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## Uniform Commercial Code - Statute of Limitations - U.C.C. Four-Year Statute of Limitations Governs Actions for Personal Injuries Based on Breach on Warranty under the U.C.C.

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## Recent Development

UNIFORM COMMERCIAL CODE—STATUTE OF LIMITATIONS—  
U.C.C. FOUR-YEAR STATUTE OF LIMITATIONS GOVERNS  
ACTIONS FOR PERSONAL INJURIES BASED ON  
BREACH OF WARRANTY UNDER THE  
U.C.C.

*Williams v. West Penn Power Co.* (Pa. 1983)

On May 19, 1975, Daniel Banks, a partner in B & M Roofing Contractors,<sup>1</sup> and his employee, Gerald Williams, suffered severe injuries when a ladder platform hoist they were using contacted a high tension power line.<sup>2</sup> Two years and one day later, Mr. and Mrs. Banks and Mr. Williams brought suit against the power company, general contractor, builder, manufacturer and immediate seller, pleading counts in negligence, strict liability and breach of warranty.<sup>3</sup>

Defendants moved for summary judgment on the ground that plaintiffs' action was barred by Pennsylvania's two-year personal injury statute of limitations.<sup>4</sup> The trial court granted defendants' motion and dismissed plaintiffs' claims.<sup>5</sup> On appeal, the Pennsylvania Superior Court held that Williams' breach of warranty claim was time-barred on the ground that Williams, as a third party, could not take advantage of the Pennsylvania commercial code's four-year statute of limitations, which is identical to the

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1. *Williams v. West Penn Power Co.*, 502 Pa. 557, 561, 467 A.2d 811, 813 (1983). B & M Roofing Contractors had been hired to perform work at the Slovenian Hall Association of Broughton. *Williams v. West Penn Power Co.*, 313 Pa. Super. 461, 462, 460 A.2d 278, 279, *aff'd in part and rev'd in part*, 502 Pa. 557, 467 A.2d 811 (1983).

2. 502 Pa. at 561, 467 A.2d at 813. The ladder conducted electricity from the high tension wires through Mr. Banks and Mr. Williams, causing severe electrical burns throughout their bodies. *Id.* As a result, Mr. Williams lost two toes on his right foot and Mr. Banks had his left leg amputated below the knee. *Id.* The complaint did not indicate the date that the ladder was purchased, but the brief of the manufacturer claimed that the men were injured "the same day the ladder was purchased." *Id.*

3. 313 Pa. Super. at 463, 460 A.2d at 279-80. The plaintiffs commenced the trespass action on May 20, 1977, and then filed complaints in trespass and assumpsit on June 29, 1977. *Id.*, 460 A.2d at 279. The ladder was manufactured by Reimann and Georger, Inc. and was purchased by B & M from Commercial Services Co. *Id.*

4. 502 Pa. at 561, 467 A.2d at 813.

5. *Id.* The Allegheny County Court of Common Pleas granted defendants' motion for summary judgment in reliance on the decision in *Salvador v. Atlantic Steel Boiler Co.* (*Salvador II*), 256 Pa. Super. 330, 389 A.2d 1148 (1978), *aff'd per curiam*, 492 Pa. 257, 424 A.2d 497 (1981). 502 Pa. at 561, 467 A.2d at 813. The trial court interpreted *Salvador II* as holding that the two-year statute of limitations applied to all breach of warranty actions seeking damages for personal injury. *Id.* For a discussion of *Salvador II*, see notes 52-57 and accompanying text *infra*.

Uniform Commercial Code (U.C.C.) provision.<sup>6</sup> Instead, the court held that the plaintiffs had to rely on the two-year personal injury statute of limitations.<sup>7</sup> However, the superior court permitted Banks, the direct purchaser, to proceed against his immediate seller on the warranty claim reasoning that the commercial code's four-year statute of limitations applied to warranty actions brought by persons in privity of contract with the defendant.<sup>8</sup> The Supreme Court of Pennsylvania<sup>9</sup> affirmed in part and reversed in part, *holding* that the Pennsylvania commercial code's four-year statute of limitations applied to all breach of warranty claims brought under the code, regardless of whether there was privity between the plaintiff and defendant and regardless of whether the plaintiff sought recovery for personal injuries. *Williams v. West Penn Power Co.*, 502 Pa. 557, 467 A.2d 811 (1983).

Persons who are injured by defective products may seek compensation for their injuries under various theories of liability.<sup>10</sup> Two such theories of recovery are breach of implied warranty of merchantability and strict liability in tort.<sup>11</sup> A claim for breach of an implied warranty is contractual in

6. 313 Pa. Super. at 471, 460 A.2d at 284. *Compare* 13 PA. CONS. STAT. ANN. § 2725(1) (Purdon 1984) with U.C.C. § 2-725(1) (1978).

7. 313 Pa. Super. at 471, 460 A.2d at 284. Initially, the superior court found that plaintiffs' counts in negligence and strict liability were barred by the applicable two-year statute of limitations. *Id.* at 465, 460 A.2d at 281. The court then relied on its holding in *Salvador II* in disposing of Williams' breach of warranty claim. *Id.*

8. 313 Pa. Super. at 471, 460 A.2d at 284. The superior court gave a more restricted reading to the holding in *Salvador II* than that of the trial court. *Id.* The superior court found that the reasoning of *Salvador II* did not extend to the situation where the direct purchaser brings the cause of action against the seller. *Id.* at 469-70, 460 A.2d at 283. It therefore distinguished the direct buyer from the third party and applied the four-year U.C.C. statute of limitations to the former and the two-year personal injury statute of limitations to the latter. *Id.* at 470-71, 460 A.2d at 283-84. The superior court reasoned that the U.C.C. explicitly provided a four-year statute of limitations for a cause of action brought by a direct purchaser and that that language could not be ignored. *Id.* at 470, 460 A.2d at 283. However, regarding the third party warranty claim, the superior court adopted the analysis of *Salvador II* and allowed the third party beneficiary action under the U.C.C., but applied the personal injury statute of limitations. *Id.*

9. The case was heard by Chief Justice Roberts and Justices Nix, Larsen, Flaherty, McDermott, Hutchinson, and Zappala. Justice Nix delivered the opinion of the Court. Justice Larsen concurred in the result.

10. *See generally* Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

11. The implied warranty of merchantability has been called a "first cousin" of strict tort liability. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 343 (1980). Breach of warranty originally sounded in tort and was characterized as a form of misrepresentation or fraud. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888). In the late 1700's, however, the contractual aspects of warranty were recognized and the form of action for breach of warranty became that of assumpsit (contract). W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 634-35 (4th ed. 1971). "The seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." *Id.* at 634.

A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it

nature, arising from a presumption that the seller impliedly warranted that the goods were merchantable when sold.<sup>12</sup> The implied warranty of merchantability, as defined in section 2-314 of the U.C.C.,<sup>13</sup> provides that merchantable goods must be fit for the ordinary purpose for which such goods are used.<sup>14</sup> In order to maintain an action for breach of implied warranty, the plaintiff must establish the following: (1) the goods were sold by a merchant, (2) the goods were not merchantable at the time of sale, (3) the

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later ceased necessarily to be consensual, and at the same time came to lie mainly in contract.

Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 414-15 (1929) (footnotes omitted). For a discussion of the implied warranty of merchantability, see notes 12-16 and accompanying text *infra*. For a discussion of strict tort liability, see notes 21-24 and accompanying text *infra*. In addition to an action for breach of an implied warranty, an injured consumer may bring a cause of action for breach of an express warranty or breach of an implied warranty of fitness for a particular purpose. See U.C.C. §§ 2-313, 2-315 (1978). An implied warranty that the goods be fit for a particular purpose arises when the seller has reason to know of a particular purpose for which the goods are required. See *id.* § 2-315. The consumer may also sue under the negligence theory by claiming that the manufacturer or supplier failed to exercise the care of a reasonable person in the process of preparation, manufacture or sale of the product. W. PROSSER, *supra*, at 644.

12. W. PROSSER, *supra* note 11, at 635. Such a warranty is imposed by law, regardless of the seller's intention to make or avoid any warranty. *Id.* For this reason, it has been said that designating a warranty as contract "is to speak the language of pure fiction." Williston, *Liability for Honest Misrepresentations*, 24 HARV. L. REV. 415, 420 (1911). See also Smith, *Surviving Fictions*, 27 YALE L.J. 147 (1917).

13. While the principal case was decided under Pennsylvania law, the relevant Pennsylvania law and the Uniform Commercial Code provisions are substantially the same. Compare 13 PA. CONS. STAT. ANN. §§ 1101-9507 (Purdon 1984) with U.C.C. § 1-101 to 9-507 (1978). Accordingly, references to the commercial code will be to the U.C.C. in order to allow for more general application of the note's discussion and analysis.

14. See U.C.C. § 2-314(2)(c) (1978). The implied warranty of merchantability has been termed by far the most important warranty in the U.C.C. See J. WHITE & R. SUMMERS, *supra* note 11, at 343. The implied warranty provides in pertinent part as follows:

- (1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
- (2) Goods 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.

