A.2d 968, 980 (Del. 1980); *Swartz v. General Motors Corp.*, 378 N.E.2d 61, 63-64 (Mass. 1978); see *Parish v. B. F. Goodrich Co.*, 395 Mich. 271, 284-95, 235 N.W.2d 570, 576-81 (1975) (Williams, J., dissenting). When Michigan courts refer to breach of implied warranty in lieu of strict liability, however, they appear to be speaking not of the warranty action provided by the Code, but rather of a tort cause of action substantially identical to strict liability. See *Hanson v. Art Post Am., Inc.*, 83 Mich. App. 553, 557-58, 269 N.W.2d 222, 224 (1978).

106. See *supra* note 82 and accompanying text.

107. N.Y.U.C.C. § 2-725(2) (McKinney 1964); see *supra* notes 98-102.

108. *Raymond-Dravo-Langenfelder v. Microdot, Inc.*, 425 F. Supp. 614, 617 (D. Del. 1976); *Continental Oil Co. v. General Am. Transp. Corp.*, 409 F. Supp. 288, 292 (S.D. Tex. 1976); *Curtis v. Murphy Elevator Co.*, 407 F. Supp. 940, 944-45 (E.D. Tenn. 1976); *Tomes v. Chrysler Corp.*, 60 Ill. App. 3d 707, 710-11, 377 N.E.2d 224, 226-27 (1978); *Fazio v. Ford Motor Corp.*, 69 A.D.2d 896, 896, 415 N.Y.S.2d 889, 890 (1979).

109. *Raymond-Dravo-Langenfelder v. Microdot, Inc.*, 425 F. Supp. 614, 617 (D. Del. 1976); see *McCarthy v. Bristol Laboratories*, 61 A.D.2d 196, 199-200, 401 N.Y.S.2d 509, 511-12 (1978). Where the warranty explicitly extends to future performance, however, the cause of action accrues "when the breach is or should have been discovered." *Owens v. Patent Scaffolding Co.*, 77 Misc. 2d 992, 998, 354 N.Y.S.2d 778, 784 (Sup. Ct. 1974) (citation omitted), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975). An implied warranty, though, "by its very nature, cannot explicitly extend to future performance." *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1104 (N.D.N.Y. 1977); *accord Voth v. Chrysler Motor Corp.*, 218 Kan. 644, 652, 545 P.2d 371, 378 (1976).

110. The New York Court of Appeals incurred much criticism by affirming a decision that imposed the warranty statute of limitations on what was essentially a strict liability claim brought under the name of breach of warranty. In *Mendel v. Pittsburgh Plate Glass Co.*, 57 Misc. 2d 45, 291 N.Y.S.2d 94 (Sup. Ct. 1967), *aff'd*, 29 A.D.2d 918, 290 N.Y.S.2d 186 (1968), *aff'd*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), the court held that the contract law statute of limitations accruing from time of tender should apply. *Id.* at 46, 291 N.Y.S.2d at 96. Occasionally, this would allow the plaintiff to be barred before the injury occurred. See *supra* notes 99-100. Following the adoption of strict liability, the Court of Appeals wisely corrected this error by overruling *Mendel* in *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), holding that the tort statute

to which date of tender is controlling: that from the manufacturer to wholesaler, wholesaler to retailer, or retailer to consumer.<sup>111</sup> When a bystander is hurt, no date makes more sense than any other.<sup>112</sup> For the purposes of judicial efficiency and ease of analyzing claims, the legislature should have defined the exact date from which the statute is to run when a bystander, or other party not in privity, is harmed. Even if a plaintiff were barred from bringing a warranty action by the statute of limitations before he was harmed, no grave injustice would result. He would still be able to sue under strict liability.<sup>113</sup> He would have lost, however, the opportunity to benefit from the potentially lesser proof requirement of breach of warranty—that the product is merely unmerchantable, not defective and unreasonably dangerous as in strict liability.<sup>114</sup>

Similarly, the Code's provisions on notice preclude an injured plaintiff from suing if he does not give timely notice of breach.<sup>115</sup> Yet the purpose of such a requirement is presumably to allow the seller to "cure" a defective tender.<sup>116</sup> In a personal injury case, the harm has

of limitations (three years from date of injury) would govern strict liability actions and stating in dictum that the Code statute (four years from tender) would govern warranty actions. *Id.* at 403, 335 N.E.2d at 278-79, 373 N.Y.S.2d at 43-44. New York's adoption of Alternative B of § 2-318, *see supra* note 75, resurrects the *Mendel* holding in that the four-year statute of limitations must be applied in warranty actions. The danger of *Mendel*—that an injured person will be left without any remedy—no longer exists, because such a plaintiff now has a tort action accruing on the date of injury. Amended § 2-318, however, again raises the potential for the curious situation in which the plaintiff's warranty cause of action is barred before he is injured. A buyer at least technically has a cause of action upon tender since he received a defective product. A non-buyer, however, can sue only if he is harmed and if the harm occurs within four years from tender. *See Fazio v. Ford Motor Corp.*, 69 A.D.2d 896, 896, 415 N.Y.S.2d 889, 890 (1979); *Ribley v. Harsco Corp.*, 57 A.D.2d 234, 236, 394 N.Y.S.2d 741, 743 (1977).

111. Courts usually hold that the applicable tender is the retail sale. *See, e.g., Patterson v. Her Majesty Indus.*, 450 F. Supp. 425, 433 (E.D. Pa. 1978).

112. *See Salvador v. Atlantic Steel Boiler Co.*, 256 Pa. Super. Ct. 330, 343, 389 A.2d 1148, 1155 (1978). In rejecting the plaintiff's argument that the Code warranty statute of limitations should apply although he was not within the class protected by Alternative A, the *Salvador* court observed that it "takes a very strained reading of [the Code's statute of limitations section] to conclude that it was ever meant to apply to persons other than the contracting parties in breach of warranty actions." *Id.* at 341, 389 A.2d at 1154 (citation omitted).

113. The tort statute of limitations runs three years from date of injury. N.Y. Civ. Prac. Law § 214 (McKinney Supp. 1980-1981).

114. *See supra* notes 90-97 and accompanying text.

115. N.Y.U.C.C. § 2-607(3)(a) (McKinney 1964) ("Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . .").

116. *Id.* § 2-508 (permitting a seller under some circumstances to remedy a defective performance).

already occurred and notice would serve little purpose. Nonetheless, if notice is not timely given, the plaintiff will be barred from any Code remedy.<sup>117</sup>

The Code also provides explicitly that the seller may disclaim warranties.<sup>118</sup> Although limitation of remedies for personal injury is not permitted,<sup>119</sup> it is theoretically possible for the seller validly to disclaim all warranties,<sup>120</sup> and there can be no suit for breach of a

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117. *Id.* § 2-607(3)(a). Often the notice requirement is disregarded entirely when strict adherence to its provisions would result in injustice to an injured consumer. See James, *supra* note 19, at 197 (Notice requirement "may prove a trap to the unwary victim who will generally not be steeped in the 'business practice' which justifies the rule."). The Code, however, contemplates that the notice requirement be construed very broadly when the plaintiff is not a business person and the sale was a consumer, rather than commercial, transaction. See *Smith v. Butler*, 19 Md. App. 467, 471-72, 311 A.2d 813, 816-17 (1973) (no formal requirements of notice; buyer must merely let seller know that something is wrong with the product); *Fischer v. Mead Johnson Laboratories*, 41 A.D.2d 737, 737, 341 N.Y.S.2d 257, 259 (1973) (notice required in commercial transactions only); Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 Ind. L.J. 457, 470-71 (1972) (notice requirement not unfair unless unreasonably oppressive to the plaintiff).

118. N.Y.U.C.C. § 2-316 (McKinney 1964).

119. *Id.* § 2-719(3). The Code permits the parties to agree upon liquidated damages in the event of breach, provided the amount is reasonable in light of the "anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." *Id.* § 2-718(1). But this section may not be used to limit liability for personal injury. *Id.* § 2-719(3).

