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Richard C. Ausness, *Replacing Strict Liability with a Contract-Based Products Liability Regime*, 71 Temple L. Rev. 171 (1998).

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Notes/Citation Information

Temple Law Review, Vol. 71, No. 2 (Summer 1998), pp. 171-215

TEMPLE LAW REVIEW

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OF HIGHER EDUCATION

VOL. 71 NO. 2

SUMMER 1998

ARTICLES

REPLACING STRICT LIABILITY WITH A CONTRACT- BASED PRODUCTS LIABILITY REGIME

*Richard C. Ausness**

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INTRODUCTION

When strict products liability first appeared on the scene some thirty-five years ago, it was heralded as a boon to consumers whose claims to compensation had hitherto been frustrated by the law of sales.¹ Warranty law, it was said, worked fairly well in purely "commercial" transactions, but tort law did a better job in cases where ordinary consumers suffered personal injuries or property damage from defective products.² To be sure, defenders of warranty law pointed out that the newly-drafted Uniform Commercial Code (the "Code" or "U.C.C.") was much more consumer friendly than the old Uniform Sales Act.³ Nevertheless, the proponents of strict liability prevailed, and to this day strict liability in tort remains the pre-eminent theory of products liability.⁴

However, as the present century draws to a close, academic support for the existing tort-based system of strict products liability appears to be receding.⁵ Indeed, some legal commentators have begun to suggest that the current products liability system be scrapped and replaced with something better.⁶ These fertile minds have been responsible for a number of novel and ingenious proposals but, surprisingly, almost no one has suggested sales law as a possible alternative to strict liability. I will attempt to remedy this over-

1. See generally William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1127-34 (1960) (discussing difficulties and disadvantages of applying concept of warranty to tort situations).

2. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962) ("[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products . . .").

3. See Reed Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L. REV. 205, 206 (1977) ("My general complaint is that section 402A has been either unnecessary, if it did not undercut the Uniform Sales Act or the Code, or unconstitutional, if it did."); Reed Dickerson, *Was Prosser's Folly Also Traynor's*, 2 HOFSTRA L. REV. 469, 485 (1974) ("[T]he Uniform Commercial Code preempts at least part of the domain claimed by § 402A.").

4. See Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 194 (1991) ("As a result of *Greenman* and its progeny, and section 402A of the Second Restatement of Torts, strict liability has become a widely accepted basis for liability in products liability cases.").

5. See Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 5 (1995) ("The literature overflows with criticism, and anyone perusing the law reviews in recent years might well come away believing that the predominant view is that products liability has been a disaster.").

6. See *infra* Part I for a critique of strict products liability.

sight by taking a fresh look at the Uniform Commercial Code's warranty provisions.

This article is divided into five parts. Part I examines the shortcomings of the current tort-based system of products liability. In this portion of the article, I contend that strict liability does not necessarily promote product safety, nor does it distribute product-related risks fairly or efficiently. Finally, I conclude that the present system of products liability is outrageously expensive to administer, distributing less than fifty cents on the dollar to the victims of product-related injuries.

In Part II, I argue that products liability should be viewed as a form of insurance. In addition, I contend that products liability law should abandon its traditional concern with product safety, broad risk-spreading, and corrective justice, and instead focus on providing consumers with warranty/insurance protection against product-related injuries at the lowest possible cost.

Part III examines some of the basic features of the Uniform Commercial Code and identifies several assumptions that underlie the notion that a contract-based products liability system can adequately protect consumer interests. The first assumption is that a contract-based liability regime will rely primarily on express warranties, running directly from producer to consumer, to carry out this insurance function. The implied warranty of merchantability, even when modified or limited, requires buyers to purchase a socially-mandated level of warranty or insurance protection whether they desire it or not. Express warranties, on the other hand, allow the parties to allocate product-related risks in a way that maximizes their utility. The second assumption is that consumers have sufficient knowledge and bargaining power to avoid being swindled or coerced by producers. This assumption is supported by studies that focus on the behavior of markets, concluding that producers respond to consumer preferences with respect to warranty/insurance protection.

Part IV examines some of the Code's potential shortcomings. One concern is privity of contract. According to traditional doctrine, warranty protection extends only to the original buyer and not to other parties who may be injured by the product. Although the privity requirement has lost much of its force during the past thirty years, it still can be troublesome. Another problem is the Code's notice provision, which requires buyers to notify sellers of breach of warranty within a reasonable time or lose their right to sue. If this requirement was rigorously enforced it could strip unsophisticated consumers of the warranty/insurance protection for which they bargained.

Disclaimers and warranty limitations constitute another pitfall. While these concepts can serve a useful and benign purpose by allowing the parties to adjust the level of insurance coverage provided, they also can operate in an oppressive manner against ignorant or economically-disadvantaged buyers. The Code's statute of limitations is another sticking point. Unlike the statute of limitations in tort cases, which begins to run when the plaintiff's injury occurs, or in some cases, when the injury is discovered, a breach of warranty claim under the Code's statute of limitation typically begins to run

as soon as the goods are delivered. Because this limitation period is relatively short, it may run out before any injury occurs, thereby leaving the victim without a remedy.

In Part V, I consider whether the problems described in part IV are serious enough to require correction. The first issue is privity. Because I envision a system of express warranties issuing directly from producers to consumers, I conclude that both vertical privity and horizontal privity requirements ought to be eliminated for consumer-related warranty claims. In the absence of privity requirements, the parties themselves can decide warranty coverage issues. A second concern is the notice requirement of U.C.C. section 2-607 (3)(a). Although this provision is useful and reasonable in commercial transactions, it may serve as a trap for the unwary consumer. Therefore, I recommend eliminating the notice requirement in transactions between producers and ordinary consumers.