U.C.C. § 2-314 (1978). Article 2 of the U.C.C. has been adopted in various forms in all states except Louisiana. See 1 U.L.A. 1 (1984 Supp.).

plaintiff suffered injury and damage to his person or property, (4) the injuries were proximately caused by the defective nature of the goods, and (5) the plaintiff notified the seller of the injury.<sup>15</sup> Should these elements be proven, the plaintiff can recover for consequential damages, including damages for personal injuries.<sup>16</sup>

However, many legal scholars and practitioners believed that due to difficulties inherent in suing under warranty theory, the warranty action under the U.C.C. did not offer the consumer adequate protection.<sup>17</sup> The seller could avoid liability for breach of warranty by proving that the plaintiff was not in privity of contract<sup>18</sup> or failed to give the seller notice of a defect in the product within the statutory period,<sup>19</sup> or by proving that the seller's liability was limited through a valid disclaimer.<sup>20</sup>

In an effort to alleviate these problems, courts and legislatures developed the doctrine of strict liability in tort, which imposes liability on the

15. J. WHITE & R. SUMMERS, *supra* note 11, at 343.

16. *See* U.C.C. § 2-715(2) (1978). Section 2-715(2) provides for the recovery of "[c]onsequential damages resulting from the seller's breach includ[ing] . . . injury to person or property proximately resulting from any breach of warranty." *Id.*

17. *See* W. PROSSER, *supra* note 11, at 655-56. "[I]t gradually became apparent that 'warranty' . . . carries far too much luggage in the way of undesirable complications, and is more trouble than it is worth." *Id.* at 656. For a discussion of the obstacles to recovery presented by privity, notice requirements, and disclaimers, see Note, *Products Liability: Tort or Contract—A Resolution of the Conflict?*, 21 N.Y.L.F. 587 (1976).

18. In any breach of warranty action there are two possible privity issues: horizontal privity and vertical privity. Vertical privity determines how far up the chain of distribution an injured purchaser may reach for recovery—"who can be sued." *See* Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391, 394-95 (1972). Horizontal privity classifies those parties that may bring suit—"who can sue." *Id.* at 395-96. The U.C.C. is silent on the issue of vertical privity but does suggest three alternatives on the issue of horizontal privity, leaving the states free to select one. *See* U.C.C. § 2-318 (1978). Alternative A extends seller's warranty to the purchaser's family, household and guests. *Id.* Alternative A. Alternative B extends the warranty to any *natural person* expected to use, consume or be affected by the goods. *Id.* Alternative B. Alternative C extends a seller's warranty to any *person* reasonably expected to use, consume or be affected by the goods. *Id.* Alternative C. Although these categories may be expanded judicially, many states retain the defense of lack of privity as a bar to recovery under the U.C.C. *See generally* J. WHITE & R. SUMMERS, *supra* note 11, at 399-405. Pennsylvania adopted Alternative A but judicially expanded its application. *See* 13 PA. CONS. STAT. ANN. § 2318 (1984). For a discussion of the judicial expansion of the class of beneficiaries to which warranties extend in Pennsylvania, see note 48 *infra*.

19. *See* U.C.C. § 2-607(3) (1978). Section 2-607(3) of the U.C.C. provides that a buyer must give notice to the seller of a breach of warranty within a reasonable time after discovery of the breach. *See id.* Those beneficiaries who are given rights under the U.C.C. by virtue of one of the alternative provisions of § 2-318 are required to notify the seller that an injury has occurred once the injured party becomes aware of the legal situation. *Id.* comment 5.

20. *See* U.C.C. § 2-316(2) (1978). Under § 2-316(2), a seller may exclude or modify the implied warranty of merchantability if the disclaiming language is conspicuous and mentions the word merchantability. *See id.*

manufacturer or supplier of defective goods without proof of fault.<sup>21</sup> The development of the doctrine of strict liability culminated in the enactment of section 402A of the Second Restatement of Torts.<sup>22</sup> In order to recover

21. See W. PROSSER, *supra* note 11, at 655-56. Warranty theory under the U.C.C. was designed to protect the expectations of the contracting parties. Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123, 127 (1974). Strict product liability, however, is based on the social policy of protecting consumers from harm. W. PROSSER, *supra* note 11, at 613.

The doctrine of strict liability in tort emerged in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Strict liability relieves the injured plaintiff of the difficult, if not impossible, burden of proving the negligence of the manufacturer. See Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973). There are two principal policy reasons behind the adoption of strict liability: shifting of loss from the injured consumer to the manufacturer who is better able to absorb that loss, and giving the manufacturer greater incentive to prevent the release of defective products into the consumer market. *Id.* at 826.

22. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides as follows:

Special Liability of Seller of Product for Physical Harm to User or Consumer.

- (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.

*Id.*

The following states have judicially adopted section 402A: Alabama, *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976); Arizona, *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); Colorado, *Bradford v. Bendix-Westinghouse Auto. Air Brake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1974); Connecticut, *Wachtel v. Rosol*, 159 Conn. 496, 271 A.2d 84 (1970); Florida, *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); Hawaii, *Stewart v. Budget Rent-A-Car Corp.*, 52 Hawaii 71, 470 P.2d 240 (1970); Idaho, *Shields v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857 (1974); Indiana, *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 258 N.E.2d 681 (1970); Iowa, *Hawkeye-Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672 (Iowa 1970); Kansas, *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976); Kentucky, *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1965); Maryland, *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); Mississippi, *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); Missouri, *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969); Montana, *Brandenburger v. Toyota Motor Sales U.S.A., Inc.*, 162 Mont. 506, 513 P.2d 268 (1973); New Hampshire, *Buttrick v. Arthur Lessard & Sons, Inc.*, 110 N.H. 36, 260 A.2d 111 (1969); New Mexico, *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972); North Dakota, *Johnson v. American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974); Oklahoma, *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); Oregon, *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967); Pennsylvania, *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966);

under section 402A, the plaintiff must prove only that (1) the plaintiff's injury was attributable to a dangerous condition of a product supplied by the defendant, (2) the defective condition proximately caused plaintiff's injuries, and (3) the defective condition existed at the time the product left the possession of the defendant.<sup>23</sup> Thus, under the strict products liability action, the plaintiff was relieved of the problems associated with privity, disclaimer, and notice of defect and, as a result, strict liability became the favored theory of recovery.<sup>24</sup>

One of the most significant distinctions between implied warranty and strict liability is the length of their statutes of limitations.<sup>25</sup> Under the

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Rhode Island, *Ritter v. Narragansett Elec. Co.*, 109 R.I. 176, 283 A.2d 255 (1971); South Dakota, *Engberg v. Ford Motor Co.*, 87 S.D. 196, 205 N.W.2d 104 (1973); Texas, *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969); Utah, *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152 (Utah 1979); Vermont, *Zaleskie v. Joyce*, 133 Vt. 150, 333 A.2d 110 (1975); Washington, *Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 452 P.2d 729 (1969); Wisconsin, *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Maine has adopted section 402A by statute. *See* ME. REV. STAT. ANN. tit. 14, § 221 (1980). Arkansas has also enacted a statute that incorporates the language of section 402A. *See* ARK. STAT. ANN. § 85-2-318.2 (1983 Supp.).

The following states, although not adopting 402A per se, have adopted some theory of recovery equivalent to strict product liability: Alaska, *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970); California, *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Delaware, *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976); Illinois, *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Louisiana, *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971); Michigan, *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965); Minnesota, *Kerr v. Corning Glass Works*, 284 Minn. 115, 169 N.W.2d 587 (1969); Nebraska, *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); Nevada, *Ginniss v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970); New Jersey, *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); New York, *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); Ohio, *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Tennessee, *Ford Motor Co. v. London*, 217 Tenn. 400, 398 S.W.2d 240 (1966); West Virginia, *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979).

In addition, Georgia provides for strict liability for manufacturers in the sale of personal property. *See* GA. CODE ANN. § 51-1-11(b)(1) (1982). For a survey of the status of products liability law in various states, see Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695 (1984).

23. PROSSER AND KEETON ON THE LAW OF TORTS 712-13 (W. Keeton 5th ed. 1984).

24. *See* W. PROSSER, *supra* note 11, at 656-58.

25. *Compare* U.C.C. § 2-725(a) (1978) (four-year limitations period) with 42 PA. CONS. STAT. ANN. § 5524(2) (Purdon 1974) (two-year limitations period). One of the earliest purposes of statutes of limitations was the avoidance of law suits. 21 Jac. I, ch. 16 (1623). Statutes of limitations serve both evidentiary and social purposes. They compel a litigant to enforce a claim while the evidence is still fresh, and ensure individuals that a long-unsettled claim will not suddenly and unexpectedly be successfully instituted. *See Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereafter cited as *Developments in the Law*]. Statutes of limitations prevent "the unexpected enforcement of stale claims after evidence has been lost or destroyed, witnesses have disappeared or died, or memories have faded."

U.C.C., an action must be commenced within four years from the date of the accrual of the cause of action.<sup>26</sup> Generally, the cause of action accrues at the time tender of delivery is made.<sup>27</sup> In contrast, actions brought under state strict liability and negligence law typically must be filed within two years or less of the date of accrual.<sup>28</sup> Usually, these tort statutes run from the date of injury or the date the plaintiff discovered or should have discovered the injury.<sup>29</sup> Due to the radical differences between these two statutes of limitations, a contrariety of judicial opinion has evolved over whether the U.C.C. or tort statute of limitations should apply to breach of warranty actions involving personal injury.<sup>30</sup>

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Note, *Statute of Limitations: Time for Reform in Oklahoma*, 33 OKLA. L. REV. 178 (1980) (citing *Developments in the Law*, *supra*, at 1185). Finally, these statutes are evidence of the legislative policy which may favor or disfavor certain types of actions. *Developments in the Law*, *supra*, at 1185-86.

26. See U.C.C. § 2-725(1) (1978). "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 limitations to not less than one year but may not extend it." *Id.*

27. See *id.* § 2-725(2). Section 2-725(2) provides as follows:

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.*

28. See, e.g., ARIZ. REV. STAT. ANN. § 12-542 (1982) (two years); ILL. ANN. STAT. ch. 83, § 15 (Smith-Hurd 1966) (two years); N.J. STAT. ANN. § 2A:14-2 (West 1952) (two years); 42 PA. CONS. STAT. ANN. § 5524(2) (Purdon 1984) (two years).