120. *Id.* § 2-316(2). Even the section on limitation of remedies recognizes that such limitation is "merely an allocation of unknown or undeterminable risks." *Id.* § 2-719 official comment 3. That section further provides that, although remedies cannot be manipulated to limit the buyer's recovery, "[t]he seller in all cases is free to disclaim warranties." *Id.* To be effective, disclaimers must mention the word "merchantability" and, if in writing, must be conspicuous. *Id.* § 2-316(2). The court determines whether a disclaimer is conspicuous. *Id.* § 1-201(10). Frequently courts find that even if a party has agreed to a disclaimer, the provision is void because it does not meet these formal requirements. See *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys., Inc.*, 65 A.D.2d 590, 590-91, 409 N.Y.S.2d 257, 258 (1978); *Victor v. Mammana*, 101 Misc. 2d 954, 955-56, 422 N.Y.S.2d 350, 351 (Sup. Ct. 1979); *Christopher v. Larson Ford Sales, Inc.*, 557 P.2d 1009, 1011-12 (Utah 1976). See generally *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973). Moreover, a disclaimer of warranty, like any other contract provision, may be invalidated by the court if it is determined to be unconscionable. N.Y.U.C.C. § 2-302(1) (McKinney 1964). The test for unconscionability is vague. Essentially, it requires that a provision must not be so one-sided as to lead to oppression and unfair surprise. The section does not purport to disturb the "allocation of risks because of superior bargaining power." *Id.* § 2-302 official comment 1. But see *Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 516-28 (1967) (unconscionability may not have been intended by formulators of the Code to be a means of overriding implied warranty disclaimers). The Code also imposes a duty of good faith upon the parties, N.Y.U.C.C. § 1-203 (McKinney 1964), which cannot be disclaimed. *Id.* § 1-102(3). Good faith is defined to mean "honesty in fact," *id.* § 1-201(19), a subjective standard applicable to all



nonexistent warranty. New York appears to recognize the validity of contractual restrictions for personal injury liability pursuant to the Code.<sup>121</sup> Problems arise, however, with remote parties. To give effect to disclaimers with respect to a party who has never seen the contract has been characterized in New York as unfair to the injured party,<sup>122</sup> yet to deny effect to the disclaimer is both to disregard the Code and to interfere with an element of the contract for which the seller bargained and presumably provided consideration.

Third, the amendment can be viewed as a retrogression in the law of products liability in that it resurrects the old breach of warranty action as it was used by courts to redress product-caused harms prior to the adoption of strict liability.<sup>123</sup> The majority of courts have, however, preferred strict liability.<sup>124</sup> Taking only judicial efficiency and clarity of doctrine as goals, the reinstatement of this quasi-duplicative cause of action has remuddied the waters of products liability theory just when New York, following *Codling*, was successfully sorting out the two theories<sup>125</sup>—and this at a time when courts and commentators alike were recognizing the need for a unified products liability theory.<sup>126</sup>

parties under the Code. In the case of a merchant who is the defendant in a warranty action, however, an additional definition of good faith applies—an objective standard of conduct based upon “reasonable commercial standards of fair dealing.” *Id.* § 2-103(1)(b). Some states have enacted statutes prohibiting disclaimers of implied warranties in favor of consumers. *See, e.g.*, Mass. Ann. Laws ch. 106, § 2-316A (Michie/Law. Co-op 1976). On the federal level, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1976), prohibits disclaimers of warranty in consumer sales if the seller either gives the buyer a written warranty or enters into a service contract with the buyer within ninety days of the date of sale. *Id.* § 2308(a). Limitations on the duration of the warranty period are allowed, however, if conscionable. *Id.* § 2308(b).

121. *See Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 623 (1973).

122. *Dorman v. International Harvester Co.*, 46 Cal. App. 3d 11, 19-20, 120 Cal. Rptr. 516, 522-23 (1975); *Sellman Auto, Inc. v. McCowan*, 89 Nev. 353, 355-56, 513 P.2d 1228, 1230 (1973); *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys., Inc.*, 65 A.D.2d 590, 590-91, 409 N.Y.S.2d 257, 258 (1978). *See generally Weintraub, Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 Tex. L. Rev. 60 (1974).

123. *See supra* notes 22-45 and accompanying text.

124. *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 & n.2 (D.N.H. 1972); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 286 n.12 (Alaska 1976); *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244, 248 & n.10 (Alaska 1969); *Shepard v. Alexian Bros. Hosp.*, 33 Cal. App. 3d 606, 614-15, 109 Cal. Rptr. 132, 137 (1973); *Phipps v. General Motors Corp.*, 278 Md. 337, 348-52, 363 A.2d 955, 961-62 (1976); *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 93, 179 N.W.2d 64, 70-71 (1970); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 156-57, 305 A.2d 412, 426-27 (1973); *Hill v. Joseph T. Ryerson & Son*, 268 S.E.2d 296, 303-05 (W. Va. 1980).

125. *See supra* notes 62-66 and accompanying text.

126. *See supra* note 19 and accompanying text.

Fourth, to the extent the plaintiff is held to a higher showing of proof in a strict liability action than in a breach of warranty action, the amendment creates an inconsistency in the law. Society, as mirrored in judicial decisions, wishes to protect itself either from any defects or from unreasonably dangerous defects only. Because no other substantive characteristic distinguishes the causes of action in New York,<sup>127</sup> an anomaly exists in that one of the causes of action must not accurately reflect the current social temperament vis-à-vis the level of defectiveness to be tolerated.

Fifth, in any suit by an injured non-purchaser joining both causes of action, the jury will be confronted with dual instructions, each phrased in wholly different language and each requiring a sufficient amount of background explanation to enable the jury to make an educated finding.<sup>128</sup> It is submitted that instructions based on the Code as well as on *Codling*, with variations in liability and procedure, can lead only to obfuscation.<sup>129</sup>

Sixth, parties are now less sure of the availability of the breach of warranty cause of action. This lack of clarity gives rise to a potential for increased expense to the parties and burden on the court system.<sup>130</sup> This situation has arisen not so much due to any confusion surrounding the causes of action themselves but more because of the Court of Appeals' suggestion in *Martin v. Julius Dierck Equipment Co.*<sup>131</sup> that it might not give effect to the amendment.<sup>132</sup> In *Martin*,

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127. See *supra* notes 85-89 and accompanying text.

128. See *Recent Developments in Commercial Law*, 11 Rut.-Cam. L.J. 527, 605 (1980) ("The majority's rationale [in a decision modifying the strict liability standard] for adopting the 'not reasonably fit, suitable and safe' standard is compelling: avoidance of jury confusion regarding the unreasonably dangerous standard.") [hereinafter cited as *Recent Developments*].

129. See *Stenberg v. Beatrice Foods Co.*, 176 Mont. 123, 130-31, 576 P.2d 725, 729-30 (1978).

130. Section 2-318 has led to the situation described by Dean Green in which reliance by the courts upon the language technic of one doctrine (breach of warranty) to effectuate another (strict liability) results in distorted analysis. See *supra* note 32.

131. 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978).

132. *Id.* at 591-92, 374 N.E.2d at 101, 403 N.Y.S.2d at 189. In *Martin*, the plaintiff was injured at his employer's place of business when a forklift malfunctioned. His employer had purchased the truck from the manufacturer through a distributor in New York City on June 26, 1967. Plaintiff brought suit for negligence and breach of implied warranty against the distributor on May 21, 1971 and the manufacturer in June of that year. *Id.* at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186. The defendants moved for summary judgment, alleging that (1) the cause of action was in tort and thus had accrued at the situs of the injury, Virginia, (2) that the forum state was bound by its borrowing statute to apply the Virginia statute of limitations, (3) that the Virginia limitations period is two years from the date of accrual, and (4) that the action accrued on May 6, 1969 (the date on which plaintiff reached his twenty-first birthday, rather than the date of the injury; the statute was tolled until then). Thus, they argued that the actions were time-barred. *Id.* at 587-88, 374 N.E.2d at 98-99, 403 N.Y.S.2d at 186-87. Although the amended version

the plaintiff was a non-buyer whose cause of action accrued prior to the adoption of the amendment to section 2-318. Thus, the court did not apply the amendment. However, the majority observed in dictum that there would probably be disagreement as to the effect of the amendment when a case properly involving it was before the court.<sup>133</sup> Additionally, the majority noted that if a warranty complaint by a non-purchaser were allowed to stand, the time and place of accrual would be governed by tort, not contract, principles.<sup>134</sup> On the other hand, the court stated that were it to allow a breach of warranty action, damages recoverable might be limited to contract damages,<sup>135</sup> but it did not discuss how those would differ from tort damages.

If *Martin* suggests solely that absent Alternative B breach of warranty should no longer be available to non-purchasing plaintiffs, the decision is wise and in accord with other jurisdictions.<sup>136</sup> It is also an affirmation of the *Codling* case, which held that a breach of warranty action brought by a non-purchaser is actually a strict liability case.<sup>137</sup> Absent some constitutional infirmity in the amendment, however, it is very doubtful that the court has the power to ignore it.<sup>138</sup> Yet several

of § 2-318 was in effect when the case reached the Court of Appeals, the court declined to give the amendment retroactive effect. *Id.* at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189. *Martin* is one of several cases in which New York courts evidence a preference to treat personal injury actions as tort claims, even if a prior contractual relationship between the parties would give rise to an action in contract. See *Sears Roebuck & Co. v. Enco Assoc.*, 43 N.Y.2d 389, 395, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 770 (1977); *Deutsch Relays Inc. v. Giffords Oil Co.*, 105 Misc. 2d 524, 525-26, 432 N.Y.S.2d 448, 449 (Sup. Ct. 1980). *Enco* allows contract damages but not tort damages when suit is brought after the tort statute has run. 43 N.Y.2d at 395, 372 N.E.2d at 558, 401 N.Y.S.2d at 770. One commentator has noted that a "satisfactory principle for this distinction has yet to be offered by anyone." McLoughlin, *New York Trial Practice*, N.Y.L.J., Oct. 10, 1980, at 1, 2, col. 1.