A third area of controversy involves disclaimers and limitations on remedies. These contractual devices are essential to the furnishing of efficient levels of insurance protection by producers. I assume that competitive forces within the market will discourage producers from scaling back their insurance coverage without a corresponding reduction in product prices. If this does not occur, however, the courts can invalidate exculpatory provisions by invoking the Code's unconscionability provisions.

The final, and most intractable, problem is the Code's statute of limitations. The Code's four-year date-of-sale rule may be too short where personal injury claims are involved. On the other hand, the date-of-injury and discovery doctrine approaches employed by tort law may keep the producer on the hook for too long. I conclude that the traditional date-of-sale rule be retained. With the exception of automobiles and major appliances, most consumer goods have relatively short useful lives and producers can offer express warranties for future performance under section 2-725 (2) for products that present long-term risks to their users.

Therefore, I conclude that the Uniform Commercial Code, with certain minor changes, might indeed be preferable to the present tort-based system, particularly if we view products liability as an insurance mechanism rather than as an instrument of accident cost avoidance or unlimited risk distribution.

I. A CRITIQUE OF STRICT PRODUCTS LIABILITY

The current operation of products liability law has generated significant criticism.⁷ Many argue that strict liability has caused unwarranted price in-

7. See William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 639 ("Current products liability law is a mess. Its foundation is flawed, its content is exceedingly complex, and its effect on personal injury litigation is pernicious.").

creases⁸ and undermined America's competitive position in world markets.⁹ In addition, some legal scholars allege that strict tort liability has destabilized the liability insurance industry.¹⁰ Finally, it has been suggested that the existing liability regime has siphoned money away from product research and development,¹¹ discouraged companies from introducing new products,¹² and even caused some firms to remove existing products from the market.¹³

A. Accident Cost Avoidance

A number of legal commentators have expressed doubts about the ability of strict products liability to control accident costs. Strict liability is supposed to encourage producers to make safer products.¹⁴ According to conventional wisdom, product sellers, and particularly manufacturers, are in a good position to make their products safe,¹⁵ but have little incentive to invest in product safety as long as the costs of product-related injuries are borne by others.¹⁶ The imposition of strict liability on producers supposedly

8. See Tim Moore, Comment, *Comment K Immunity to Strict Liability: Should Prescription Drugs Be Protected?*, 26 HOUS. L. REV. 707, 718 (1989) (describing effect of tort liability on price of DTP vaccine).

9. See William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 245 (1995) ("While not the sole culprit, strict tort liability has been a significant contributor to the decline in competitiveness of American industry.").

10. See Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 338 (1993) ("Some features operating within the tort system, however, appear to aggravate the problem of unaffordable (or unavailable) insurance coverage.").

11. See Worthington, *supra* note 9, at 246 ("Vast resources are diverted from research and development to pay the spiraling cost of defending lawsuits.").

12. See C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 97 (1983) ("Because manufacturers cannot predict the standards by which their products will be judged, they may be reluctant to introduce new designs or innovative products."); Marcus L. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 950 (1957) ("A less obvious but perhaps more socially perilous result which will follow the inauguration of strict liability, is the impeding of progress in the development of new products and the improvement of old ones.").

13. See Pennington Parker Landen, *Federal Preemption and the Drug Industry: Can Courts Co-Regulate?*, 43 FOOD DRUG COSM. L.J. 85, 119 (1988) ("In addition to chilling new remedies, litigation has already forced some manufacturers to remove useful products from the market."); George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 500 (1987) ("[A] recent Conference Board survey of the nation's 500 largest corporations showed that twenty-five percent had removed products or services from markets in response to increased corporate tort liability.").

14. See Robert A. Prentice & Mark E. Roszkowski, "Tort Reform" and the Liability "Revolution": *Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 274 (1991-92) ("Strict product liability induces manufacturers to make safer products.").

15. See David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 711 (1980) ("Manufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products that they make and sell.").

16. See Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932, 933 (1993) ("Thus, but for tort liability, producers would have inadequate incentives to compete either in reducing risk or in offering warranties.").

corrects this problem by forcing manufacturers to choose between paying damages for product-related injuries or preventing them from occurring in the first place.¹⁷ Presumably, a producer will spend money on product safety as long as the marginal cost of additional safety does not exceed the marginal reduction of expected tort liability achieved by such efforts.¹⁸

Not everyone agrees with this view,¹⁹ however, and there are good reasons to question whether tort law really can influence producer behavior to any significant degree.²⁰ In the first place, corporate managers often see liability standards as vague and unpredictable.²¹ Thus, instead of creating economic incentives, tort law standards often leave corporate decisionmakers befuddled and demoralized. Moreover, the corporate reward structure encourages decisionmakers to discount or ignore risks, particularly long-term risks.²² To make matters worse, corporate managers frequently have a hard time communicating with lower-level employees.²³ As a result, accident-cost avoidance policies promulgated by upper-level management are not always passed down through the chain of command. Finally, the deterrent effect of tort liability is often weakened by the existence of liability insurance.²⁴

17. See Craig Brown, *Deterrence and Accident Compensation Schemes*, 17 U. WEST. ONT. L. REV. 111, 128 (1979) ("[Strict liability] provides an incentive for those engaged in a particular activity to make it safer, for by doing so, their costs will be lower.").

18. See James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 768 (1983) ("[A] manufacturer will respond to threatened liability by investing in safety up to, but not beyond, the point at which the marginal costs of the investment equal the marginal costs of accidents thereby avoided.").

19. See Powers, *supra* note 7, at 644 ("It is debatable, both analytically and empirically, whether strict liability increases product safety, much less whether it tends to *optimize* product safety."); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1351 (1981) ("Again, the adoption of the strict liability standard is likely to have increased the rate of personal injury losses from defective products.").

20. See Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conception of Tort Law*, 72 CORNELL L. REV. 765, 775 (1987) ("[T]he argument that tort law can allocate to injurers the correct costs of injuries and thereby prompt the correct level of safety investment seems manifestly implausible.").

21. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 566 (1985) ("Even those with broad awareness of tort liability have many reasons to see it as highly unpredictable.").

22. See Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1040 (1990) ("The decision to discover and address possible long-term risks requires that costs be incurred in the short term, and managers with an interest in profits now will be disinclined to dedicate firm resources to programs the benefits of which will accrue to the firm, if at all, only in the distant future."); Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1301 (1980) ("[I]ndividual decisionmakers tend to emphasize the short-term consequences of their decisions and to deemphasize the long-term consequences . . .").

23. See Fred A. Manuele, *Product Safety Program Management*, 2 J. PROD. LIAB. 97, 98 (1978) ("Executives responsible for decisions affecting product safety do not always have adequate communication with each other on the subject . . .").

24. See Izhak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 46 (1980) ("The ubiquity of liability insurance is a fact; it puts into question the practicability of market deterrence in almost all accident cases.").

When insurance is readily available, manufacturers whose products cause an excessive number of injuries are able to shift some of their liability to other members of the insurance pool.²⁵ Thus, it cannot be said with any confidence that strict products liability necessarily enhances product safety.

B. Loss-Spreading

Strict liability also is supposed to shift accident costs to those who can spread them more efficiently.²⁶ Advocates of strict liability contend that loss-spreading is desirable because it reduces the "secondary" costs of accidents.²⁷ Business enterprises generally are considered to be better loss-spreaders than individual consumers.²⁸ Not only can producers obtain more comprehensive insurance coverage than individuals,²⁹ but they also can pass their insurance costs on to the consuming public by raising prices.³⁰ In theory, that is the way loss-spreading is supposed to work.

It is by no means self-evident, however, that loss-spreading is best achieved by imposing liability upon producers.³¹ First of all, producer liability often duplicates other loss-spreading mechanisms, such as workers' com-

25. See Sugarman, *supra* note 21, at 575-76 ("So long as individual firms pay on the same basis, individual accident records and safety measures will have no impact on premiums.").

26. See Prosser, *supra* note 1, at 1120 ("Entitled to more respect is the 'risk-spreading' argument, which maintains that the manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to do so, and through their prices to pass such losses on to the community at large.").

27. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 794 (1985) ("Rather than seeking to reduce the frequency and severity of such injuries, secondary cost avoidance involves allocating injury costs so as to decrease the economic dislocation caused by injuries. Spreading the impact of loss over time or among a class of individuals will decrease economic dislocation, thereby reducing secondary costs.").

28. See Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980) ("The manufacturer can spread the risk through insurance and price adjustments, whereas the injured individual might suffer a crushing financial blow underwriting the loss himself."); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 934 (1981) ("In general, manufacturers are believed to be better able to obtain insurance than consumers, and are assumed to be able to pass on most, if not all, of the insurance costs by raising the prices of products.").

29. Third party or liability insurance pays the costs of tort claims, a large percentage of which typically include pain and suffering; first party insurance, on the other hand, only reimburses accident victims for pecuniary losses. See George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REG. 237, 242-43 (1992) ("[F]irst-party insurance provides no coverage whatsoever of pain and suffering loss, while pain and suffering comprises a significant portion of tort law damages for almost all injuries.").

30. See Page Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966) ("The assumption is that the manufacturer can shift the loss to the consumers by charging higher prices for products.").

31. See Plant, *supra* note 12, at 947 ("The point attempted to be made here is that it is not sound thinking to assume, as a general basis for policy determination, that manufacturers are always in an economic position to pass on to the public the risks arising from non-negligently caused product defects.").

pensation and private insurance.³² Thus, consumers who purchase their own insurance are required to pay for such protection a second time when they buy products.³³ By the same token, employers who contribute to workers' compensation programs must pay again for employees' injuries in the form of higher prices for workplace supplies and equipment because the producers of such products pass their liability costs on to their customers.³⁴ Second, the tort system does not distribute benefits fairly; some accident victims are grossly overcompensated, while others receive little or nothing at all.³⁵ Third, excessive tort liability claims have driven some product sellers out of business, thereby refuting the prevailing assumption that product sellers have virtually unlimited resources to pay such claims.³⁶ Finally, products liability has proven to be far more expensive to operate than other loss-spreading systems.³⁷ On average, accident victims receive less than half of the money that is paid out by producers to settle tort claims.³⁸ In contrast, the administrative costs associated with workers compensation, private health insurance, and Social Security are much more reasonable.³⁹

32. See George L. Priest, *The Continuing Crisis in Liability*, 1 *PROD. LIAB. L.J.* 243, 248 (1988) ("Today, the compensation insurance provided by the legal system is largely redundant. The workers filing 60 percent of products liability claims are already covered for disability losses and full medical expenses through workers' compensation. Similarly, the vast majority of the U.S. population possesses medical coverage, and a large number possesses general disability coverage.").

33. See Owen, *supra* note 15, at 707 ("Nor may it be fair (or efficient) to penalize the prudent consumer who insures himself through health and wage insurance plans by forcing him to pay again through higher prices to overinsure himself and also to insure his less prudent neighbors.").

34. See Jeffrey O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 *U. ILL. L. REV.* 435, 441 ("But now, in addition to paying workers' compensation benefits, the employer increasingly pays the equivalent of common law liability reflected in increased costs of machinery or indemnity agreements with his capital goods suppliers.").

35. See generally Sugarman, *supra* note 21, at 592-96 (discussing undercompensation and overcompensation aspects of tort system).

36. See Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 *OHIO ST. L.J.* 329, 335-36 (1987) ("In fact, in some mass tort situations, the amounts of money sought and likely to be awarded are so great as to threaten to exhaust both liability insurance and the underlying capital of the defendant companies.").

37. See Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 *CORNELL L. REV.* 628, 642-43 (1988) ("Administrative costs and attorney's fees absorb a large percentage of every dollar awarded through the tort system.").