29. See W. PROSSER, *supra* note 11, at 655-56.

30. The following courts have held that the statute of limitations provided by the U.C.C. governs: *Reid v. Volkswagen of Am., Inc.*, 512 F.2d 1294 (6th Cir. 1975) (applying Michigan law); *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981) (applying Kentucky law); *Maly v. Magnavox Co.*, 460 F. Supp. 47 (N.D. Miss. 1978) (applying Mississippi law); *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976 (D. Alaska 1973) (applying Alaska law); *Wright v. Cutler-Hammer, Inc.*, 358 So. 2d 444 (Ala. 1978); *Johnson v. Hockessin Tractor, Inc.*, 420 A.2d 154 (Del. 1980); *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974); *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 512 P.2d 776 (1973); *Layman v. Keller Ladders, Inc.*, 224 Tenn. 396, 455 S.W.2d 594 (1970); *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980).

The following courts have held that the U.C.C. statute of limitations governs only where there is a buyer-seller relationship between the parties: *Becker v. Volkswagen of Am., Inc.*, 52 Cal. App. 3d 794, 125 Cal. Rptr. 326 (1975); *Plouffe v. Good-year Tire & Rubber Co.*, 118 R.I. 288, 373 A.2d 492 (1977).

The following courts have applied the state personal injury statute of limitations: *Maynard v. General Elec. Co.*, 486 F.2d 538 (4th Cir. 1973) (applying West Virginia law); *Tyler v. R.R. Street & Co.*, 322 F. Supp. 541 (E.D. Va. 1971) (applying Virginia law); *Abate v. Barkers of Wallingford, Inc.*, 27 Conn. Supp. 46, 229 A.2d 366 (1967); *Parish v. B.F. Goodrich Co.*, 395 Mich. 271, 235 N.W.2d 570 (1975) (applying Ohio law); *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974).

For a general discussion of courts' adoption and treatment of different statutes of



One line of cases has held that the tort statute of limitations applies to all breach of warranty actions for personal injury on the ground that, regardless of the form of the action, the essence of the action is tortious in nature.<sup>31</sup> Other courts have reached the same conclusion reasoning that the U.C.C. statute of limitations was not designed to cover products liability cases but, rather, was intended to govern only those actions arising in commercial settings.<sup>32</sup> Still other courts have stated that it is the nature of the

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limitations see Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 260-70 (1973); [hereinafter cited as Murray, *Products Liability*] (U.C.C. statute of limitations should not apply to personal injury actions); Murray, *supra* note 18, at 416-28 (U.C.C. statute of limitations intended for commercial transactions); Murray, *Random Thoughts on Mendel*, 45 ST. JOHN'S L. REV. 86 (1970) (tort statute of limitations should apply to personal injury actions caused by defective products); Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323 (1982) (U.C.C. time of delivery not feasible for disease related products liability); Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693 (1978) (statutes of limitations needed to avoid indefinite liability for manufacturers of long-lived products); Note, *supra* note 17, at 605-10 (U.C.C. statute of limitations intended for commercial transactions only); Note, *supra* note 25 (a single statute of limitations for defective products is necessary); Case Comment, *U.C.C.—Statute of Limitations—Conflict Between Personal Injury and Sales Contract Statutes of Limitations*, 75 W. VA. L. REV. 201 (1972) (personal injury actions arising from contracts of sale are still tort actions).

31. See, e.g., *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). In *Kirkland*, the court stated that “[t]he essential nature of an action based upon products liability is an action for injury to personal property or for injury to the rights of another. The action thus being primarily tortious in nature must be governed by [the tort statute of limitations] . . .” *Id.* at 1361. The court further noted that the Restatement itself points out the inapplicability of warranty principles in products liability by relying on the Restatement comment that “warranty” must be given a new and different meaning if used in connection with products liability. *Id.* at 1362 (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965)). The court concluded that products liability was an action independent of any contractual liability and, therefore, the tort statute was applicable rather than that of the U.C.C. *Id.* at 1361. The court found support for its analysis in the seminal strict tort liability case of *Greenman v. Yuba Power Products*: “[r]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot be invoked to govern manufacturer’s liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.” 521 P.2d at 1362 (quoting *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)). See also *Maynard v. General Elec. Co.*, 486 F.2d 538 (4th Cir. 1973) (applying West Virginia law) (action was in essence a personal injury action and statute applicable to personal injuries controlled regardless of the form of the action); *Waldron v. Armstrong Rubber Co.*, 64 Mich. App. 626, 235 N.W.2d 722 (1975) (breach of warranty action treated as a tort claim to which personal injury statute of limitations is applicable); *Lee v. Wright Tool & Forge Co.*, 48 Ohio App. 2d 148, 356 N.E.2d 303 (1975) (plaintiff alleged the breach of an implied warranty of fitness which was treated as an action in tort and controlled by the two-year tort statute of limitations).

32. See, e.g., *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). The *Heavner* court concluded that the sales chapter of the U.C.C. was inapplicable to personal injury actions, stating that “[f]undamentally, the chapter is commercially and contractually oriented.” *Id.* at 152, 305 A.2d at 424. The court claimed that the U.C.C. contemplated actions between two contracting parties, not those between a seller and a consumer injured by a defective product. *Id.* at 152-53, 305 A.2d at 424-

wrong alleged that should control. Therefore, these courts have held that the state statute of limitations governing action for personal injuries applies whenever suit is brought for the recovery of damages for personal injuries.<sup>33</sup>

In contrast, another line of cases has held that the statute of limitations provided by the U.C.C. governs warranty actions for personal injuries on the ground that the U.C.C. provides a remedy separate and distinct from strict tort liability.<sup>34</sup> These courts embraced the sales statute of limitations in breach of warranty cases by relying on the implied warranty's genesis in the contract of sale context.<sup>35</sup> Alternatively, these courts reasoned that the U.C.C. explicitly provided for the recovery of personal injuries; thus, they determined that the U.C.C. statute of limitations governs actions brought under the U.C.C. without regard to any previous classifications of such actions as tort or contract.<sup>36</sup> In further support of their position, these courts have explained that in adhering to the four-year statute of limitations, they further the U.C.C.'s underlying purpose of making the law among various jurisdictions uniform.<sup>37</sup>

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25. *See also* *Parish v. B.F. Goodrich Co.*, 395 Mich. 271, 235 N.W.2d 570 (1975) (U.C.C. statute of limitations satisfactory in commercial setting but inconsistent with principles developed with respect to actions against manufacturers for personal injury).

The inapplicability of the U.C.C. in products liability cases is dealt with extensively in *Murray, Products Liability*, *supra* note 30.

33. *See, e.g.*, *Tyler v. R.R. Street & Co.*, 322 F. Supp. 541 (E.D. Va. 1971) (applying Virginia law). The *Tyler* court held that the state two-year tort statute of limitations applied to every action for personal injuries. *Id.* *See also* *Hanson v. American Motors Corp.*, 83 Mich. App. 553, 269 N.W.2d 222 (1978) (statute of limitations governing personal injuries applied in actions where the injury is to the person).

34. *See, e.g.*, *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (U.C.C. is a statutory cause of action for recovery for injuries from defective products distinct and in addition to strict tort liability); *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980) (U.C.C. establishes an alternative remedy for injuries caused by defective products).

35. *See, e.g.*, *Simmons v. Clemco Indus.*, 368 So. 2d 509 (Ala. 1979) (breach of warranty statute of limitations applicable since such actions are *ex contractu*); *Johnson v. Hockessin Tractor, Inc.*, 420 A.2d 154 (Del. 1980) (U.C.C. statute applies since statutory remedy should be governed by the period of limitation provided by the statute creating the remedy); *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 276-77, 512 P.2d 776, 778 (1973) (court will not look outside the provisions of the U.C.C.); *Layman v. Keller Ladders, Inc.*, 224 Tenn. 396, 455 S.W.2d 594 (1970) (breach of warranty action arises out of contract for sale and U.C.C. sales contract statute of limitations governs the action).

36. *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 277, 512 P.2d 776, 778 (1973). The court in *Redfield* stated that where the legislature has provided a statutory remedy, whether that action was in tort or contract at common law is irrelevant. *Id.* The court found that the specific limitation provided in the U.C.C. was applicable under the language of the Code and declined to look outside the provision of the U.C.C. for more precise definitions. *Id.*

*See also* *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456 (Tex. 1980) (traditional tort/contract distinctions were irrelevant since the U.C.C. provides a statutory remedy).

37. *Morton v. Texas Welding & Mfg. Co.*, 408 F. Supp. 7 (S.D. Tex. 1976) (U.C.C. liberally construed to simplify, clarify, and make uniform the law governing

Still a third line of cases has held that the U.C.C. statute of limitations is applicable only where there is privity of contract between the plaintiff and defendant.<sup>38</sup> Although the individual state may have eliminated the requirement of privity in breach of warranty actions, these courts have re-established the privity requirement for the purposes of deciding which statute of limitations applies.<sup>39</sup> Essentially, these courts have interpreted the U.C.C. statute of limitations literally, reasoning that because the statute was designed to cover actions for breach of sales contracts, it is inapplicable where there is no contractual buyer-seller relationship between the litigants.<sup>40</sup>

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commercial transactions including the elimination of jurisdictional variations in statutes of limitations).

*See also* *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964). The court in *Gardiner* literally interpreted § 2-725 in adopting the four-year statute of limitations. *Id.* at 418, 197 A.2d at 613. The court was motivated by the need for uniformity in the law and the liberal construction of the code called for in § 1-102 of the Code. *Id.* at 419, 197 A.2d at 613.

Section 1-102 of the U.C.C. provides:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are
  - (a) to simplify, clarify and modernize the law governing commercial transactions;
  - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
  - (c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102 (1978).