133. 43 N.Y.2d at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189.

134. *Id.*

135. *Id.* at 589-90, 374 N.E.2d at 100, 403 N.Y.S.2d at 188-89.

136. *E.g.*, *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1103 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 1516 (1981); *Moss v. Polyco, Inc.*, 522 P.2d 622, 626 (Okla. 1974); *Salvador v. Atlantic Steel Boiler Co.*, 256 Pa. Super. Ct. 330, 334-35, 389 A.2d 1148, 1150-51 (1978).

137. See *supra* note 63. "In *Martin*, the Court of Appeals finally laid to rest the old common law concept of implied warranty, at least insofar as [the warranty action] relates to plaintiffs who are not in privity with the defendant." Weinberger, *The Law of Implied Warranty: What Hath Martin Wrought?*, 13 *Trial Law. Q.* 21, 33 (Spring 1980).

138. The doctrine of separation of powers binds a court to apply a statute even though it questions the wisdom of the legislation. *In re Fosdick's Trust*, 4 N.Y.2d 646, 655-56, 152 N.E.2d 228, 233, 176 N.Y.S.2d 966, 973 (1958); *People v. Breslin*, 4 N.Y.2d 73, 78, 149 N.E.2d 85, 88, 172 N.Y.S.2d 157, 161 (1958); *People ex. rel. Doctors Hosp. v. Sexton*, 267 A.D. 736, 742-43, 48 N.Y.S.2d 201, 207 (1944), *aff'd per curiam*, 295 N.Y. 553, 64 N.E.2d 273 (1945); *Purdy v. McGarity*, 262 A.D. 623,

lower courts have expressly stated in dicta that the Court of Appeals might not permit a warranty suit in the absence of privity, notwithstanding the presence of section 2-318.<sup>139</sup> One court, however, observing that the *Martin* court found no constitutional defect, applied the statute to permit a suit by a non-purchasing user.<sup>140</sup>

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626, 30 N.Y.S.2d 966, 971 (1941); Kornbluth v. Reavy, 261 A.D. 60, 62, 24 N.Y.S.2d 514, 517 (1941); Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 Tenn. L. Rev. 205, 208 (1977) [hereinafter cited as Dickerson II]. "Indeed, *Martin* could not [prohibit warranty suits by those not in privity], constitutionally speaking, in that the statute in question is clear and unambiguous. Under the New York State Constitution the courts are bound to give Section 2-318 of the Code a literal interpretation." Weinberger, *supra* note 137, at 33. But see Hoenig, *Products Liability: Clarification of Breach of Warranty Actions*, N.Y.L.J., March 29, 1978, at 1, col. 1, in which the author suggests that courts would have authority constitutionally to require privity in warranty suits—as *Martin* suggests—because the amendment applies only to horizontal privity and is neutral on the question of vertical privity. See *supra* note 26.

139. The most recent interpretation of *Martin* came in *Fisher v. Graco Inc.*, 81 A.D.2d 209, 440 N.Y.S.2d 380 (1981). There the plaintiff's employer bought the product prior to the effective date of § 2-318, but the plaintiff was injured after the effective date. The tort statute had run before the plaintiff brought his cause of action, and so the issue centered on whether he would have a breach of warranty suit. The court held that he would not. *Martin*, the court observed, had stated that even if the plaintiff sues in warranty, the cause of action accrues on injury. The *Fisher* court noted that the plaintiff, however, did not have a cause of action for warranty because, according to the *Martin* court, a party not in privity does not have a suit for breach of warranty, but one for negligence or strict tort. *Id.* at 210, 440 N.Y.S.2d at 382. Moreover, even if the amendment were to change this principle, the results would be the same, since the purchase occurred before the effective date of the amendment and, under the then-existing § 2-318, plaintiff was not within the class protected by the warranties. *Id.* at 210-11, 440 N.Y.S.2d at 382. Thus, the case clearly suggests that a breach of warranty action by a non-purchaser might not be allowed, as *Martin* had indicated. See *supra* note 133. Similar holdings are found in *Ramos v. Gulf & Western Indus.*, N.Y.L.J., July 3, 1979, at 11, col. 1 (Sup. Ct. June 26, 1979), and *Connar v. General Motors Corp.*, N.Y.L.J., July 12, 1978, at 14, col. 1 (Sup. Ct. July 6, 1978). In *Ramos*, the court noted that although the Court of Appeals in *Martin* may have intended to preclude breach of warranty suits absent privity, it was relieved of so holding because the plaintiff had not filed within either the tort or the Code statute of limitations period. N.Y.L.J., July 3, 1979, at 11, cols. 1-2. The *Ramos* court noted, however, that even in a Code action, the tort statute alone might apply by virtue of *Martin*. *Id.* Similarly, in *Connar*, the court dismissed the breach of warranty cause of action, suggesting that *Martin* may indicate an intent to eliminate suits in warranty by non-purchasers. N.Y.L.J., July 12, 1978, at 14, cols. 1-2.

140. *Atkinson v. Ormont Mach. Co.*, 102 Misc. 2d 468, 423 N.Y.S.2d 577 (Sup. Ct. 1979). The court stated that it would "not annul a statute that has not been declared unconstitutional nor assume that the Court of Appeals intended to usurp the function of the Legislature by withdrawing the statutory remedy and substituting in its place one of judicial creation, of a new concept, namely, 'strict products liability.'" *Id.* at 469, 423 N.Y.S.2d at 579; see *Martin v. Drackett Prods. Co.*, 100 Misc. 2d 728, 732-33, 420 N.Y.S.2d 147, 150 (Sup. Ct. 1979) (allowing a cause of action against the manufacturer under § 2-318 by a plaintiff who had bought the product from an intermediary). Other cases interpreting *Martin* include *Mack v. Clairrol*,

*Martin* thus leaves the availability of a warranty action uncertain. It is therefore likely that defendants subject to breach of warranty liability by virtue of amended section 2-318 will prefer litigation to settlement. Additionally, non-purchasing plaintiffs precluded by the running of the tort statute will seek to sue under the warranty cause of action if that limitations period has not run.<sup>141</sup> The amendment also gives rise to other issues previously considered settled by the adoption of strict liability: (i) when the statute should begin to run;<sup>142</sup> (ii) what the effect of disclaimers is;<sup>143</sup> and (iii) whether notice is required.<sup>144</sup> Moreover, it is possible that defendants will argue that by eliminating the privity requirement, the legislature intended that strict liability be effected not through *Codling*, but through the Code. If this is the case, the argument would go, then the procedural requirements of the Code would also apply to strict liability actions, a proposition certain to be hotly contested by plaintiffs.<sup>145</sup> The cost of resolving these issues, in terms of time and expense to plaintiffs, defendants and the court system, will be considerable.

#### IV. STREAMLINING PRODUCTS LIABILITY LAW IN NEW YORK

The existence of two nearly identical causes of action is difficult to justify. Given the problems created by the amendment,<sup>146</sup> the criti-

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Inc., 69 A.D.2d 752, 752, 415 N.Y.S.2d 16, 17 (1979) (absent privity, implied warranty action is strict liability); *Titlebaum v. Loblaw's, Inc.*, 64 A.D.2d 822, 822, 407 N.Y.S.2d 307, 308 (1978) (lack of privity is a defense in a warranty action); *Frank v. Clairol, Inc.*, N.Y.L.J., May 15, 1979, at 11, col. 2 (Sup. Ct. May 9, 1979) (no cause of action for either express or implied warranty breach can be brought absent privity); *Altman v. Upjohn Co.*, N.Y.L.J., Oct. 12, 1978, at 18, col. 5 (Sup. Ct. Sept. 28, 1978) (if plaintiff is determined not to be in privity, then the warranty claim is to be dismissed); *Maure v. Fordham Motor Sales, Inc.*, 98 Misc. 2d 979, 983, 414 N.Y.S.2d 882, 884 (Civ. Ct. 1979) (dicta) (warranty action would be permitted in personal injury case despite lack of privity; citing *Martin* dissent). In fact, it has been argued that strict liability actions are unconstitutional because the Code, as a statute, preempts the field of product-related injury suits. The controversy has been largely academic, with such writers as Professors Dickerson and Shanker arguing that strict liability is unconstitutional, Dickerson II, *supra* note 138; Shanker, *supra* note 19, and Dean Wade arguing that it is not. Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 Tenn. L. Rev. 123 (1974). Courts have not taken the challenge to strict liability too seriously. *Markle v. Mulholland's, Inc.*, 265 Or. 259, 272-73, 509 P.2d 529, 535 (1973) (strict liability is not preempted).

141. See *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 587, 374 N.E.2d 97, 98, 403 N.Y.S.2d 185, 186 (1978); *Atkinson v. Ormont Mach. Co.*, 102 Misc. 2d 468, 470-71, 423 N.Y.S.2d 577, 579-80 (Sup. Ct. 1979); D. Siegel, *Handbook on New York Practice* § 37 (Supp. 1979).