38. See Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 *OHIO ST. L.J.* 479, 492 (1987) ("[O]verall, plaintiffs appear to receive, in net compensation, about fifty percent of tort litigation expenditures."); Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 *SAN DIEGO L. REV.* 13, 35 (1988) ("Reduced to a single figure, injury victims were receiving slightly less than half of every dollar expended by the system on accident claims.").

39. See Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in *TORT LAW AND THE PUBLIC INTEREST* 127, 135 (Peter H. Schuck ed., 1991) ("[T]ransaction costs' consume 30 percent of the costs of the workers' compensation system, 15 percent of health insurance, and just 1 percent of the social security system.").

C. Moral Principles

There is also a moral dimension to products liability.⁴⁰ Thus, it has been suggested that products liability rules should promote corrective justice, provide vindication for accident victims, and uphold community norms of conduct and rectitude.

Corrective justice in its traditional form requires those who wrongfully acquire something of value from another to return their unjust gains.⁴¹ By extension, principles of corrective justice also can be invoked to justify the payment of compensation when a wrongful act causes injury even though the wrongdoer has not directly profited from a wrongful act.⁴² Arguably, this principle of corrective justice is not limited to unjust enrichment situations, but can be applied to personal injury cases as well.⁴³ Thus, forcing those who profit from the sale of defective products to compensate accident victims can also be said to further the principle of corrective justice.

Tort liability also may serve a vindicatory function.⁴⁴ Lawsuits, it is said, provide an opportunity for accident victims to tell their story in a public forum and to receive comfort and emotional support from the rest of the community.⁴⁵ In addition, damage awards may help victims of wrongdoing to overcome their sense of indignation and outrage.⁴⁶ Finally, tort actions are thought to uphold community norms of conduct and rectitude by providing a degree of public accountability for those who violate them.⁴⁷ In this manner,

40. See David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 430 (1993) ("At bottom, product accidents are moral—not technological—events. And so the law of products liability should turn to moral theory in establishing its fundamental principles.").

41. See Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982) ("The principle of corrective justice requires annulments of both wrongful gains and losses.").

42. See *id.* ("A compensable or undeserved loss need not, however, be the result of another's wrongdoing. Sometimes the justifiable (i.e. nonwrongful) taking of what another has a well-established right to justifies a claim to rectification.").

43. See Catherine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2351 (1990) ("A corrective justice justification for tort law has a strong intuitive basis—if one party wrongfully injures another, our deepest intuitions seem to argue that justice requires a remedy.").

44. See Smith, *supra* note 20, at 783-85 (discussing need to respond to "sense of injustice" felt by accident victims).

45. See Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1218 (1990) ("This opportunity to speak and be heard about personal tragedy may be the most important feature of tort for accident victims, more important in some ways than obtaining monetary compensation."); Joseph W. Little, *Up With Torts*, 24 SAN DIEGO L. REV. 861, 869 (1987) ("Damaged people want compensation; there is no denying that. They also want accountability, which in a civilized society means access to a forum and a set of rules by which they may publicly prove themselves right and someone else wrong.").

46. See Ingber, *supra* note 27, at 781 ("Compensation may restore the plaintiff's sense of self-value, and erase his sense of outrage.").

47. See Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1226 (1993) ("This goal [of vindication] is achieved through compensating the victim, the sense of retribution and rectification that attaches to that compensation and the

moral values are strengthened when powerful violators, such as government institutions or large corporations, are publicly called to account.

Unfortunately, products liability does not seem to be a very effective mechanism for upholding moral principles. The corrective justice rationale appears to be especially weak. First of all, the existence of a wrongful act, which is a core concept of corrective justice, is largely ignored in products liability litigation. The emphasis is on condition of the product, not the culpability of the manufacturer.⁴⁸ Second, personal connection between the victim and the wrongdoer, another important aspect of corrective justice, is almost entirely absent from products liability litigation. Instead, when accident victims seek legal redress for their injuries, they seldom recover from the actual wrongdoer, assuming that there is one, but instead are typically compensated by a corporate defendant or its liability insurer.⁴⁹

There also are problems with the vindicatory rationale. In fact, few victims ever get to tell their story in court because the great majority of cases never go to trial,⁵⁰ and those who do pursue their claims aggressively often experience delay and frustration rather than vindication.⁵¹ It is rare indeed for an accident victim to achieve complete vindication through the judicial process.

Finally, products liability litigation seldom upholds any public notions of morality. The liability rules are much too vague and uncertain for that. Instead, when cases go to trial, if the plaintiff wins, the verdict is more likely to reflect the caprice of the jury than any conscious attempt to uphold community standards of morality.

reallocation of loss that takes place."); Timothy T. Laden, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 504 (1993) ("Tort law not only remedies injustice by imposing damage awards, it also exposes normative features of relations between parties by articulating and applying conceptions of responsibility.").

48. See *Jackson v. Harsco Corp.*, 673 P.2d 363, 365 (Colo. 1983) ("Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to the product, rather than on the conduct either of the manufacturer or of the person injured because of the product."); *Fops v. General Motors Corp.*, 363 A.2d 955, 958 (Md. 1976) ("The relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself."); *Lionhearted v. Ford Motor Co.*, 683 P.2d 1097, 1099 (Wash. 1984) (stating that strict liability may be imposed only when product is unsafe beyond what reasonable consumer would contemplate).

49. See Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 796 (1987) ("A victim today rarely can expect to recover directly from the individual who injured him. Instead, he will recover from an insurance company or a large impersonal enterprise, such as a corporation or a government entity.").

50. See JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 174 (1988) ("All but a tiny fraction, less than 5 percent, of all successful tort claims terminate in a negotiated settlement rather than a judicial adjudication."); Thomas D. Rowe, Jr., *Study on Paths to a 'Better Way': Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 837 ("Of all cases filed in court, the large majority—at least ninety percent—are settled without trial.").