38. This was the view adopted by the Pennsylvania Superior Court in *Williams v. West Penn Power Co.*, 313 Pa. Super. 461, 460 A.2d 278, *aff'd in part, rev'd in part*, 502 Pa. 557, 467 A.2d 811 (1983). *See also* *International Union of Operating Eng'rs v. Chrysler Motors Corp.*, 106 R.I. 248, 258 A.2d 271 (1969) (U.C.C. statute of limitations inapplicable because the plaintiff was not a buyer and the manufacturer was not a seller to which the implied warranty of merchantability applied). Some courts also include an additional limited class of beneficiaries provided by the states' version of the U.C.C. while continuing to disallow recovery to other consumers under the U.C.C. statute of limitations if they lack a contractual relationship with the defendant. *See, e.g.*, *Becker v. Volkswagen of Am., Inc.*, 52 Cal. App. 3d 794, 125 Cal. Rptr. 326 (1975) (U.C.C. not intended to apply to personal injury action except where the suit was between a buyer, or a limited class of beneficiaries, and the immediate seller, and even then, only on the basis of a warranty in the commercial sales sense); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973) (sales chapter of the U.C.C. inapplicable to warranty actions for personal injuries where there was a direct buyer or a limited class of beneficiaries).

39. *See, e.g.*, *Kelly v. Ford Motor Co.*, 110 R.I. 83, 290 A.2d 607 (1972). In *Kelly*, the plaintiffs were not required to be in privity of contract with the manufacturer in order to bring a cause of action alleging breach of warranty. *Id.* at 87-88, 290 A.2d at 610. However, the court held that the U.C.C. statute of limitations did not govern actions by third-party beneficiaries because they lacked a contractual relationship with the defendant, thus barring the plaintiffs' action because it was brought after the statute of limitations applicable to personal injuries had run. *Id.* at 88, 290 A.2d at 610.

40. *See, e.g.*, *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973); *International Union of Operating Eng'rs v. Chrysler Motors Corp.*, 106 R.I. 248, 258 A.2d 271 (1969). In support of the proposition that the U.C.C. statute applies in a breach

Over the course of the past twenty-five years, Pennsylvania has adhered to a number of these approaches. Pennsylvania was the first state to adopt the U.C.C.; it became effective in 1954 replete with the four-year statute of limitations.<sup>41</sup> In 1966, Pennsylvania courts adopted strict tort liability in the form of section 402A of the Second Restatement of Torts.<sup>42</sup> Strict tort liability actions are governed by Pennsylvania's two-year personal injury statute of limitations.<sup>43</sup> Thus, under Pennsylvania law, a person injured by a defective product theoretically could bring a cause of action to recover damages for personal injuries under either the U.C.C. or section 402A.<sup>44</sup>

However, the outcome of the suit could differ depending upon the form of action selected. For example, after the adoption of section 402A in Pennsylvania, a person injured by a defective product could have brought a strict products liability action against the direct seller or the manufacturer without a showing of privity of contract with the defendant.<sup>45</sup> However, if the same individual brought a breach of warranty action in contract under the U.C.C., the plaintiff's cause of action would have failed automatically where there was no proof of privity between the plaintiff and defendant.<sup>46</sup> To eliminate this disparity, the Pennsylvania Supreme Court abolished the requirement of privity in connection with claims brought under the U.C.C.<sup>47</sup> By this action, the court aspired to achieve legal symmetry between the two causes of action so that identical controversies would not be decided differently solely because one was labelled products liability and the other breach of warranty.<sup>48</sup>

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of warranty case between parties in privity of contract and not in a similar action brought by a third-party beneficiary, the court in *Heavner* relied on the Official Comment to § 2-725 which is commercially oriented and specifically states that the U.C.C. "takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern practice." *Heavner*, 63 N.J. at 156, 305 A.2d at 426 (quoting U.C.C. § 2-725 Official Comment (1978)).

41. 13 PA. CONS. STAT. ANN. §§ 1101-9507 (Purdon 1984). The U.C.C. became effective in Pennsylvania on July 1, 1954. 1 U.L.A. 1 (1984 Supp.).

42. *See Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). For the text of § 402A, see note 22, *supra*.

43. The Pennsylvania personal injury statute of limitations provides: "The following actions and proceedings must be commenced within two years: . . . (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another." 42 PA. CONS. STAT. ANN. § 5524(2) (Purdon 1981).

44. For a discussion of these two causes of actions as theories of liability for the recovery of injury caused by defective products, see notes 11-24 and accompanying text *supra*.

45. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853, 854 (1966).

46. *See, e.g., Miller v. Preitz*, 422 Pa. 383, 392, 221 A.2d 320, 325 (1966) (deceased nephew of buyer not within benefits of any implied warranty made by remote seller of defective product since he was not a purchaser of the product).

47. *See Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974) (horizontal privity); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968) (vertical privity).

48. In *Kassab*, the Pennsylvania Supreme Court abolished the concept of vertical

In addition to abolishing the privity requirement in breach of warranty actions, Pennsylvania courts have also struggled with the issue of whether the two-year personal injury or the four-year commercial statute of limitations should apply. In *Gardiner v. Philadelphia Gas Works*,<sup>49</sup> the plaintiffs, as direct purchasers, brought an action for breach of implied warranty against their immediate seller to recover for personal injuries sustained two years and eight days earlier.<sup>50</sup> Recognizing that a claim for breach of warranty is

privity, thereby allowing purchasers injured by defective goods to sue remote manufacturers for breach of implied warranty. *Kassab*, 432 Pa. at 234, 246 A.2d at 856. In that case, a couple that raised breed cattle sued the manufacturer of a food supplement and the seller of food that injured their cattle. *Id.* at 220-21, 246 A.2d at 850. The plaintiffs alleged that the food contained a synthetic hormone that caused their pregnant cows to abort and their breed bull to "behav[e] in a manner which tended to cast doubt upon his masculinity." *Id.* at 220, 246 A.2d at 849. Eventually, the bull was pronounced sterile. *Id.*

The *Kassab* court concluded that since Pennsylvania had adopted § 402A, which contained no privity requirements, "the same demands of legal symmetry which once supported privity now destroy it." *Id.* at 229, 246 A.2d at 853. The court did not want identical controversies to be decided differently solely because one was framed as a contract action and the other a tort action, stating that "[t]o permit the result of a lawsuit to depend solely on the caption atop plaintiff's complaint is not now, and has never been, a sound resolution of identical controversies." *Id.* The supreme court claimed that recovery under the Code had to be co-extensive with that under § 402A in the area of products liability, reasoning that the same policy considerations behind the imposition of strict liability in tort mandated the abolition of privity in contract actions for breach of warranty. *Id.* at 230-31, 246 A.2d at 854. These policy considerations are "the consumer's inability to protect himself adequately from defectively manufactured goods . . . ; the implied assurance on the part of the seller that his goods are safe . . . ; [and] the superior risk bearing ability of the manufacturer . . . ." *Id.* at n.6 (citations omitted).

Six years later, the Pennsylvania Supreme Court abolished horizontal privity in warranty actions. See *Salvador v. Atlantic Steel Boiler Co.* (*Salvador I*), 457 Pa. 24, 32-33, 319 A.2d 903, 907-08 (1974). In *Salvador I*, an employee of a company that purchased a steam boiler brought an action for breach of warranty against the buyer, seller and manufacturer of the boiler for injuries sustained when the boiler exploded. *Id.* at 26, 319 A.2d at 904. A standing problem arose because the employee did not fit into the limited class of third party beneficiaries that were provided for in the version of § 2-318 of the U.C.C. adopted by the Pennsylvania legislature. *Id.* at 27, 319 A.2d at 905. See 13 PA. CONS. STAT. ANN. § 2318 (1984) (adopting Alternative A of § 2-318 of the U.C.C.). The scope of the seller's liability in Pennsylvania was as follows:

The warranty of a seller 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 . . . .

13 PA. CONS. STAT. ANN. § 2318 (1984).

Finding that by virtue of § 402A a manufacturer was virtually the guarantor of his product's safety, the court reasoned that it would be unjust to allow a plaintiff to recover when the complaint was in trespass (tort) but be denied relief on identical facts if the complaint was in assumpsit (contract). 457 Pa. at 32, 319 A.2d at 907. Referring to the *Kassab* decision, the court stated that this anomalous situation is certainly to be avoided. *Id.*

49. 413 Pa. 415, 197 A.2d 612 (1964).

50. *Id.* at 416, 197 A.2d at 612. The Gardiners sustained injuries when gas escaped from an underground conduit maintained by defendants. *Id.*

a separate and distinct claim from a personal injury action based on negligence, the Supreme Court of Pennsylvania applied the four-year statute of limitations provided by the U.C.C.<sup>51</sup>

In 1978, however, in *Salvador v. Atlantic Steel Boiler Co. (Salvador II)*,<sup>52</sup> the Superior Court of Pennsylvania distinguished *Gardiner* and held that the two-year tort statute of limitations applied to breach of warranty actions for personal injuries brought by third parties.<sup>53</sup> The court first noted that Pennsylvania had abolished the requirement of privity under the U.C.C. in order to permit third parties to bring actions against remote defendants in warranty, as well as in strict products liability.<sup>54</sup> The court then focused on the primary reason for this change—the desire to achieve legal symmetry between the two causes of action—and determined that in order to better further this goal, the two-year personal injury statute of limitations should apply to actions by third parties for personal injuries under the U.C.C.<sup>55</sup> Noting that the extension of the breach of warranty action to third party

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51. *Id.* at 419, 197 A.2d at 614. The *Gardiner* court was also motivated by an underlying purpose of the U.C.C.: to make the law among various jurisdictions uniform. *Id.*, 197 A.2d at 613. *Gardiner* was decided prior to the adoption of strict tort liability by the Pennsylvania Supreme Court. See *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

After *Gardiner*, federal courts applying Pennsylvania law also applied the four-year statute of limitations provided by the U.C.C. See, e.g., *Patterson v. Her Majesty Indus.*, 450 F. Supp. 425 (E.D. Pa. 1978) (adoption of § 402A did not preclude use of U.C.C. statute of limitations in breach of implied warranty action alleging personal injury); *Hoffman v. A.B. Chance Co.*, 339 F. Supp. 1385 (M.D. Pa. 1972) (four-year statute governed personal injury action based upon breach of warranty); *Hoeflich v. Williams S. Merrell Co.*, 288 F. Supp. 659 (E.D. Pa. 1968) (four-year statute applicable to breach of warranty action alleging personal injury); *Natale v. Upjohn Co.*, 236 F. Supp. 37 (D. Del. 1964) (U.C.C. applied regardless of whether the damages were for personal injury or not), *aff'd*, 356 F.2d 590 (3d Cir. 1966).