142. See *supra* note 60 and accompanying text.

143. See *supra* note 121 and accompanying text.

144. See *supra* note 59 and accompanying text.

145. See *supra* note 15 and accompanying text.

146. See *supra* pt. III.

cism of it by courts<sup>147</sup> and commentators,<sup>148</sup> and the need for simplifying products liability law,<sup>149</sup> significant remedial measures are required. The Court of Appeals in *Martin v. Julius Dierck Equipment Co.*<sup>150</sup> clearly implied that it might treat any breach of warranty suit brought by a non-purchaser as a strict liability case<sup>151</sup>—which indeed it is.<sup>152</sup> Nonetheless, it is doubtful that any court can disregard such a clear statutory directive as section 2-318.<sup>153</sup> Any efforts, then, to remedy the situation created by section 2-318 will most likely have to be legislative.

There are several legislative options. First, the Code could be amended to re-erect the privity barrier in some way and to allow strict liability and breach of warranty to coexist, as they did until 1975. Second, strict liability could be expressly abrogated, permitting the Code to take over as the mechanism for remedying product-caused harms. Third, breach of warranty for personal injury could be abrogated, and strict liability could be retained as the sole means for recovery.

#### A. Retaining the Two Causes of Action

If both actions were retained, some modification of section 2-318 would be necessary to avoid the problems now caused by the near duplication of the actions. One commentator has suggested merely repealing section 2-318,<sup>154</sup> thereby allowing a breach of warranty

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147. See *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 591, 374 N.E.2d 97, 101, 403 N.Y.S.2d 185, 189 (1978); *Ramos v. Gulf & Western Indus.*, N.Y.L.J., July 3, 1979, at 11, col. 1 (Sup. Ct. June 26, 1979); *Connar v. General Motors Corp.*, N.Y.L.J., July 12, 1978, at 14, col. 1 (Sup. Ct. July 6, 1978).

148. D. Siegel, *Handbook on New York Practice* § 37 (Supp. 1979); *Martin, Torts, Survey of New York Law*, 30 Syracuse L. Rev. 555, 563 (1979).

149. Birnbaum I, *supra* note 19, at 252-55; Epstein I, *supra* note 19, at 651-52; see *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 345, 322 A.2d 440, 444 (1974) (there should be only one theory of recovery: strict liability); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 156, 305 A.2d 412, 426-27 (1973) (same). The Model Uniform Product Liability Act, a model statute offered by the U.S. Department of Commerce to state legislatures wishing to unify existing products liability law, states: "The principal purposes of the Act are to provide a fair balance of the interests of both product users and sellers and to eliminate existing confusion and uncertainty about their respective legal rights and obligations." Model Uniform Product Liability Act preamble (Proposed Official Draft 1979), reprinted in 44 Fed. Reg. 62,714, 62,716 (1979).

150. 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978).

151. *Id.* at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189.

152. See *supra* notes 38-44.

153. See *supra* note 138.

154. *Martin*, *supra* note 148, at 563. "If [the legislature] was attempting to codify *Codling*, the result was not just unnecessary; it also missed the point of the Court's shift from 'breach of warranty' to 'strict products liability' terminology and, in so doing, suggested a distinction that the Court has not been willing to recognize. If it was attempting to give plaintiffs alternative statutes of limitations for products

action only by direct buyers against immediate sellers. This is the approach adopted by California.<sup>155</sup> Other possibilities exist. Alternative A, the pre-amendment version of section 2-318,<sup>156</sup> could be reinstated, allowing suits by a buyer, his family members and guests in his house as is the case in most states.<sup>157</sup> Another choice would be to reinstate Alternative A, but allow suits against any seller in the chain of distribution. This is the Maryland approach.<sup>158</sup>

If any of these alternatives resurrecting privity were selected, the two different causes of action would once again be clearly distinguishable.<sup>159</sup> Anyone could sue for strict liability, while only buyers, or those in a specified relationship with a buyer, could sue in breach of warranty. Warranty actions brought by the parties specified in the alternatives above, however, would suffer from many of the same problems that surround the present section 2-318. Multiple instruc-

injuries, the intention was opaque and the result extremely difficult to justify. Unless the legislature had some other, indiscernable purpose in mind, the better course would be to repeal the now-redundant Code provisions which give non-contracting consumers warranty remedies for personal injuries." *Id.* (footnote omitted).

155. The California version of the U.C.C. contains no § 2-318.

156. N.Y.U.C.C. § 2-318 (McKinney 1964). Other jurisdictions have similar privity requirements. *See* *Klimas v. ITT*, 297 F. Supp. 937, 939 (D.R.I. 1969); *Lane v. Barringer*, 407 N.E.2d 1173, 1175 (Ind. App. 1980). Economic loss recovery usually requires privity. *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 348, 432 N.Y.S.2d 132, 134 (Sup. Ct. 1980). The extension of the warranty protection to those in a close relationship to the buyer is based on the legal fiction that the buyer acted as agent, a means of obviating privity requirements that existed in pre-Code law. "[T]he primary hope for recovery in warranty by a member of a household who has been injured by a defective commodity is to persuade the court that the family member who personally made the purchase was the 'agent' of the injured party who was the 'principal' in the transaction with seller." State of New York Law Revision Comm'n, Article 2—Sales, Legislative Doc. No. 65(C), at 79-80 (1955), reprinted in 1 State of N.Y. Law Revision Comm'n, Study of the Uniform Commercial Code 335, 413-14 (1955). Obvious problems arose with such fictions because "[a]s might be expected, children [found] it somewhat more difficult to show that they [were] the 'principal' of a parent who effect[ed] a purchase." *Id.* at 80, reprinted in 1 State of N.Y. Law Revision Comm'n, Study of the Uniform Commercial Code at 414; *see Pendarvis v. General Motors Corp.*, 6 U.C.C. Rep. Serv. (Callaghan) 457 (N.Y. Sup. Ct. 1969).

157. *See supra* note 76.

158. Md. Com. Law Code Ann. § 2-314(1)(a), (b) (1975) ("'[S]eller' includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer [and] [a]ny previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.").

159. New York courts have frequently allowed both causes of action to be pleaded if the plaintiff was properly within the case law or statutory requirements of both a strict liability action and a breach of warranty action. *See Lancaster Silo & Block Co. v. Northern Propane Gas Co.*, 75 A.D.2d 55, 61, 427 N.Y.S.2d 1009, 1013 (1980); *Cerrato v. R.H. Crown Co.*, 58 A.D.2d 721, 721, 396 N.Y.S.2d 716, 717 (1977); *Ribley v. Harsco Corp.*, 57 A.D.2d 234, 236, 394 N.Y.S.2d 741, 743 (1977); *Dickey v. Lockport Prestress, Inc.*, 52 A.D.2d 1075, 1075-76, 384 N.Y.S.2d 609, 609-10 (1976); *Nickel v. Hyster Co.*, 97 Misc. 2d 770, 773, 412 N.Y.S.2d 273, 275 (Sup. Ct. 1978).

tions, for instance, could still confuse the jury,<sup>160</sup> and the fundamental question of the Code's propriety as a mechanism for remedying personal injury would remain.<sup>161</sup>

Given these problems, the question arises: Is there any overriding justification for retaining both breach of warranty and strict liability? The existence of breach of warranty can be justified only if society wishes to offer slightly more protection to buyers than to non-buying consumers.<sup>162</sup> This assertion is based on the proposition that the breach of warranty action, when it coexists with strict liability, can only benefit plaintiffs. An injured plaintiff would always be able to sue in strict liability. When, however, he could take advantage of the longer statute of limitations or the lower standard of liability, he would be able to bring an action or to prevail in breach of warranty when he would not in strict liability.<sup>163</sup>

It is, however, by no means clear that society wishes to give more protection to buyers. The argument might be made that because society generally favors the transfer of property,<sup>164</sup> the buyer should be afforded special protection in order to encourage such activity. Yet

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160. See *supra* notes 128-29 and accompanying text.

161. W. Prosser, *supra* note 21, at 656. It is "apparent that 'warranty,' as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of undesirable complications, and is more trouble than it is worth." *Id.* Moreover, the privity requirement creates an artificial means for determining to whom the warranty cause of action is available. Consider this example: Two unrelated friends, X and Y, enter a grocery store so that X can buy a sandwich. Having forgotten his money, X asks Y to buy the food for him, which he does. Later X eats the sandwich, which turns out to be tainted, and becomes ill, suffering considerable pain, medical expenses, and loss of earnings. If X and Y are in a jurisdiction with a restrictive privity requirement, such as Alternative A of § 2-318, there can be no breach of warranty action by X, since he was not in privity, nor by Y, since he suffered no harm. In *Titlebaum v. Loblaws, Inc.*, 75 A.D.2d 985, 429 N.Y.S.2d 92 (1980), a mother and son, injured when the boy carelessly unpacked a soda bottle that exploded, were not allowed to state a claim in strict liability because the son had been contributorily negligent. Because the mother was in privity and the jury found the bottle unmerchantable, however, she was permitted to bring a warranty action. *Id.* at 985-86, 429 N.Y.S.2d at 92-93.