51. See Sugarman, *supra* note 21, at 610 ("[T]he victim who sues often finds more aggravation than satisfaction or revenge.").

D. Alternatives to Strict Liability in Tort

The above discussion suggests that the existing tort-based system of products liability is seriously flawed and, perhaps, should be replaced by something else. Indeed, commentators already have proposed various alternatives, such as neo-contractual arrangements,⁵² statutory compensation schemes,⁵³ or comprehensive social insurance programs.⁵⁴ On the other hand, these reformers generally have ignored contract law as a possible substitute for strict liability. Possibly they feel that contract law is too complicated⁵⁵ or too insensitive to the needs of ordinary consumers.⁵⁶ Nevertheless, I believe that it is appropriate to give serious consideration to the Uniform Commercial Code as a possible replacement for the existing system of tort-based products liability.

II. PRODUCTS LIABILITY AS AN INSURANCE MECHANISM

A number of legal scholars have suggested that products liability theory acts in some respects like an insurance policy.⁵⁷ According to this view, a consumer who purchases a product also buys insurance protection against certain product-related injuries.⁵⁸ The implicit assumption is that producers can insure against product-related injuries (either by obtaining liability insurance from commercial providers or by self-insuring) more cheaply than indi-

52. See Jeffrey O'Connell, *Balanced Proposals for Product Liability Reform*, 48 OHIO ST. L.J. 317, 322-28 (1987) (proposing that product sellers be immunized from tort claims if they offer period payment of victims' net economic losses); Jeffrey O'Connell, *An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employer's Remedy Against Third Parties*, 1976 INS. L.J. 683, 685-87 (proposing to limit claims by injured workers to workers compensation benefits).

53. See Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 692-710 (1997) (proposing statutory scheme based on first-party insurance model).

54. See Sugarman, *supra* note 21, at 642-51 (proposing that tort law be replaced by expanded social programs to pay disability and medical expenses for accident victims).

55. See *Ketterer v. Armour & Co.*, 200 F. 322, 323 (S.D.N.Y. 1912) ("The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales.").

56. See Morris G. Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697, 707 (1978) ("Indeed, a great deal of the motivation for strict tort seems based on the assumption that strict tort gives consumers a better break, i.e., better justice than would be true under the UCC.").

57. See Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 88 (1993) ("Tort liability is also a forced-insurance arrangement, under which potential victims are required to insure themselves against the risk of suffering injury from the sale of a product."); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 668 (1985) ("The current doctrines of products liability law can be understood as a form of mandatory insurance that is tied to the sale of an automobile [or other product]."); see also Owen, *supra* note 40, at 487 ("[M]anufacturers today provide a form of unscheduled third-party insurance through the products liability system.").

58. See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 362 (1988) ("An element of the price thus is an insurance premium, whose size ideally varies with the amount of 'coverage' against loss that consumers demand.").

vidual consumers.⁵⁹ Thus, even though consumers ultimately pay for insurance coverage in the form of higher product prices, they indirectly benefit by obtaining this insurance protection at lower cost. In addition, products liability extends insurance coverage to less fortunate members of society who might not otherwise be able to insure themselves against product-related injury.⁶⁰

There are a number of techniques that insurance companies typically employ to control risk and maintain stable prices for insurance services. For example, insurers attempt to make the risks they insure against more predictable by relying upon a strategy of diversification.⁶¹ This involves pooling together a large number of insureds so that unexpected losses will be offset by unexpected gains.⁶² Insurers also try to segregate insureds into separate, narrowly-defined risk pools for purposes of calculating premiums.⁶³ This helps to control the problem of adverse selection⁶⁴ and thereby makes insurance more attractive to low-risk purchasers.⁶⁵ Finally, insurers impose deductible and co-payment requirements in order to reduce the problem of moral hazard.⁶⁶

However, the present system of strict liability prevents insurers or product sellers from using these risk-control tools effectively. First of all, some of the risks that product sellers are subjected to, such as unexpected increases in

59. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1535 (1987) ("A provider, especially a corporate provider, is in a substantially better position than a consumer to obtain insurance for product- or service-related losses, because a provider can either self-insure or can enter one insurance contract covering all consumers—in comparison to the thousands of insurance contracts the set of consumers would need—and can easily pass the proportionate insurance premium along in the product or service price.").

60. See *id.* ("More importantly, to tie insurance to the sale of the product or service will provide insurance coverage to consumers who might not otherwise obtain first-party coverage, in particular the poor or low-income among the consuming population.").

61. See Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. REV. 908, 926-27 (1989).

62. See *id.*

63. See Priest, *supra* note 59, at 1545.

64. Adverse selection occurs when high-risk individuals are allowed to participate in the same risk pool as low-risk individuals. See ROBERT C. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 14 (Student ed. 1988).

65. See Priest, *supra* note 59, at 1543. According to Professor Priest, the premium for the entire pool must be set according to the average level of risk in the pool. See *id.* at 1541. If there is a wide range between high-risk and low-risk members of the pool, a premium, based on average risk, will be so high as to cause low-risk individuals to leave the pool. At the same time, the premium will be low enough to encourage more high-risk individuals to enter the pool. See Jon D. Hanson & Kyle D. Logue, *The First Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 140 (1990).

66. See *id.* at 142 (stating that insurers often implement copayment features to limit risk-pool inefficiencies). The term "moral hazard" refers to the tendency of some insureds to fail to take adequate precautions against injury, to make fraudulent claims against insurers, or to increase their consumption of health services. See Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 525 (1984).

liability exposure due to changes in liability rules, are not uncorrelated⁶⁷ and, therefore, cannot be controlled, like ordinary risks, by diversification.⁶⁸ Furthermore, under the current liability system each potential victim pays the same premium, regardless of risk, even though such flat-rate premiums encourage adverse selection and drive away low-risk consumers.⁶⁹ Finally, the present approach exacerbates moral hazard problems because producers are required under existing tort damage rules to pay accident victims full compensation for their injuries.