52. 256 Pa. Super. 330, 389 A.2d 1148 (1978), *aff'd per curiam*, 492 Pa. 258, 424 A.2d 497 (1981).

53. *Id.* at 344, 389 A.2d at 1156. Mr. Salvador, an employee of United Machine & Tool Co., suffered loss of hearing when a boiler exploded where he was working. *Id.* at 333, 389 A.2d at 1150. The boiler was installed in 1962. Salvador was injured in 1967 and brought suit in 1971. *Id.* at 332-33, 389 A.2d at 1150. The case had reached the Pennsylvania Supreme Court on the issue of horizontal privity. *Id.* at 332, 389 A.2d at 1149. The court abolished horizontal privity (*Salvador I*) and remanded the case. *Id.*, 389 A.2d at 1150. See *Salvador I*, 457 Pa. 24, 319 A.2d 903 (1974). For a discussion of the abolition of horizontal privity in Pennsylvania, see notes 47-48 and accompanying text *supra*. The second appeal to the supreme court involved the issue of the proper statute of limitations. See *Salvador II*, 256 Pa. Super. at 332, 389 A.2d at 1150.

The superior court, in *Salvador II*, distinguished *Gardiner* by noting that the *Gardiner* were direct purchasers in privity of contract with the seller, rather than third party beneficiaries. *Id.* at 337-38, 389 A.2d at 1152-53. The court also relied on the fact that *Gardiner* was decided before strict products liability had been adopted in Pennsylvania. *Id.*

54. 256 Pa. Super. at 336-37, 389 A.2d at 1150-52. For a discussion of the abolition of privity in Pennsylvania and the reasons therefor, see notes 45-48 and accompanying text *supra*.

55. 256 Pa. Super. at 337, 389 A.2d at 1152.

plaintiffs suing for personal injuries was entirely the creation of the judiciary, the *Salvador II* court concluded that it was free to determine which statute of limitations should apply to the resultant cause of action.<sup>56</sup> Furthermore, the court found that the U.C.C. statute of limitations was never intended to apply to third-party claims for personal injuries but only to claims by the contracting parties and, therefore, the statute of limitations for strict products liability actions would govern.<sup>57</sup>

Finally, in *Hahn v. Atlantic Richfield Co.*,<sup>58</sup> the Third Circuit, interpreting Pennsylvania law, applied the two-year statute of limitations in a breach of warranty suit brought by a third party.<sup>59</sup> Initially, the court noted that implied warranty was merely a transparent device to impose strict liability.<sup>60</sup> With the abolition of privity this had become even more apparent because warranty liability, as with strict products liability, was thus imposed by law, not contractual agreement.<sup>61</sup> The court further found that implied war-

56. *Id.* at 341, 389 A.2d at 1154. Claiming that strict liability recovery under a contract theory such as implied warranty was a pure fiction created to reach a desirable social policy, the court found that the theory of recovery was one sounding in tort. *Id.* at 341-42, 389 A.2d at 1154 (citing Murray, *Products Liability*, *supra* note 30, at 267).

57. *Id.* at 341, 389 A.2d at 1154. The court claimed that it would take a very strained reading of the U.C.C. statute of limitations to conclude that it applied to anyone other than the contracting parties in a breach of warranty action. *Id.* (citing *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 403, 335 N.E.2d 275, 280, 373 N.Y.S.2d 39, 45 (1975) (Fuchsberg, J., concurring)). The court reached this conclusion by noting that the entire section was entitled "Statute of Limitations in Contracts for Sale" and was directed to commercial transactions. *Id.* at 341-42, 389 A.2d at 1154. Noting that in warranty actions breach occurs at tender of delivery, the court recognized that an injured party could be completely unaware of any breach until after the statute of limitations had run, leaving the injured party with no remedy under the U.C.C. at the time of injury. *Id.* at 342, 389 A.2d at 1155. The court reasoned that this anomaly underscored the notion that the U.C.C. statute of limitations was not intended to apply to third party personal injury actions. *Id.* The court then applied the two-year personal injury statute of limitations as "the only sensible accommodation between the two theories of liability, contract and tort, if legal symmetry is to be achieved." *Id.* at 343, 389 A.2d at 1155.

58. 625 F.2d 1095 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981).

59. *Id.* at 1100. In *Hahn*, the plaintiff-employee was severely injured when a 600-pound pipe suspended overhead by a one-ton chain hoist fell on him. *Id.* at 1097. Although the court applied Pennsylvania law with regard to the statute of limitations, the court decided the case on the ground that the evidence was insufficient to prove that the defendant-manufacturer had sold the defective hoist to the plaintiff's employer—a necessary element for recovery under a breach of warranty theory. *Id.* at 1097.

The court detailed the cases eliminating the privity requirement in Pennsylvania, and noted the effort by the Pennsylvania Supreme Court to make recovery for nonpurchaser claimants under the U.C.C. co-extensive with recovery under § 402A. *Id.* at 1103. For a discussion of the elimination of the privity requirement in Pennsylvania, see notes 45-48 and accompanying text *supra*.

60. 625 F.2d at 1103 (citing *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965)).

61. *Id.* (citing Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 802 (1966)).

ranty liability was tortious in nature, like strict liability, because it was based upon the same tort-based policy considerations of protecting the plaintiff from unreasonable risks of injury, as opposed to the contract consideration of protecting the plaintiff's expectation interests.<sup>62</sup> Having erected this tort/contract dichotomy, the court concluded that because Pennsylvania had been moving continuously in the direction of treating implied warranty actions as strict liability actions, the two-year personal injury statute of limitations should apply.<sup>63</sup> The *Hahn* court buttressed this conclusion through an analysis of the inapplicability of the U.C.C. statute of limitations in any personal injury actions brought by non-purchasers.<sup>64</sup>

Against this background, the Pennsylvania Supreme Court, in *Williams v. West Penn Power Co.*, began its analysis of whether the Pennsylvania two-year personal injury statute of limitations or the four-year commercial statute of limitations governed warranty actions for personal injury brought under the U.C.C.<sup>65</sup> Initially, the *Williams* court examined the development

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62. 625 F.2d at 1103-04. According to the *Hahn* court, tort law is designed to further an important social policy of protecting persons from unreasonable risks of injury. *Id.* Further, the court claimed that the goal of tort law is to place the injured party in the same position after the injury as before the injury. *Id.* at 1104. Contract law, on the other hand, protects the expectations of the contracting parties expressed by voluntary agreement. *Id.* The Third Circuit stated that contract law is designed to protect only the contracting parties, and the goal is to give the nonbreaching party the benefit of the bargain by putting him in the position occupied before the breach. *Id.*

63. *Id.* Reasoning that the Pennsylvania Supreme Court extended liability to third parties based solely on the social policy of protecting the interest in freedom from injury to the person, and not based on the contractual intent of the parties, the *Hahn* court applied the personal injury statute of limitations. *Id.*

64. *Id.* at 1104-05. In its analysis, the *Hahn* court relied on the commercial nature and intent of the U.C.C., quoting Dean Murray extensively. *Id.* (quoting Murray, *Products Liability*, *supra* note 30, at 267). The court stated that § 2-725 should not apply to non-purchaser breach of warranty actions based upon a literal reading of the section. *Id.* The section is entitled "Statute of Limitations in Contracts for Sale" and is directed towards a buyer/seller relationship. *Id.* Breach occurs and the statute begins to run when tender of delivery is made: since delivery is made only to the buyer, the court reasoned that the only relevant parties seem to be the buyer and seller. *Id.* As further support for the contractual nature of § 2-725, the court quoted Dean Murray's notation that the comment to the statute states: "This article takes *sales contracts* out of the general laws limiting the time for commencing *contractual actions* and selects a four-year period as the most appropriate to modern business practice." *Id.* at 1105 (quoting Murray, *Products Liability*, *supra* note 30, at 267 (quoting U.C.C. § 2-725 Official Comment (1978) (emphasis supplied by Dean Murray))).

The court also noted that recovery by nonpurchasers would be completely accidental under the U.C.C. statute of limitations, since it would begin to run on the date of tender of delivery. *Id.* Referring again to Dean Murray's analysis, the court stated that adhering to the U.C.C. statute of limitations could result, in some cases, in a nonpurchaser being barred from bringing an action before he or she has sustained an injury. *Id.* (citing Murray, *supra* note 30, at 270). Thus, the purchaser's ability to recover would depend upon the accidental event of how close in time to delivery the person was injured. *Id.*

65. 502 Pa. at 560, 467 A.2d at 812. As a preliminary matter, the court announced that the trespass actions were time-barred; thus the court dealt only with the



of warranty law in Pennsylvania.<sup>66</sup> First, the court explained that Pennsylvania had abolished privity in warranty actions because of the unfairness, under present marketing practices, of insulating the manufacturer of a defective product from liability to an injured nonbuyer consumer.<sup>67</sup> Noting that warranties could arise without the parties' intent to make a contract, Pennsylvania courts had reasoned that warranties could exist between parties who had not dealt with one another.<sup>68</sup> Moreover, the *Williams* court explained that the privity requirement was condemned in Pennsylvania because of the belief that, in the context of nonpurchaser actions, the U.C.C. should be co-extensive with 402A.<sup>69</sup> Finally, the *Williams* court stated that

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assumpsit portion of the complaint that alleged a breach of warranty by the manufacturer and the retail seller of the ladder. *Id.* at 563, 467 A.2d at 814.