162. The adverb "slightly" seems appropriate since only rarely will the availability of the warranty action benefit the buyer. In most cases, the procedural limitations of the warranty action will be a disadvantage and strict liability will be the more convenient, if not the only, action. See *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 (D.N.H. 1972); *Rossignol v. Danbury School of Aeronautics*, 154 Conn. 549, 560-62, 227 A.2d 418, 423-24 (1967); *Ellis v. Rich's, Inc.*, 233 Ga. 573, 576-77, 212 S.E.2d 373, 376 (1975).

163. *E.g.*, *Patterson v. Her Majesty Indus.*, 450 F. Supp. 425, 432-33 (E.D. Pa. 1978); *McCarthy v. Bristol Laboratories*, 61 A.D.2d 196, 199, 401 N.Y.S.2d 509, 511 (1978); *Atkinson v. Ormont Mach. Co.*, 102 Misc. 2d 468, 469, 423 N.Y.S.2d 577, 579 (Sup. Ct. 1979); see *supra* notes 90-102 and accompanying text.

164. See *Rafe v. Hindin*, 29 A.D.2d 481, 484, 288 N.Y.S.2d 662, 665, *aff'd*, 23 N.Y.2d 759, 244 N.E.2d 469, 296 N.Y.S.2d 955 (1968).



whether the minimally extra protection occasionally afforded buyers by the Code would encourage sales is questionable. Any encouragement to buyers afforded by the Code's warranty protection is at the expense of sellers. More plaintiff's awards and the increasing cost of liability insurance will drive more small entrepreneurs out of business, thus having an inhibiting effect on the marketplace.<sup>165</sup>

Nor does the argument seem valid that buyers are entitled to special protection by virtue of their having paid consideration.<sup>166</sup> It is equally reasonable to argue that non-buyers are entitled to special protection vis-à-vis buyers, because they do not have a buyer's ability to inspect and learn about the product.<sup>167</sup> Thus, the extra protection afforded by the Code is not a sufficiently important consideration to compensate for the difficulties caused by the existence of two similar causes of action.<sup>168</sup> Because the need for a unified body of products liability law has been consistently recognized in recent years,<sup>169</sup> the best solution to the current difficulties in New York is the abolition of one of the causes of action.

### B. Retaining Only Breach of Warranty

To abrogate *Codling* and retain only breach of warranty would be to adopt the doctrine of contractual allocation of risk.<sup>170</sup> Under this theory, the sales contract, supplemented by all the present provisions of the Code, controls the cause of action. Thus, if the party injured was not within the protected scope of section 2-318, he would be precluded from any recovery.<sup>171</sup> Similarly, the plaintiff would be

165. Birnbaum I, *supra* note 19, at 252-55.

166. It has been argued that the act of entering a contract for sale gives rise to special obligations on the part of the seller to satisfy reasonable expectations on the part of the buyer. See *Lambert v. Sistrunk*, 58 So. 2d 434, 434-35 (Fla. 1952); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 730 (1976); R. Pound, *Social Control Through Law* 114 (1968). Some courts have held, however, that safety from personal injury and property damage is not an element of the bargain between the buyer and seller. *Anglo E. Bulkships Ltd. v. Ameron, Inc.*, 460 F. Supp. 1212, 1213 (S.D.N.Y. 1978); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 561-62, 209 N.W.2d 643, 653 (1973); *Milau Assoc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 488-89, 368 N.E.2d 1247, 1251, 398 N.Y.S.2d 882, 886 (1977).

167. See *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 308-09, 405 P.2d 624, 628 (1965).

168. See *supra* notes 103-40.

169. See *supra* note 19 and accompanying text.

170. Speidel, *The Virginia Anti-Privity Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 Va. L. Rev. 804, 851 (1965). The author suggests that through the use of the Code as the sole means for remedying product-caused harms "the treacherous uncertainties of strict products liability imposed by courts can be reduced by at least one firm anchor to the traditional values of freedom of contract." *Id.* (footnote omitted); see Phillips, *supra* note 117, at 479-80.

171. See *supra* notes 72-76 and accompanying text.

barred from bringing his action if the defendant had included a disclaimer that met the Code's formal requirements, if the plaintiff had failed to give timely notice of the breach, or if the statute of limitations, which would accrue on tender, had run.

Such an approach would, of course, lead to considerably more defendants' verdicts than presently occur. In fact, it would be an unqualified return to the pre-strict liability days when the citadel of privity and other procedural elements acted to bar injured plaintiffs from recovery.<sup>172</sup> From the point of view of economic benefit to industry, such an approach is appealing. It has been argued that strict liability is a highly inefficient way to allocate loss caused by defective products because it requires resort to the tort litigation system—a cumbersome and costly process.<sup>173</sup> Moreover, since this loss in most

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172. See *supra* note 29 and accompanying text.

173. See Birnbaum II, *supra* note 91, at 643-44 (if society's goal is to provide insurance against product-caused harms, then legislation—not the tort litigation system—should do so); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. Colo. L. Rev. 153, 191-92 n.107 (1976) (it is the victim, rather than the defendant, who is usually in the best position to distribute his losses through insurance and other welfare programs); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 Tenn. L. Rev. 938, 946 (1957) (strict liability is merely “crass expediency seeking its ends without any particular regard for basic principles”). In the Oregon decision adopting strict liability in that state, Judge Bryson dissented, stating: “I am not willing to place the court in a position of adopting a law based on a socialistic theory.” *Markle v. Mulhollands, Inc.*, 265 Or. 259, 297, 509 P.2d 529, 546 (1973). Professor Epstein does not advocate the contractual allocation approach. In fact, he is quite satisfied with the structure of strict liability as it existed in the 1960's under *Greenman* and § 402A of the Restatement. Epstein I, *supra* note 19, at 647-48. His major objections to strict liability as it exists now are both to recent developments in the case law: (i) the ease with which a plaintiff can get to a jury and the difficulty of resolving the case when he alleges that the product, which performed as intended, could have been made safer, *id.* at 648-50, and (ii) the refusal to consider the plaintiff's own fault in reducing or precluding recovery. *Id.* at 654-57. His first objection seems directed primarily at *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), which held the burden of proof can be shifted to the manufacturer to show his design is reasonable. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. New York has not followed this approach and in fact appears to strike a fair balance between the plaintiff and the defendant on the issue of designing safety into a product. In *Robinson v. Reed-Prentice Div.*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980), the Court of Appeals refused to find the manufacturer liable when the plaintiff's employer removed a press's safety guards and held: “The manufacturer's duty . . . does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented. A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user . . . .” *Id.* at 480-81, 403 N.E.2d at 444, 426 N.Y.S.2d at 721. Epstein suggests that the legislature should establish safety standards for products. Epstein I, *supra* note 19, at 651. Governmental regulatory efforts, however, have been largely unsuccessful. W. Keeton, D. Owen & J. Montgomery, *supra* note 26, at 17. With respect to Epstein's second objection—that strict liability avoids a consideration of the plaintiff's own fault—it should be noted that New York had always permitted the

cases is placed on the manufacturer and since the judgments are usually quite high, industry is being overly burdened by strict liability.<sup>174</sup> The adoption of breach of warranty, subject to all of the elements in the Code, would both protect business and conveniently place the loss on those who have accepted the risk.

A number of objections, however, can be made to such a suggestion. First, a blanket acceptance of the Code as the sole means of remedying product-caused harms is not necessarily a more efficient allocation of loss than strict liability. Undoubtedly such an approach will not lead to a reasoned bargaining of risks. The inequality of bargaining power will result in the instant re-emergence of contracts of adhesion, by which manufacturers can successfully avoid their liability and shift the loss to the buyer.<sup>175</sup>

Such a shift only appears to provide an efficient allocation of the loss. Because most individuals are unable to pay the massive medical expenses of an accident and to be economically self-sufficient either permanently or through a period of convalescence, the question of allocation of loss will focus not only on this contract, but on how much of the loss will be borne by the individual, by his insurers, by his employer, by his friends and family members, by government, or by society as a whole. Resolving this issue seems no less cumbersome than tort law, which limits the allocation issue to two parties: the plaintiff,

defense of contributory negligence prior to 1975, *Codling v. Paglia*, 32 N.Y.2d 330, 342-43, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973), and comparative fault after that date. N.Y. Civ. Prac. Law § 1411 (McKinney 1976). Thus, Epstein's major objections to strict liability would be essentially inapplicable in New York. He would, however, object to the recent decision in *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 124-26, 417 N.E.2d 545, 550-51, 436 N.Y.S.2d 251, 256-57 (1980) (evidence of subsequent design modification admissible on issue of liability in strict liability action). See Epstein I, *supra* note 19, at 661-62. See generally Epstein, *Intentional Harms*, 4 J. Legal Stud. 391 (1975); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. Legal Stud. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973) [hereinafter cited as Epstein II].