Arguably, a contract-based approach would be more efficient as an insurance mechanism than the present tort-based system of products liability. For example, under a tort law regime, liability and compensation issues are determined by someone other than the parties themselves; in contrast, under a contract-based approach, liability and compensation issues can be agreed upon *ex ante* by the parties themselves through the use of express warranties, disclaimers, and limitations of remedy. This would allow producers (insurers) to limit their exposure to unexpected risks.

Adverse selection also can be dealt with much better under a contract-based approach. For example, sellers can distinguish between casual users and professional users by charging professional users more for their warranty protection. This would place professional users, who tend to have higher usage rates and correspondingly higher injury rates, in a different risk category than buyers who use the product less frequently. Sellers also could exclude specific types of high-risk product uses (or misuses) from warranty/insurance coverage or could limit their liability for injuries resulting from such uses. In addition, sellers could impose time limits on warranty protection, thereby excluding injuries to consumers who continue to use a product beyond its useful life. These measures would shift more of the insurance cost to high risk buyers; on the other hand, sellers could keep lower-risk buyers in the risk pool by insuring them at considerably lower cost.

A contract-based approach also would allow sellers to cope more effectively with moral hazard problems. For example, sellers could restrict warranty coverage to specific types of losses or sellers could pay claims on a scheduled basis as is done under workers' compensation. Another alternative would be to limit liability to a specific percentage of the loss suffered instead of paying for all of it. This technique would operate much like co-payments in first-party insurance contracts.

67. An uncorrelated risk is one which is random or statistically independent. This means that the likelihood of one event occurring is not increased or decreased by the occurrence of some other event. See Priest, *supra* note 59, at 1540.

68. See Bovbjerg et al., *supra* note 61, at 927 ("Non-random fluctuation, however, cannot be diversified away, and the possibility that the tort system will convulsively increase available damages is not a random risk.").

69. See Priest, *supra* note 13, at 500 ("If the disparity between the premium and the risks added by low-risk members becomes too substantial, low-risk members are likely to drop out of the pool because they find alternative means of protection cheaper than market insurance.").

Finally, a contract-based approach would avoid the problem of overinsurance. It has been suggested that compensation levels should not exceed the amount of insurance protection consumers are willing to pay for.⁷⁰ However, because consumers' insurance needs vary, tort law damage rules often force consumers to purchase excessive amounts of insurance.⁷¹ A sales-based approach avoids the problem of overinsurance because insurance (or warranty) coverage can be tailored to fit the needs of individual buyers. For example, consumers who do not have sufficient medical, life, or disability insurance might want to obtain full warranty coverage, while those with adequate first-party insurance could purchase less warranty protection or none at all. Similarly, consumers who do not wish to insure against nonpecuniary losses, such as pain and suffering, could select a warranty that excluded consequential damages.⁷² The point is that a wide variety of consumer tastes can be accommodated if sellers are allowed to provide variable warranty coverage.

III. BASIC FEATURES OF A CONTRACT-BASED LIABILITY REGIME

Arguably, a contract-based products liability regime is preferable to a tort-based approach because it gives the parties more freedom to allocate product-related risks. Moreover, there is no need to develop a contract-based liability system from scratch; the Uniform Commercial Code's system of warranties and remedies, with only slight changes, will work quite well. However, my argument for a contract-based products liability system assumes that sellers will offer reasonable choices with respect to risk allocation. It also assumes that consumers will act rationally when they purchase warranty/insurance protection from sellers.

A. *The Argument for a Contract-Based Liability Regime*

There are several advantages to allowing buyers and sellers to allocate risk by private agreement instead of leaving such decisions to courts and juries. First of all, private decisionmaking fosters autonomy and personal freedom.⁷³ Assuming that buyers have access to relevant information and are not subjected to economic coercion, there is no reason to prevent them from

70. See Danzon, *supra* note 66, at 520 ("The optimal compensatory award is the amount of insurance the victim would have purchased voluntarily, at the price implied by the load of the defendant's liability insurance."); Ellen S. Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 100 (1993) ("[I]nsurance theorists posit that the optimal compensatory sum is the amount of insurance that individuals would have purchased in an actuarially fair insurance market.").

71. See Priest, *supra* note 59, at 1552 ("In comparison to first-party insurance, third-party tort law insurance provides coverage in excessive amounts . . .").

72. See Schwartz, *supra* note 58, at 362-66 (explaining that it is not economically efficient to insure against nonpecuniary losses because they do not affect marginal utility of money).

73. See Pierce, *supra* note 22, at 1283 ("Since values are highly individualized, the choice of purchasing more or less safety is to a significant extent linked to the individual freedom so highly regarded by American society.").

making their own decisions about product-related risks. A contract-based system of products liability allows them to do so, while the existing approach perpetuates the paternalistic values of an earlier time.

Private decisionmaking also promotes economic efficiency. There are many situations where buyers can deal with risk more cheaply than sellers.⁷⁴ For example, for some buyers, the risk of injury might be much lower than average. For these buyers, it might make sense to forego additional warranty protection. In addition, buyers may be able to insure against risk more cheaply than sellers, or they may simply have enough insurance already. In any event, significant utility gains can be achieved if such buyers are permitted to purchase exactly the type of warranty/insurance coverage they desire.⁷⁵

B. Consumer Protection Under the Uniform Commercial Code

When a defective product causes economic or physical harm, the buyer may maintain an action for breach of warranty in accordance with the provisions of Article Two of the Uniform Commercial Code.⁷⁶ Express warranties may arise under the Code as the result of express representations about the physical attributes or quality of a product.⁷⁷ In addition, the Code recognizes warranties of merchantability and fitness for a particular purpose which may be implied by law.⁷⁸ Furthermore, the Code provides injured parties with a wide variety of remedies when either express or implied warranties are breached.⁷⁹

74. See Mark A. Kaprelian, Note, *Privity Revisited: Tort Recovery by a Commercial Buyer for a Defective Product's Self-Inflicted Damage*, 84 MICH. L. REV. 517, 538 (1985) ("It seems likely that there will be at least some product risks that the buyer, rather than the seller, will be able to avoid more cheaply or insure against more readily.")