66. *Id.* at 565-66, 467 A.2d at 815. The court detailed the history of the action for breach of warranty, noting its development as a contract action replete with the requirements of an agreement and privity. *Id.* at 563, 467 A.2d at 814. The court explained that breach of warranty was originally a tort concept arising from the warrantor's consent to be bound. *Id.* The requirement of consent was later eliminated. *Id.* However, because the action involved an undertaking and the existence of a warranty, the action was deemed as sounding in contract. *Id.* As the contractual nature of warranty became more pronounced, lack of privity between the plaintiff and defendant developed as a defense. *Id.* at 563-64, 467 A.2d at 814. Privity was defined as "[t]hat connection or relationship which exists between two or more contracting parties." *Id.* at n.11.

According to the court, the requirement of privity was clearly established in Pennsylvania when the U.C.C. was adopted and, although the U.C.C. extended causes of action for breach of warranty to members of the buyer's family, household or a guest in the purchaser's home, the Pennsylvania courts continued to require privity as to employees of the purchaser. *Id.* at 564, 467 A.2d at 814-15 (citing *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963)).

67. *Id.* at 564-65, 467 A.2d at 815. The court targeted the seminal case of *Henningens v. Bloomfield Motors, Inc.*, as having triggered the fall of privity in products liability cases. *Id.* at 565, 467 A.2d at 815 (citing *Henningens v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960)). The *Williams* court noted that *Henningens* abolished horizontal privity and extended the implied warranty to the ultimate purchaser on the grounds that it was a necessary response to modern marketing conditions. *Id.* The supreme court then explained that after Pennsylvania's adoption of strict liability for defective products, it was a logical step for privity to fall in breach of warranty cases. *Id.*

For a discussion of the fall of privity in Pennsylvania warranty cases, see notes 45-48 and accompanying text *supra*.

68. 502 Pa. at 567, 467 A.2d at 816. The *Williams* court noted that *Salvador I* recognized that the abolition of privity made the manufacturer essentially a guarantor of his product, a result commended by the court. *Id.* (citing *Salvador I*, 457 Pa. at 32-33, 319 A.2d at 907-08 (1974)). The *Salvador I* court would not allow the fact that the purchaser had no contractual relationship with the manufacturer to defeat the claim. *Id.*

69. *Id.* at 566, 467 A.2d at 815. The court stated that "[t]o retain this tort-contract dichotomy with its haphazard, crazy quilt of exceptions and appendages can only cause . . . [l]egal confusion . . . . Aggrieved plaintiffs have scarcely known whether to sue in deceit or fraud or for negligence or breach of warranty—or indeed whether it was worthwhile to sue at all." *Id.* at 566, 467 A.2d at 815-16 (quoting *Kassab v. Central Soya*, 432 Pa. 217, 234-35, 246 A.2d 848, 856 (1968) (quoting *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 129, 90 N.W.2d 873, 878 (1958))). The *Williams* court noted that although the causes of

Pennsylvania courts had also been motivated by a desire not to allow a non-purchaser to be denied recovery under warranty theory because of privity requirements when, under the identical factual situation, that nonpurchaser could recover in tort under section 402A.<sup>70</sup> The *Williams* court recognized that, to avoid this anomaly, Pennsylvania courts would not allow the form of action to control and would instead seek to achieve a degree of legal symmetry between actions under the U.C.C. and section 402A.<sup>71</sup>

However, the *Williams* court then found that "Pennsylvania was not to enjoy a respite after the successful siege on the citadel of privity" because the dispute over the appropriate statute of limitations "resuscitate[d] the ghost of privity."<sup>72</sup> In an effort to avoid this result, the court determined that the *Salvador II* court had erred when it resurrected a tort/contract dichotomy in warranty actions and applied the two-year personal injury statute of limitations to third-party plaintiffs.<sup>73</sup> The *Williams* court found that, instead of creating legal symmetry, the *Salvador II* court had created legal asymmetry by treating direct purchasers differently from all other consumers in warranty actions even though both groups of individuals had received their injuries in the same accident.<sup>74</sup> In light of Pennsylvania case law criticizing the use of privity and the lack of legal symmetry that would result if *Salvador II* were followed, the court expressly declared its disapproval of the holding in *Salvador II*.<sup>75</sup>

According to the *Williams* court, this tort/contract dichotomy failed to

action under the U.C.C. and § 402A were co-extensive, they were not identical. *Id.* n.16, 467 A.2d at 815 n.16.

70. *Id.* at 567, 467 A.2d at 816. (citing *Salvador I*, 457 Pa. 24, 32-33, 319 A.2d 902, 907-08 (1974)).

71. *Id.* at 567-68, 467 A.2d at 816. The court stated that, with the adoption of strict products liability by Pennsylvania, "the same demands of legal symmetry which once supported privity now destroy it." *Id.* at 568, 467 A.2d at 816 (quoting *Salvador I*, 457 Pa. at 32-33, 319 A.2d at 907-08 (quoting *Kassab*, 432 Pa. at 229, 246 A.2d at 853)).

72. 502 Pa. at 568, 467 A.2d at 817. The court stated that the *Salvador II* court resuscitated the privity requirement when it applied the two-year personal injury statute of limitations to a breach of warranty action brought by a party not in privity of contract with the defendant. *Id.* Earlier in the opinion, the *Williams* court made it clear that such a distinction between a direct buyer and injured third parties had been discredited by the Pennsylvania Supreme Court in products liability cases. *Id.* at 562, 467 A.2d at 813.

73. *Id.* at 569, 467 A.2d at 817. The *Williams* court disapproved of the *Salvador II* court's application of a two-year statute of limitations to third-party breach of warranty actions that alleged personal injury based on the tortious nature of the complaint. *Id.* at 569 n.17, 467 A.2d at 817 n.17.

74. *Id.* at 568, 467 A.2d at 817. The *Williams* court acknowledged that the court in *Salvador II* was motivated by an effort to maintain symmetry between § 402A and breach of warranty claims under the U.C.C. *Id.* However, the court claimed that *Salvador II* created the reverse effect when it selected a statute of limitations for third-party actions that differed from the statute of limitations that governed actions by parties in privity of contract. *Id.*

75. *Id.* at 570, 467 A.2d at 818. The court concluded that to embrace the holding in *Salvador II* would "clearly be a disservice to our jurisprudence." *Id.*

recognize that in the area of products liability "we enter the borderland of tort and contract."<sup>76</sup> Thus, the court found that the mere fact that a warranty claim sought recovery for personal injury did not justify a court's deviating from the U.C.C.'s prescribed statute of limitations in order to choose a personal injury limitations period.<sup>77</sup> Moreover, the court found that there was "no justification in restoring the concept of privity" since the U.C.C. itself limited neither recovery nor the availability of its statute of limitations to direct purchasers.<sup>78</sup> Therefore, the *Williams* court concluded that neither the concept of privity of contract nor the nature of the breach of warranty action justified any deviation from the U.C.C. statute of limitations.<sup>79</sup> As a result, the *Williams* court held that the U.C.C. four-year statute of limitations governed all breach of warranty claims brought under the U.C.C. regardless of whether the claim sought recovery for commercial loss or personal injuries, and regardless of whether the plaintiff was a direct purchaser or third party.<sup>80</sup>

Analyzing the decision in *Williams*, it is submitted that it is unfortunate that the Pennsylvania Supreme Court adopted the U.C.C. four-year statute of limitations with respect to breach of warranty claims for personal injuries, regardless of the status of the plaintiff as a third party or a contracting

76. 502 Pa. at 569, 467 A.2d at 817. The court explained: "It is not a question of whether a claim sounds in tort or assumpsit. Rather it sounds in both." *Id.* The court recognized that at least 16 jurisdictions have remedied this problem legislatively by drafting a specific statute of limitations in the field of products liability. *Id.* & n.18. See ALA. CODE § 6-5-502 (1984 Supp.); ARIZ. REV. STAT. ANN. § 12-551 (1982); ARK. STAT. ANN. § 34-2803 (1983 Supp.); COLO. REV. STAT. § 13-80-127.5 (1983 Supp.); CONN. GEN. STAT. ANN. § 52-577a (West Supp. 1984); FLA. STAT. ANN. § 95.031 (West 1982); IDAHO CODE § 6-1403 (1984 Supp.); ILL. ANN. STAT. ch. 110, § 13-213 (Smith-Hurd 1984); IND. CODE ANN. § 33-1-1.5-5 (West 1983); MICH. COMP. LAWS § 600.5805 (1984 Supp.); MINN. STAT. ANN. § 541.05 (West Supp. 1984); NEB. REV. STAT. § 25-224 (1979); N.H. REV. STAT. ANN. § 507-D:2 (1983); OR. REV. STAT. § 30.905 (1983); TENN. CODE ANN. § 29-28-103 (1980). Iowa, the sixteenth state cited by the court, has a uniform statute of limitations of two years for all actions founded on personal injuries, "whether based on contract or tort." IOWA CODE ANN. § 614.1 (West Supp. 1984).

77. *Id.* at 569, 467 A.2d at 817.