174. See *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1189 (5th Cir. 1971) (the interest in avoiding injury must be balanced against the need for successful industry and business), *overruled on other grounds*, *Porter v. American Optical Corp.*, 641 F.2d 1128, 1141 (5th Cir. 1981) (compliance with industry standards, a defense allowed by *Ward*, held not dispositive of liability); Birnbaum I, *supra* note 19, at 252-55. The objection to the cumbersome nature of strict liability and the unfairness of the process relates mostly to design defects, see *supra* note 91, not manufacturing defects. See Epstein I, *supra* note 19, at 646-48. However, according to a Department of Commerce survey of product liability cases between 1971 and 1976, design defects accounted for 39% of all cases, and of these, plaintiffs were successful in 46% of the cases. 3 U.S. Department of Commerce Interagency Task Force on Product Liability, *Product Liability: Final Report of the Legal Study 82-87* (1977). Thus, it should not be assumed that objections to strict liability pervade all situations of product-caused harms.

175. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 390-91, 161 A.2d 69, 86-87 (1960).

who bears the loss to the extent of his own fault,<sup>176</sup> and the defendant, which as a manufacturing corporation has a ready-made system for distributing the loss through product pricing and insurance.<sup>177</sup>

Although it would appear that contractual allocation would benefit business, it can be argued that the final effect of such allocation will be as detrimental as strict liability. Fewer plaintiffs' judgments would result in less incentive to improve safety, and thus more injuries. A long-term adverse effect will occur as purchasers, increasingly aware that they may have no remedy for injuries resulting from harmful products, avoid unproven products.

Even assuming, *arguendo*, that warranty actions are an efficient means of allocating the loss, accepting efficiency as the only major goal of the legal process with respect to products liability actions is short-sighted. One commentator has suggested that a developed society such as ours, which has risen above a subsistence level, can afford to be somewhat inefficient if doing so will compensate individuals for harm and death.<sup>178</sup>

Second, throughout this century, the legal system has struggled to free strict liability from the obstructions of its breach of warranty heritage and create a new cause of action.<sup>179</sup> Courts and legislatures would not so casually return to the nineteenth century. In fact, not one state has adopted this contractual allocation approach to the exclusion of strict liability or a comparable theory.

Third, any adoption of the Code with adjustments of provisions unfair to injured parties would have adverse effects. For instance, the Code's statute of limitations could be modified to run from the date of injury, instead of tender,<sup>180</sup> in the case of personal injury breach of warranty actions. Such modifications, however, would destroy the uniformity of the Code, a body of law that, by definition, is meant to be uniform. Second and more important, these alterations would shift the decision as to the allocation of risk of injury from the parties to society as a whole. This would be inconsistent with the initial premise of the contractual allocation theory—that the parties should decide where the loss is to fall. In fact, those states that do use the Code in place of strict liability—Massachusetts and Delaware—have so al-

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176. See generally *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977).

177. See W. Keeton, D. Owen & J. Montgomery, *supra* note 26, at 211-14.

178. Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 Mercer L. Rev. 465 (1978). See generally Bernacchi, *A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration*, 47 U. Cinn. L. Rev. 43 (1978); Green, *Strict Liability under Section 402A and 402B: A Decade of Litigation*, 54 Tex. L. Rev. 1185 (1976).

179. See *supra* notes 22-44 and accompanying text.

180. See *supra* notes 107-12 and accompanying text.

tered the Code that in personal injury situations it is virtually identical to strict liability and does nothing to effectuate contractual allocation of the loss.<sup>181</sup>

Thus it is highly unlikely that society is presently willing to accept breach of warranty as the sole remedy for product-caused harms. Nor is it likely that doing so would result in any advantages that could not be better gained through the use of strict liability. In coming to the same conclusion, Dean Prosser observed that as a means to effect personal injury recovery, breach of warranty is "more trouble than it is worth."<sup>182</sup>

### C. Retaining Strict Liability

Strict liability alone is fully capable of adequately providing the type and level of protection from dangerous products that society requires,<sup>183</sup> and most states hold that it is the preferred mechanism for redressing product-caused harms.<sup>184</sup> If strict liability is to some extent inefficient in allocating loss, the absence of any evidence that breach of warranty is more efficient neutralizes this criticism.<sup>185</sup> Moreover,

181. See *supra* note 104 and accompanying text.

182. W. Prosser, *supra* note 21, at 656. "[V]ery few injured parties can satisfy all the Code's technical prerequisites to the bringing of a suit thereunder." Weinburger, *supra* note 137, at 33-34 (emphasis in original).

183. See Epstein I, *supra* note 19, at 646-48.

184. See *Maynard v. General Elec. Co.*, 486 F.2d 538, 540 (4th Cir. 1973); *Anglo E. Bulkships Ltd. v. Ameron, Inc.*, 460 F. Supp. 1212, 1213 (S.D.N.Y. 1978); *Tyler v. R.R. Street & Co.*, 322 F. Supp. 541, 543-44 (E.D. Va. 1971); *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244, 248 (Alaska 1969); *Becker v. Volkswagen of Am., Inc.*, 52 Cal. App. 3d 794, 799-802, 125 Cal. Rptr. 326, 329-31 (1975); *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 703, 211 N.W.2d 914, 917 (1973); *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 345, 322 A.2d 440, 444 (1974); *Manieri v. Volkswagenwerk A.G.*, 151 N.J. Super. 422, 430, 376 A.2d 1317, 1321-22 (App. Div. 1977); *Mead v. Warner Pruyon Div.*, 57 A.D.2d 340, 343-44, 394 N.Y.S.2d 483, 485 (1977); Weinberger, *supra* note 137, at 33. "Apparently, the Court of Appeals of [New York] is desirous of removing personal injury product liability suits from the sphere of influence of the Uniform Commercial Code." *Id.* The Model Uniform Product Liability Act provides for the preemption of the breach of warranty action by a statutory cause of action that is, in effect, a negligence-oriented form of strict liability. Model Uniform Product Liability Act §§ 103(A), 104(B) (Proposed Official Draft 1979), reprinted in 44 Fed. Reg. 62,714, 62,720-21 (1979). While there is little reason to retain both strict liability and breach of warranty, see *supra* pt. III. A, some justification exists for the retention of straight negligence as an alternative cause of action to whichever strict-type of action is retained. See Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 Hofstra L. Rev. 521, 531 (1974).

185. It has been advocated too that both strict liability and breach of warranty should be replaced by traditional negligence in processing product liability claims. Birnbaum, *supra* note 91, at 645-48. Several objections, however, can be raised to such an approach. First, nearly all design defect litigation based on strict liability, see *supra* note 91, involves a negligence-type analysis. See *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69-70 (Ky. 1973). Thus, it can be argued that a body of

strict liability is free from the ties to commercial and business law that characterize the breach of warranty action and have been found to complicate, rather than aid, the just resolution of product liability litigation.<sup>186</sup>

Some commentators have pointed out the heavy burden products liability law places on business.<sup>187</sup> To the extent the law does so, it often runs contrary to the principles of economic efficiency, a doctrine of jurisprudence that pervaded tort law in the 1960's and 1970's.<sup>188</sup> The economic approach, for which the chief spokesmen are Professors Calabresi<sup>189</sup> and Posner,<sup>190</sup> would place the burden of accidents wher-

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negligence-oriented law adjusted to the peculiarities of product accidents has been developed and should not be disturbed. Second, to have negligence as the only cause of action for product harms would be to deny any recovery to those persons injured by unit or manufacturing defects, *see supra* note 91, since the vast majority of such defects occur simply by happenstance and not through any negligence or other fault on the part of the manufacturer.

186. *See Garcia v. Texas Instruments, Inc.*, 598 S.W.2d 24, 28 (Tex. Civ. App.), *rev'd on other grounds*, 610 S.W.2d 456 (Tex. 1980); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 Stan. L. Rev. 974 (1966). "[O]ne is left with regret that the Code, devoted so extensively to dealings within the business community, decided to try its hand at the products liability problem. That it did so is clear. That it should have is much less clear. The considerations involved in the products cases are so different from traditional commercial dealings that the Code's insistence on covering all of an abstract 'commercial' area may unfortunately lead to similar treatment for dissimilar problems." *Id.* at 1019-20. "As the accident toll of modern life has increased, the urge towards strict liability has grown. Many older forms of liability were vehicles for such a principle but none of them is well adapted to solving our present accident problem. Warranty . . . was fashioned to serve commercial needs in a commercial context, and however well or ill adapted it is to that end today, its technicalities and limitations reflect those needs. If it occasionally happens to fit the needs of accident law, that is pure coincidence." James, *supra* note 19, at 227. *See generally* Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 Tenn. L. Rev. 439 (1969); Donnelley & Donnelley, *Commercial Law, 1975 Survey of New York Law*, 27 Syracuse L. Rev. 277 (1976).

187. *See* Birnbaum I, *supra* note 19, at 252-55; Epstein I, *supra* note 19, at 659-62.