75. See Lindley J. Brenza, Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. CHI. L. REV. 277, 291 (1987) ("For example, a buyer who already has insurance for bodily injury may not want duplicative coverage; such a buyer would prefer to accept this risk rather than pay a higher price that included some insurance component.")

76. See, e.g., William R. Clement, Jr., Note, *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the UCC in Cases Involving Economic Loss, Used Goods, and Nondangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347, 1354 (1982) (stating that UCC permits recovery for economic losses sustained as result of defective product in breach of warranty action); John E. Lynch, Jr., Note, *Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law*, 27 CASE W. RES. L. REV. 683, 718 (1977) (explaining that actions for breach of warranty are controlled by article two of UCC).

77. See Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1171-72 (1987).

78. An implied warranty may also arise from trade usage or course of dealing. See Richard A. Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L. REV. 509, 572-73 (1980) (arguing that warranties arising from trade usage or course of dealing are separate and distinct from other implied warranties).

79. See generally Special Project, *supra* note 77, at 1220-1257 (explaining remedies available for action based on breach of warranty).

1. Express Warranties

Under section 2-313, an express warranty may arise in various ways. For example, an affirmation of fact or promise relating to the goods sold may be treated as a warranty that the goods will conform to the affirmation or promise.⁸⁰ Courts have held affirmations or promises in advertisements,⁸¹ pamphlets and brochures,⁸² sales contracts,⁸³ and owner's manuals⁸⁴ all to be express warranties. However, express warranties do not necessarily have to be in writing; in some cases, oral representations by sellers have been treated as express warranties.⁸⁵

Express warranties also may be created by description.⁸⁶ The seller may declare that the goods shall conform to a particular description given in the sales contract.⁸⁷ Any deviation from the description provided may constitute a breach of warranty.⁸⁸ Finally, an express warranty may be created by sam-

80. U.C.C. § 2-313 (1)(a) (1997). This provision declares that: "Any affirmation of fact or promise may be made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Id.*

81. *See Scheuler v. Aamco Transmissions, Inc.*, 571 P.2d 48, 51 (Kan. Ct. App. 1977) (advertising by transmission repair franchisor held to create express warranty); *Pake v. Byrd*, 286 S.E.2d 588, 589 (N.C. Ct. App. 1982) (finding statement in newspaper advertisement that used tractor was in "good condition" constituted express warranty).

82. *See Ricwil, Inc. v. S.L. Pappas & Co.*, 599 So. 2d 1126, 1131 (Ala. 1992) (holding that statement in seller's brochure that copper piping could withstand up to 250 degrees water temperature amounted to express warranty); *Jensen v. Seigel Mobile Homes Group*, 668 P.2d 65, 71 (Idaho 1983) (finding that promotional material and pamphlets given to customer by mobile home dealer gave rise to express warranty); *Boatel Indus., Inc. v. Hester*, 550 A.2d 389, 396-97 (Md. Ct. Spec. App. 1988) (concluding that newsletters and other promotional material given to buyer which extolled seaworthiness of seller's yachts constituted express warranty).

83. *See Colorado-Ute Electric Ass'n v. Envirotech Corp.*, 524 F. Supp. 1152, 1156 (D. Colo. 1981) (finding representations by seller in sales contract about performance characteristics of air pollution control equipment to be express warranty).

84. *See Gladden v. Cadillac Motor Car Div.*, 416 A.2d 394, 397 (N.J. 1980) (stating that representations in automobile tire owner's manual constituted express warranty).

85. *See Yost v. Millhouse*, 373 N.W.2d 826, 829 (Minn. Ct. App. 1985) (holding that oral statement by seller that horse was registered created express warranty); *Miller v. Hubbard-Wray Co.*, 630 P.2d 880, 882 (Or. Ct. App. 1981) (ruling that seller's oral representations about age of used hay baler constituted express warranty).

86. *See Lord, supra* note 78, at 516 (stating that express warranty is created any time description of goods is involved in sale). These types of warranties were treated as implied warranties under the Uniform Sales Act. *See Note, Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 319 (1963) (explaining that warranty relating to description is treated as implied under Uniform Sales Act, but express under UCC).

87. U.C.C. § 2-313 (1)(b) (1997). This provision provides that: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." *Id.*

88. *See Agricultural Servs. Ass'n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1064 (6th Cir. 1977) (concluding that breach of express warranty occurred when seed package labeled as "C/S okra seed" contained another variety).

ple or model.⁸⁹ Thus, if a sample⁹⁰ or model⁹¹ is provided by the seller to the buyer, this also may constitute a warranty that the goods sold will conform to it. A sample is an item that is drawn from the bulk of the goods, while a model is a representation of what the goods are supposed to look like.⁹²

Some states require that consumers specifically rely on the seller's representations of product quality in order to recover damages for breach of express warranty.⁹³ Of course, this requirement, if strictly enforced, would invalidate many express warranty claims because consumers seldom read warranty information before purchasing a product. However, the Uniform Commercial Code merely requires that the seller's promises or representations become "part of the basis of the bargain."⁹⁴ Many courts have concluded that this language has effectively eliminated any reliance requirement.⁹⁵

2. Implied Warranties

Warranties also may be implied by law, regardless of the intent of the parties. The implied warranty of merchantability is an example of such a warranty.⁹⁶ The implied warranty of merchantability is applicable to used as well as new goods.⁹⁷ This warranty will arise only if the seller is a "merchant

89. U.C.C. § 2-313 (1)(c) (1997). This provision provides that: "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model." *Id.*

90. See *Glyptal Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 895-96 (D. Mass. 1992) (ruling that sample of cadmium paint created express warranty); *AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 228 (N.D. Ill. 1980) (holding that samples of liquor bottle cap liners provided by seller created express warranty).