78. *Id.* The court stated that the extension of liability under the U.C.C. to persons not in privity with the manufacturer or marketer of a product does not validate application of a tort statute of limitations. *Id.* at 569-70, 467 A.2d at 817. The court quoted the comment to U.C.C. § 2-318, which provides that

[t]he first alternative expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extends to other persons in the distributive chain.

*Id.* at 570, 467 A.2d at 818 (quoting U.C.C. § 2-318, comment 3 (1978)).

79. 502 Pa. at 570, 467 A.2d at 818.

80. *Id.* The court concluded that injured parties, irrespective of their status as direct buyer or third party beneficiary, have the option of bringing suit in tort under the tort statute of limitations, or under the U.C.C. and its corresponding statute of limitations. *Id.*

party.<sup>81</sup> In reaching its decision, the *Williams* court reversed the trend in Pennsylvania of treating products liability claims brought by nonpurchasers as subject to the state personal injury statute of limitations and not the statute provided by the U.C.C.<sup>82</sup>

Moreover, in *Williams*, the supreme court expressly stated that its conclusion was motivated by a desire to achieve legal symmetry between section 402A and U.C.C. breach of warranty claims, and was also grounded in reliance on the court's previous rejection of any privity requirements in suits by third parties in order to maintain a cause of action for breach of warranty under the U.C.C.<sup>83</sup> However, it is submitted that the court did not achieve its goal of legal symmetry and that, after the court's holding, the form of the action will still control over the substance of the complaint. Further, it is suggested that the court's fear of renewed privity requirements is misplaced.

The Pennsylvania Supreme Court had previously espoused the principle of legal symmetry in order to equate recovery under warranty theory with recovery under section 402A.<sup>84</sup> After the *Williams* decision, the two

81. It is suggested that, given the availability of a cause of action for the recovery of personal injuries under both the U.C.C. and § 402A, courts will continue to struggle with the issue of the appropriate statute of limitations. The mixed tort/contract nature of any products liability action lends itself to plausible arguments supporting the adoption of either the personal injury or the U.C.C. statute of limitations. For a discussion of the case law and pertinent arguments supporting the adoption of either theory, see notes 31-40 and accompanying text *supra*.

To resolve the problem created by the differing statutes of limitations, some states have adopted a single products liability statute of limitations. See note 76 *supra*. The Model Uniform Product Liability Act proposes a two-year statute to govern all products liability claims and specifically preempts the U.C.C. MODEL UNIFORM PRODUCT LIABILITY ACT §§ 103(A), 110(C), 44 Fed. Reg. 62,714, 62,720, 62,732 (1979).

Many scholars have commented that the U.C.C. provided for the recovery of personal injuries for defective products in order to allow for the development of strict products liability under the guise of warranty/contract theory. See, e.g., Murray, *Products Liability*, *supra* note 30, at 265. This circuitous development of the theory of products liability was subsequently dwarfed by the specific development of the theory of strict products liability under § 402A. *Id.* It is submitted that courts will continue to struggle with the differing statutes of limitations without ever finally resolving the conflict until the legislature clarifies the action and the applicable statute of limitations. Perhaps the legislature should eliminate the personal injury recovery for defective products presently permitted by the U.C.C.

82. For a discussion of the Pennsylvania cases that established this trend, see notes 49-64 and accompanying text *supra*.

83. 502 Pa. 557, 570, 467 A.2d 811, 818. For a discussion of the *Williams* court's desire to achieve legal symmetry between the U.C.C. and § 402A, see notes 69-71 and accompanying text *supra*. For a discussion of the court's reliance on the previous abolition of privity requirements in Pennsylvania, see notes 72 & 75 and accompanying text *supra*.

84. The adoption of § 402A permitted third parties to recover in products liability suits despite the absence of privity of contract between the third party and the defendant. For a discussion of the requirements for a cause of action under § 402A, see note 23 and accompanying text *supra*. The Pennsylvania Supreme Court then abolished privity of contract in breach of warranty cases to establish symmetry between the two theories of recovery. For a discussion of the Pennsylvania Supreme

theories of recovery will be symmetrical in the sense that direct purchasers and third parties will be treated without distinctions based on their status with respect to the defendant under either theory. However, these parties may invoke one of two radically different statutes of limitations depending upon whether they base their claim in warranty or strict liability.<sup>85</sup> If the *Williams* court was seeking absolute symmetry, it is submitted that it has failed. Moreover, in doing so, it is suggested that the court ignored an even more important goal—that of assuring that the substance rather than the form of the action control so that identical factual situations will not be decided differently simply because one is framed in tort and the other in contract.<sup>86</sup> Presently an injured third party can merely change the form of the action and possibly have two more years to bring a cause of action depending on the date the product was delivered to the buyer.<sup>87</sup> It is submitted that this result lends no clarity and uniformity to this troubled area of the law.

The *Williams* court also spent a great deal of time detailing the abolition of privity requirements in actions brought under the U.C.C. and reasons therefor.<sup>88</sup> It is suggested, however, that the court's reliance on the abolition of privity as support for the application of the U.C.C. statute of limitations to direct purchasers and third parties alike is not warranted. Previously, the Pennsylvania Supreme Court had discredited privity as a condition precedent to maintenance of a products liability claim couched in breach of war-

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Court decisions abolishing the concept of privity, see notes 45-48 and accompanying text *supra*. Although Pennsylvania courts strove to make the two theories co-extensive, they are not identical. See 502 Pa. at 566 n.16, 467 A.2d at 815 n.16.

85. After the decision in *Williams*, an injured plaintiff suing in trespass will be subject to the two-year personal injury statute of limitations. However, if the same plaintiff brings the suit under the breach of warranty theory of the U.C.C., a four-year statute of limitations is applicable. Although the two statutes run from different dates, it is submitted that this result also leads to legal asymmetry.

86. See *Kassab*, 421 Pa. at 229, 246 A.2d at 853. "The spirit of *Kassab* is clear: the form of action should not control. That is to say, the caption atop the complaint should not affect the substantive nature of the claim." Murray, *Products Liability*, *supra* note 30, at 274.

The *Salvador I* court also invoked this rationale to abolish the concept of horizontal privity in breach of warranty actions. For a discussion of *Salvador I*, see note 48 *supra*.

87. The U.C.C. statute of limitations extends four years from the date of tender of delivery of the goods. U.C.C. § 2-725 (1978). If a plaintiff is injured shortly after the product was delivered to the buyer, that plaintiff may have up to two additional years to bring a cause of action labelled as a breach of warranty action if the two-year personal injury statute of limitations has run. It has been suggested that one reason an injured plaintiff would proceed under the U.C.C. with all of its additional burdens is specifically because the personal injury statute of limitations ran before the suit was commenced. See Murray, *Products Liability*, *supra* note 30, at 257, 260. It is submitted that there is little else to gain by pursuing the more cumbersome route of a breach of warranty claim other than additional time to bring suit. For a discussion of difficulties inherent in suing under warranty theory, see notes 17-20 and accompanying text *supra*.

88. For a discussion of the *Williams* court's reliance on the previous abolition of privity requirements in Pennsylvania, see notes 72 & 75 and accompanying text *supra*.

ranty law, reasoning that, with the adoption of section 402A, privity requirements under the U.C.C. could not remain.<sup>89</sup> However, it is submitted that the *Williams* court never stated why the court's abolition of privity for the express purpose of permitting an injured third party to bring a cause of action in warranty compelled the abolition of privity when a court was considering the appropriateness of a particular statute of limitations.<sup>90</sup> Rather, given the previous condemnation of privity in order to allow third parties to bring what were essentially products liability actions under the U.C.C. and the effort to make such recovery co-extensive with tort recovery, it is suggested that the better approach would have been to apply the tort statute of limitations to actions by third parties under the U.C.C.<sup>91</sup> As the

89. The Pennsylvania Supreme Court had abolished the concept of vertical privity of contracts in order to permit a purchaser to maintain a cause of action for breach of warranty against a remote manufacturer. *Kassab v. Central Soya*, 432 Pa. 217, 231, 234, 246 A.2d 848, 854, 856 (1968). Similarly, the court later held that the absence of horizontal privity of contract could not be raised to defeat an action for breach of warranty. *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 32, 319 A.2d 903, 907 (1974). It is submitted that both decisions addressed the issue of privity of contract solely in the context of parties eligible to sue and be sued, and not in connection with a general prohibition of using privity of contract as a requirement in any form or setting. The *Williams* court itself speaks of its prior abolition of privity requirements in the context of maintenance of an action. 502 Pa. at 565-66, 467 A.2d at 815-16.

90. The *Williams* court correctly stated that the superior court had made distinctions between the direct buyer and third parties for statute of limitations purposes and not for substantive reasons. 502 Pa. at 561-62, 467 A.2d at 813. Although the supreme court then went on to discuss the substantive reasons for previously abolishing privity requirements, it is submitted that the court never explained why those reasons also compelled the abolition of privity when choosing the appropriate statute of limitations or why the superior court had erred in adopting such a distinction.

The *Williams* court stated that the primary reasons behind the abolition of privity requirements in Pennsylvania were "the unfairness of insulating the remote manufacturer, who in fact made the defective product, and barring a non-buyer consumer who is in fact injured by that defect under present marketing practices." 502 Pa. at 565, 467 A.2d at 815. It is suggested that these reasons are inapplicable to the consideration of the status of the plaintiff in choosing the appropriate statute of limitations. The parties addressed in those concerns will still be able to maintain the cause of action and still be capable of being sued. The question becomes, rather, what is then the appropriate time in which to compel the commencement of such a suit.