188. R. Rabin, *Perspectives on Tort Law* 141-42 (1976); Teachout, *Book Review*, 67 Va. L. Rev. 815, 842-45 (1981).

189. Recent major works by Professor Calabresi include G. Calabresi, *The Cost of Accidents* (1970), *excerpted in* *Perspectives on Tort Law* 142 (R. Rabin ed. 1976); Calabresi, *Optimal Deterrence and Accidents: To Fleming James Jr.*, *il miglior fabbro*, 84 Yale L.J. 656 (1975); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972).

190. Recent major works by Professor Posner include Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257 (1974); Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83 (1978); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103 (1979) [hereinafter cited as Posner I]; Posner, *Strict Liability: A Comment*, 2 J. Legal Stud. 205 (1973) [hereinafter cited as Posner II]. *See generally* Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law*, 39 Ohio St. L.J. 439 (1978).

ever the economic cost to society would be the least.<sup>191</sup> A contrasting approach, embodying a humanistic view, has recently gained currency.<sup>192</sup> This approach to tort law, espoused by Professors Fletcher<sup>193</sup> and Hubbard,<sup>194</sup> embraces the position that freedom from suffering and death should be the primary considerations in products liability law.<sup>195</sup> If this trend reflects society's current preferences for

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191. "[T]he economist . . . tends to define the good, the right, or the just as the maximization of 'welfare' in a sense indistinguishable from the utilitarian's concept of . . . happiness . . . . But for my normative purposes I want to define the maximand more narrowly, as 'value' in the economic sense of the term or . . . as 'wealth.'" Posner I, *supra* note 190, at 119 (footnotes omitted). The author summarizes the economic theory: "[T]he wealth-maximization principle implies, first, an initial distribution of individual rights (to life, liberty, and labor) to their natural owners; second, free markets to enable those rights to be reassigned from time to time to other uses; third, legal rules that simulate the operations of the market when the costs of market transactions are prohibitive; fourth, a system of legal remedies for deterring and redressing invasions of rights; and fifth, a system of personal morality . . . that serves to reduce the costs of market transactions." *Id.* at 127. "[T]he dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety. . . . Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident." Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 33 (1972) (footnote omitted). Professor Posner has pointed out the shortcomings of strict liability as a means to achieve economic efficiency. Posner II, *supra* note 190, at 221. Yet it appears that he is speaking not of strict products liability in which a negligence-type analysis is made before liability attaches, but a theoretical strict liability in which society holds the defendant liable without any fault on his part whatsoever.

192. Teachout, *supra* note 188, at 844-45. "[T]he moral philosophers have set about developing theoretical systems based on 'natural rights' philosophy to counter the utilitarianism of the economists and to hold the idea of 'justice' (in tort law, 'corrective justice') up against the economists' central principle of 'efficiency.'" *Id.* at 845 (footnote omitted). The current moralist approach to tort law should be termed a re-emergence since the latest theories espousing the view have been motivated in response to the popularity of economic analysis of the 1960's and 1970's. A moralistic approach to tort law clearly antedates the economic view and in fact permeates such seminal tort works as O. Holmes, *The Common Law* (1881).

193. For an exposition of Professor Fletcher's theory, see Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972). Professor Fletcher has sought to overcome traditional fault/no-fault tort analysis and create a new methodology phrased in terms of conflicting paradigms of reciprocity and reasonableness.

194. For a discussion of Professor Hubbard's analysis, see Hubbard, *supra* note 178; Hubbard, *Efficiency, Expectation, and Justice: A Jurisprudential Analysis of the Concept of Unreasonably Dangerous Product Defect*, 28 S.C. L. Rev. 587 (1977). Professor Epstein is considered a humanist, or moralist, too, as opposed to an economist. His view does not center on protection from harm-producing acts. Rather he attaches most importance to individual freedom of action. See Epstein II, *supra* note 173.

195. Teachout, *supra* note 188, at 844. "What is most striking about the economists' view is that it leaves out entirely the central fact of human suffering . . . . Within limits, economic theory can be useful in the law, but the ambitious move-

the level of desired protection,<sup>196</sup> then clearly strict liability, as opposed to contractual allocation of risk, is the proper choice for redressing product-caused harms.<sup>197</sup>

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ment to make economic efficiency the central rationalizing principle of the law has far-reaching and destructive implications." *Id.* at 844 n.112. Professor Hubbard concludes that expectations, rather than efficiency, represent a better test for attaching liability in a developed society such as ours. Hubbard, *supra* note 178, at 468-70; *see* Klemme, *supra* note 173, at 190. *See generally* Dworkin, *Seven Critics*, 11 Ga. L. Rev. 1201 (1977); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 Minn. L. Rev. 1015 (1978). Although an advocate of economic analysis, Professor Calabresi recognizes that "[j]ustice notions attach to . . . societal preferences" that cannot easily be explained in economic terms and that they too are "crucial to the choice of liability rules." Calabresi & Hirschhoff, *supra* note 189, at 1080 (footnote omitted).

196. New York courts have unquestionably favored plaintiffs bringing suits based on strict liability for product-caused injuries. *See, e.g.,* Caprara v. Chrysler Corp., 52 N.Y.2d 114, 124-26, 417 N.E.2d 545, 550-51, 436 N.Y.S.2d 251, 256-57 (1980) (evidence of subsequent design modifications admissible in strict liability action, even though it would not be in a negligence suit and even though trial court submitted case solely on issue of manufacturing defect); Halloran v. Virginia Chems., Inc., 41 N.Y.2d 386, 388, 361 N.E.2d 991, 993, 393 N.Y.S.2d 341, 343 (1977) (once plaintiff shows that the product has not performed as intended and he has excluded all causes of the harm that cannot be attributed to the defendant, "the fact finder may, even if the particular defect has not been proven, infer that the accident could only have occurred due to some defect in the product . . ."); Codling v. Paglia, 32 N.Y.2d 330, 339, 298 N.E.2d 622, 626, 345 N.Y.S.2d 461, 466 (1973) ("A developing and more analytical sense of justice, as regards both the economics and the operational aspects of production and distribution [,] has imposed a heavier . . . burden of responsibility on the manufacturer.").

197. This Note does not suggest that any emphasis given to the humanistic orientation in products liability law requires a shift in the major tests used to determine whether a product is defective. The tests are the risk/utility balancing test and the consumer expectations test. The risk/utility test to determine defectiveness derives from the negligence analysis set forth by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The determination of unreasonable danger involves "a balancing of the probability and seriousness of harm against the costs of taking precautions. . . . Relevant factors to be considered include the availability of alternative designs, the costs and feasibility of adopting alternative designs, and the frequency or infrequency of injury . . ." *Raney v. Honeywell, Inc.*, 540 F.2d 932, 935 (8th Cir. 1976) (citations omitted). This test, modified in various ways to give plaintiffs an advantage over the standard negligence requirements, has become the most widely used analysis for determining unreasonable danger. *Birnbaum II*, *supra* note 91, at 605; *see* *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974) ("A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product." (emphasis in original) (footnotes omitted)); *Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. Rev. 803, 844 (1976) ("[T]he unreasonable danger model transforms the somewhat subjective risk-benefit approach of negligence law . . . into an objective evaluation of the true costs and benefits of the product as marketed in its particular condition." (emphasis in original) (footnote omitted)); *Wade, On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973) (among the elements to be



If strict liability is to be the only cause of action, legislation should be enacted to so position it.<sup>198</sup> Such a codification should indicate the level of protection products liability law will provide. Most jurisdictions follow the formulation of the Restatement,<sup>199</sup> although various efforts have been made by courts and commentators to adjust the

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considered in balancing risk and utility are the usefulness of the product, its safe or unsafe nature, the availability of substitutes, the ability to make it safe, the user's ability to avoid harm, the user's awareness of the dangers, and the feasibility of spreading the loss). The consumer expectations test adopted by the Restatement, on the other hand, allows the jury to find an unreasonably dangerous defect if the "article sold [is] dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A comment i (1965). This borrowing of consumer expectations from pre-Code warranty law may lead courts to continue to use the unreasonably dangerous defect standard in Code warranty actions. See *Turner v. General Motors Corp.*, 514 S.W.2d 497, 500 (Tex. Civ. App. 1974) ("[Defendant auto dealer] testified that, based on his forty-five years of sales experience, the average consumer believes that a sedan vehicle will be a reasonably safe product in a roll-over."); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 332, 230 N.W.2d 794, 798 (1975) ("If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective."); Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. Rev. 339, 348 (1974) ("The consumer expectations test is natural since strict liability in tort developed from the law of warranty. The law of implied warranty is vitally concerned with protecting justified expectations since this is a fundamental policy of the law of contracts." (footnotes omitted)). Risk/utility is generally associated with economic analysis, while the consumer expectations test is associated with the humanistic approach. In giving effect to a humanistic orientation of product tort law, however, there need not, indeed should not, be a shift from the risk/utility approach to the consumer expectations approach. The latter test, it is generally felt, simply does not work. *Montgomery & Owen, supra*, at 823 ("[A]n attempt to determine the consumer's reasonable expectations of safety concerning a technologically complex product may well be an exercise in futility, for the consumer may have at most only a generalized expectancy—perhaps more accurately only an unconscious hope—that the product will not harm him if he treats it with a reasonable amount of care." (footnote omitted)); see *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Dickerson, Products Liability: How Good Does a Product Have to Be?*, 42 Ind. L.J. 301, 306 (1967) ("The reasonable expectations of consumers provide a helpful guide, but a slippery one."); *Rheingold, What Are the Consumer's "Reasonable Expectations"?*, 22 Bus. Law. 589, 593 n.16 (1967) ("[A] consumer with less than ordinary expectations, based upon particular expertise, should not gain from having ordinary expectations credited to him." (emphasis in original)). Thus, rather than a shift of test, other means can be used to attain this humanistic orientation, such as an extended statute of limitations or the reduced standard of liability.