It is suggested that the *Williams* court should have continued its analysis and examined the policies behind different statutes of limitations, the type of action being brought, and the specific language of the U.C.C. statute of limitations before deciding that the four-year statute of limitations applied. For a discussion of the purposes of statutes of limitations, see note 25 *supra*. For a discussion of statutes of limitations in connection with the U.C.C. and personal injury conflict, see Note, *supra* note 25. *But see* Case Comment, *U.C.C.—Statute of Limitations—Conflicts Between Personal Injury and Sales Contract Statutes of Limitations*, 75 W. VA. L. REV. 201 (1972).

For a discussion of the specific language of the U.C.C. statute of limitation, see notes 96-98 and accompanying text *infra*.

91. Although the *Williams* court refused to reestablish the concept of privity in connection with the applicable statute of limitations, it is submitted that the U.C.C. adopts a privity of contract requirement in the notice section. *See* U.C.C. § 2-607 comment 5 (1978). Under the U.C.C., after acceptance of the tender of delivery, a

court in *Salvador II* noted, the extension of warranties under the U.C.C. was a judicial prerogative; the judiciary had the power and should have exercised this power to determine the appropriate statute of limitations that would govern these third party actions.<sup>92</sup>

The *Williams* court stated that the mere fact that an action for breach of warranty sought recovery for personal injuries should not justify any deviation from the U.C.C. prescribed statute of limitations.<sup>93</sup> It is submitted that the U.C.C. statute of limitations should not govern third party claims under the U.C.C. not because the warranty claim seeks recovery for personal injury claims but, rather, as recognized by the court in *Hahn*, because the U.C.C. statute of limitations is not the prescribed statute with regard to those claims.<sup>94</sup> It is suggested that the U.C.C. statute was intended to govern purely commercial transactions between the contracting parties and was not intended to apply to third party strict products liability claims.<sup>95</sup> The four-

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buyer must notify the seller of a breach of warranty within a reasonable time after the buyer discovers or should have discovered the breach or be barred from any remedy under the U.C.C. *Id.* § 2-607(3)(a). Third parties are exempted, in part, from the notice requirement because they have nothing to do with acceptance. *Id.* § 2-607 comment 5 (1978). However, the third party must notify the seller of the occurrence of an injury once he has become aware of it. *Id.* Similarly, it is submitted that the *Williams* court should have recognized that the U.C.C. statute of limitations is without benefit to third parties since they have nothing to do with delivery and, therefore applied the two-year personal injury statute of limitation running from the date of injury. *See Murray, Products Liability, supra* note 30, at 268. Third party beneficiaries do not fall within the reason of the notice section because they have nothing to do with acceptance or delivery. *Id.* (citing U.C.C. § 2-607 comment J).

92. The U.C.C. provides three alternatives for the extension of the benefits of warranties to third parties. *See* U.C.C. § 2-318 (1978). *See also* note 18 and accompanying text *supra*. A comment to that section specifically states that, beyond these alternatives, the section is neutral and does not affect the developing case law. U.C.C. § 2-318 comment 3 (1978). Most courts, including those in Pennsylvania, have expanded the protection afforded by the U.C.C. to those not in privity of contract with the defendant through the use of this comment. *See, e.g., Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974). *See also* Note, *supra* note 17, at 599.

It is submitted that, since the courts have judicially extended the protection of the U.C.C. beyond that expressly permitted by the statute and allowed suits by third parties, the courts should also independently choose the appropriate statute of limitations applicable to that judicially created cause of action. *See, e.g., Salvador II*, 256 Pa. Super. at 340-41, 389 A.2d at 1154.

93. 502 Pa. at 568-69, 467 A.2d at 817.

94. *See Murray, Products Liability, supra* note 30 at 269-70. Dean Murray reasoned as follows:

The language and purpose of Section 2-725 permit a strong argument that it should not apply to third party beneficiaries protected under the literal language of the Code or judicial extensions thereof. . . . [T]he non-buyer plaintiff who is personally injured as a result of a defective product has a tort action which should not be governed by a statute of limitations which is clearly designed for use in contractual situations.

*Id.*

95. *Id.* at 267. Primarily, Chapter 2 of the U.C.C. deals with situations resulting from the sale of goods between a buyer and seller in the "conventional commercial setting and claims based on economic loss or loss-of-the-bargain." *Heavner v. Uni-*

year statute is contained in the section titled "Statutes of Limitations in Contracts for Sale" and is directed toward a situation involving a commercial transaction.<sup>96</sup> Section 2-725 requires an action to be commenced within four years after the accrual of the cause of action.<sup>97</sup> The action accrues at tender of delivery regardless of the aggrieved party's knowledge of the breach.<sup>98</sup> At the time of delivery the only available and relevant parties are the buyer and the seller, so the running of the statute of limitations upon delivery can only be relevant to these two parties.<sup>99</sup> If it were otherwise, as the *Salvador II* court noted, the court's strict reliance on the U.C.C. statute of limitations can lead to the absurd result that the statute could begin to run or could even expire before the third party plaintiff ever received the product or before the plaintiff suffered injury.<sup>100</sup> It is submitted that this is fur-

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royal, Inc., 63 N.J. 130, 153, 305 A.2d 412, 424 (1973). The U.C.C. statute of limitations, it has been said, "explicitly relates to actions 'for breach of any contract for sale' and presumably was not intended to apply to tort actions between consumers and manufacturers who were never in any commercial relationship or setting." *Rosenau v. City of New Brunswick*, 51 N.J. 130, 143, 238 A.2d 169, 176 (1968).

96. See U.C.C. § 2-725 (1978). The comment to the U.C.C. statute of limitations states that "[t]his Article takes *sales contracts* out of the general laws limiting the time for commencing *contractual actions* and selects a four year period as the most appropriate to modern business practice." *Id.* comment (emphasis added). See also Murray, *Products Liability*, *supra* note 30, at 267.

97. See U.C.C. § 2-725(1) (1978).

98. *Id.* § 2-725(2).

99. See Murray, *Products Liability*, *supra* note 30, at 267. Dean Murray reached this conclusion after an analysis of the specific language of the statute and its implications. Dean Murray made the following observations:

- 1) Delivery is made only to the buyer.
- 2) If there is a breach of warranty upon delivery only the buyer has a cause of action.
- 3) Only the buyer and seller have a legal relationship at that time.
- 4) The U.C.C. states that the cause of action accrues regardless of the aggrieved party's knowledge of the breach.
- 5) The U.C.C. defines an aggrieved party as anyone entitled to a remedy.
- 6) When the statute starts to run at tender of delivery, the only possible aggrieved party is the buyer so the buyer is the only party entitled to a remedy at that time.

*Id.*

100. *Id.* at 269. See also Stevenson, *supra* note 28, at 327-34. If delivery of the defective product to the buyer occurs more than four years before the plaintiff is injured, the plaintiff will be barred from bringing a breach of warranty claim. However, if the product is delivered less than four years before injury under the same factual situation, the plaintiff will be able to proceed under the U.C.C.

This was the result in *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969) (plaintiff barred from bringing action seven years from tender of delivery after she was seriously injured by plate glass door). *Mendel* has been expressly overruled. See *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 573 N.Y.S.2d 39 (1975) (plaintiffs, injured more than eight years after delivery of centrifuge extractors, permitted to bring action within three years after date of injury). The fact that Pennsylvania would allow a plaintiff barred from recovery after four years from tender of delivery to recover under § 402A within two years from the time of injury should not alter the conclusion that the present interpretation of the applicable statute of limitations is inaccurate: "[T]he



ther evidence of the inapplicability of the U.C.C. statute of limitations to injured third parties.

The impact of the *Williams* decision will be most significant in regard to its disparate treatment of injured consumers depending on how close in time their injury is to the delivery of the product to the buyer. An injured consumer that fails to bring a strict products liability cause of action within the two-year personal injury statute of limitation may have up to two additional years to bring an action for breach of implied warranty depending on the accidental circumstances of when the product was delivered to the buyer.<sup>101</sup> Given the Pennsylvania Supreme Court's emphasis on legal symmetry, it is unfortunate that the court failed to apply the two-year personal injury statute of limitation to third party breach of warranty actions, and thus failed to lend necessary uniformity to the area of products liability.<sup>102</sup>

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fact that a just result is possible notwithstanding an unfortunate interpretation of the Code statute of limitations does not support the vitally important value of law settlement." Murray, *Products Liability*, *supra* note 30, at 269.

101. See Murray, *Products Liability*, *supra* note 30 at 270. Dean Murray posed the following hypothetical to illustrate the asymmetric result created by the court:

For example, if a non-buyer-plaintiff is personally injured and does not commence his action until twenty-five months after the injury, he may not use 402A; and, if the product was delivered to the buyer more than four years before he commences his action, neither may he use the Code. On the other hand, non-buyer B, under otherwise identical circumstances *may* use the Code if the product happened to be delivered to the buyer less than four years from the time the action is commenced, though the action is commenced twenty-five months after the injury was sustained. This irreconcilable possibility should be eliminated if for no other reason than to foster the . . . underlying purposes of the Code, simplification and uniformity . . . .

*Id.*

102. *Id.* at 274. As Dean Murray noted, "only the most myopic and procrustean interpretation of the Code limitations section can lead to the chaotic alternative which currently prevails in Pennsylvania." *Id.* It is unfortunate that the court in *Williams* chose not to "remove this vestige of irrationality." *Id.*

It has been suggested that "courts . . . have tended to devote most of their energies to gymnastic exercises, juggling result-oriented language to permit the plaintiff to recover." Note, *supra* note 17, at 608. In fairness to the *Williams* court, it must be noted that, when faced with seriously injured plaintiffs, the intricacies of the U.C.C. statute of limitations probably do not seem overwhelmingly compelling, particularly when other arguments that would permit the plaintiffs to recover are also plausible. However, the fact that another theory which allows recovery is possible despite an unfortunate interpretation of the U.C.C. statute of limitations also does not "support the vitally important value of law settlement." Murray, *Products Liability*, *supra* note 30, at 269.