198. See *supra* notes 138-53 and accompanying text.

199. *Handy v. Uniroyal, Inc.*, 327 F. Supp. 596, 606-07 (D. Del. 1971); *Phipps v. General Motors Corp.*, 278 Md. 337, 349-52, 363 A.2d 955, 961-63 (1976). This level of protection is held to be less than absolute liability but greater than negligence. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 882-83 (Alaska 1979); *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1974); *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 464, 255 N.E.2d

formula.<sup>200</sup> For instance, the Model Uniform Product Liability Act includes a statute of repose, which raises the presumption that something other than the defective nature of the product caused the harm if it occurred more than ten years after the sale of the product.<sup>201</sup> On the other hand, some states have eliminated the "unreasonably dangerous" requirement from the Restatement's standard with respect to "defect" so that plaintiff will have an easier burden of proof.<sup>202</sup>

In New York, both the Code and case law provide clues as to the level of protection to be codified in strict liability. *Codling* is the starting point for the definition of the action.<sup>203</sup> It can, however, be broadened to reflect the current social temperament. The 1975 amendment to section 2-318<sup>204</sup> expanded the protection of the Code to all consumers.<sup>205</sup> If this adjustment is an accurate reflection of society's preferences,<sup>206</sup> then the desired level of protection can best be provided by the following steps: (i) eliminate from the Code section 2-715(2)(b),<sup>207</sup> which states that personal injury and property damage<sup>208</sup> are consequential damages, and section 2-318,<sup>209</sup> thereby elimi-

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173, 175-76, 306 N.Y.S.2d 942, 944-45 (1969); *Ellithorpe v. Ford Motor Co.*, 503 S.W.2d 516, 519-20 (Tenn. 1973); Cowan, *Some Policy Bases of Products Liability*, 17 Stan. L. Rev. 1077, 1088-89 (1965).

200. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 882-83 (Alaska 1979); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 213-14 (Alaska 1975); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 175-76, 406 A.2d 140, 152-53 (1979); *Phelan & Apfeld, Substantive Developments*, in *Product Liability Update 11-18* (P.L.I. Litigation & Administrative Practice Series 1980).

201. Model Uniform Product Liability Act § 110(B) (Proposed Official Draft 1979), reprinted in 44 Fed. Reg. 62,714, 62,732 (1979).

202. See *supra* note 96 and accompanying text.

203. See *supra* notes 63-65.

204. See *supra* note 18.

205. See *supra* note 75 and accompanying text.

206. See *supra* note 196.

207. N.Y.U.C.C. § 2-715(2)(b) (McKinney 1964). This section states that personal injury and property damage are recoverable consequentially. A further provision might be the prohibition against use of the breach of warranty cause of action to recover for personal injury. The necessity for such a prohibition stems from § 2-715(2)(a), which provides the general rule on recovery of consequential damages: They may be recovered if they result from needs of which the seller had reason to know at the time of contracting. Since it would be theoretically possible to allow personal injury recovery under such a provision, an additional clause making clear that strict liability is the only means of recovering for personal injury perhaps should be added.

208. Eliminating the Code as a means to recover for property damage will make no significant difference in the law. *Codling* permits recovery for injury "or damages," thus making property damage fully recoverable under the strict liability theory in New York. *Codling v. Paglia*, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 469-70 (1973).

209. N.Y.U.C.C. § 2-318 (McKinney Supp. 1980-1981). California has eliminated this section from its version of the Code. See *Hauter v. Zogarts*, 14 Cal. 3d 104, 117-20, 534 P.2d 377, 385-87, 120 Cal. Rptr. 681, 689-91 (1975).

nating breach of warranty as a remedy for personal injury;<sup>210</sup> (ii) amend the tort statute of limitations to run four years from the date of the harm in the case of product-caused injuries;<sup>211</sup> and (iii) codify *Codling*, absent any reference to a requirement of showing "unreasonable danger."<sup>212</sup> This would consolidate the aspects of the Code that the legislature apparently thought should be extended to all plaintiffs in a strict tort liability action, while maintaining the Code as a body of pure sales law<sup>213</sup> and eliminating any confusion created by duplicative actions.

On the other hand, if the legislature is content with the protection afforded by the *Codling* standard, it should merely eliminate the aforementioned Code sections<sup>214</sup> and codify *Codling*.<sup>215</sup> In doing so, the legislature should also determine the level of product quality for which liability will attach: defectiveness alone, which is the present *Codling* standard,<sup>216</sup> or unreasonably dangerous defectiveness, which

210. It has been suggested that as a means to curtail the use of the Code in redressing product-related injuries—an apparent goal of New York courts—strict construction of the Code's requirements be adopted. Doing so would radically reduce the availability of the breach of warranty action under the Code and make strict liability practically the sole remedy for product related harms. Weinberger, *supra* note 137, at 33-34. This is so because very few plaintiffs could meet the technical requirements of the Code. *Id.*

211. The legislature has singled out another class for special treatment with regard to the statute of limitations: N.Y. Civ. Prac. Law § 214-a (McKinney Supp. 1980-1981) provides that medical malpractice suits must be brought within two and one-half years of accrual. Other personal injury actions must be brought within three. *Id.* § 214.

212. See *Recent Developments*, *supra* note 128, at 605 ("A decision either to reject or to retain the unreasonably dangerous standard requires that a court determine, as a matter of policy, which level of duty should be imposed on a manufacturer."). It can be argued that legislatures are in as good a position as courts to make such a determination. See Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1552-58, 1565-73 (1973) (design defect situations too "polycentric," i.e., complex, for the litigation process).

213. In response to any assertion that such an approach is too favorable to the plaintiff and will result in serious hardships to the defendant, it should be recalled that New York, unlike some jurisdictions, has always allowed a consideration of the plaintiff's own fault in determining whether plaintiff might prevail or the amount of plaintiff's recovery. See *Codling v. Paglia*, 32 N.Y.2d 330, 342-45, 298 N.E.2d 622, 628-30, 345 N.Y.S.2d 461, 469-72 (1973); N.Y. Civ. Prac. Law § 1411 (McKinney 1976).

214. See *supra* notes 207, 209.

215. Codification would not be necessary to retain strict liability as it presently exists under *Codling*. A clear legislative definition of the cause of action and its standard of liability, however, would avoid the inconsistent formulations of strict liability now occurring throughout the state. See *supra* note 93 and accompanying text.

216. See *supra* note 63.

is the Restatement's.<sup>217</sup> In this way, every person injured would be able to sue under a consistent strict tort doctrine and would have three years in which to do so—a period of time that does not seem unconscionably short.<sup>218</sup> This solution, while perhaps not in harmony with the preferred basis of tort law,<sup>219</sup> would at least have the considerable advantage of clearing the muddy waters now surrounding products liability law in New York.

#### CONCLUSION

In the chronology of legal doctrines, products liability law is still quite young. Yet of necessity its formative years must soon end. The costs involved and the burdens to both the injured party and enterprise are too great to allow casual, unpremeditated adjustments to the system, such as the New York amendment to section 2-318 of the Code. Moreover, society appears to be entering a period during which inflation and dwindling resources will greatly aggravate the effects of these burdens.

For these reasons, it is vital to minimize confusion and uncertainty by selecting and implementing a single theory of products liability that most closely reflects society's preferred level of protection from defective products. In New York, the first step is the elimination of one of the virtually identical causes of action now used to remedy product harms: strict liability or breach of warranty. The commercial orientation of the Code, the noncommercial nature of most product-caused accidents, and the existence in New York of a workable strict tort doctrine all dictate that the Code yield the role of remedying non-negligent product harms to strict liability.

*Jeffery W. Deaver*

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217. See *supra* note 1.

218. It seems doubtful that consumer ignorance today is so pervasive that the requirement that plaintiffs, injured seriously enough to consider litigation, do so within three years of the injury would work any hardships. See Phillips, *supra* note 117, at 475-76 ("It is entirely conceivable that . . . the claimant might not recognize his cause of action until he consults a lawyer. But such claims are probably atypical of the majority of products liability suits in which a potential claimant would normally suspect defectiveness when damage occurs.").

219. See *supra* note 196.