91. See *Barton v. Tra-Mo, Inc.*, 686 P.2d 423, 426 (Or. Ct. App. 1984) (holding that preproduction versions of plastic auxiliary fuel tanks could be considered models); *Pacific Marine Schwabacher, Inc. v. Hydrosift Corp.*, 525 P.2d 615, 618-19 (Utah 1974) (concluding that piece of molded acrylic material constituted model for purposes of express warranty).

92. See U.C.C. § 2-313 cmt. 6 (1997).

93. See *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 366 N.W.2d 424, 428 (Neb. 1985) ("Since an express warranty must have been 'made part of the basis of the bargain,' it is essential that the plaintiff proves reliance upon the warranty."); see also *Ainger v. Michigan General Corp.*, 476 F. Supp. 1209, 1225 (S.D.N.Y. 1979) ("The question of whether the promisee 'relied' on the warranty, then, is whether he believed he was purchasing the promise."), *aff'd*, 632 F.2d 1025 (2d Cir. 1980).

94. John E. Murray, Jr., "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 284 (1982).

95. See *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261 (Ala. 1983) ("In fact, it is not necessary to show any particular reliance by the buyer to give rise to such warranties."); *Jensen v. Seigel Mobile Homes Group*, 668 P.2d 65, 71 (Idaho 1983) ("[t]he buyer of goods need not rely on an 'affirmation of fact or promise' or 'description' for the same to become 'part of the basis of the bargain' and hence an express warranty.>").

96. See William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 124 (1943) ("The warranty [of merchantability] is imposed by the law. It is read into the contract by the law without regard to whether the parties intended it in fact; it arises merely because the goods have been sold at all.>").

97. See *Dickerson v. Mountain View Equip. Co.*, 710 P.2d 621, 625 (Idaho Ct. App. 1985) ("We hold that the implied warranty of merchantability . . . applies to transactions of both new

with respect to goods of that kind."⁹⁸ However, the mere fact that the seller can be classified as a merchant for some purposes will not automatically cause him to be classified as a merchant for purposes of creating an implied warranty of merchantability.⁹⁹

The Code does not define merchantability, but instead establishes certain requirements which must be met if goods are to be considered merchantable.¹⁰⁰ To be merchantable, goods must be capable of passing without objection in the trade under the contract description.¹⁰¹ If the goods are fungible, they must be of fair average quality within the contract description.¹⁰² In addition, merchantable goods must be of even kind, quality, and quantity within each unit and among all units. Goods also must be adequately contained, packaged, and labeled.¹⁰³ Furthermore, the goods must

and used goods."); *Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 172 (Ill. App. Ct. 1972) ("Defects which have been held to make operation of a new automobile unfit and thereby cause a breach of implied warranties may result in the breach of the same warranties on a used automobile."); *Beck Enters., Inc. v. Hester*, 512 So. 2d 672, 676 (Miss. 1987) ("This Court concludes the UCC does not distinguish between new and used 'goods' and that the implied warranty of merchantability applies to the sale of a used motor vehicle by a 'merchant with respect to goods of that kind.'").

98. *Article Two Warranties in Commercial Transactions*, *supra* note 77, at 1192. The Code defines a merchant as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." U.C.C. § 2-104 (1) (1997).

99. *See Donald v. City Nat'l Bank of Dothan*, 329 So. 2d 92, 95 (Ala. 1976) (concluding that bank that sold defective boat to plaintiff was not a merchant with respect to boats).

100. U.C.C. § 2-314 (2) (1997). This provision provides:

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.

Id.

101. *See Delano Growers' Coop. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066, 1071 (Mass. 1985) (concluding that wine contaminated with "Fresno mold" would not pass without objection in trade); *Ambassador Steel Co. v. Ewald Steel Co.*, 190 N.W.2d 275, 279 (Mich. Ct. App. 1971) (finding that only steel with carbon content between 1010 and 1020 would be considered "commercial quality" steel according to custom and usage within steel business). *But see Ford v. Starr Fireworks, Inc.*, 874 P.2d 230, 234 (Wyo. 1994) (stating fireworks passed without objection in the trade because other retailers were willing to purchase the goods in question from original buyer).

102. *See Tracor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d 446, 448 (Tex. Civ. App. 1972) (declining to uphold buyer's breach of warranty claim when sheetrock delivered by seller was of average quality, though of different type than buyer expected to receive).

103. *See Sheeskin v. Giant Food, Inc.*, 318 A.2d 874, 885-86 (Md. Ct. Spec. App. 1974), *aff'd sub nom. Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 332 A.2d 1, 10-11 (Md. 1975)

conform to any promises or affirmations of fact set forth on the container or label.¹⁰⁴ Finally, to be merchantable, the goods must be fit for the ordinary purposes for which they are sold.¹⁰⁵ However, this does not mean that the goods are perfect,¹⁰⁶ nor does it mean that the goods are necessarily fit for all purposes.¹⁰⁷

An implied warranty of fitness for particular purpose ensures that a product will be suitable for any use that is peculiar to the buyer's special business needs.¹⁰⁸ For an implied warranty of fitness to arise, the seller must be aware of the particular purpose for which the goods are required and realize that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.¹⁰⁹

(finding that exploding soft drink bottle breached seller's implied warranty of merchantability); *Gillispie v. Great Atlantic & Pacific Tea Co.*, 187 S.E.2d 441, 443 (N.C. Ct. App. 1972) (concluding that defective soft drink bottle was covered by implied warranty of merchantability because it was inadequate container); *Kassab v. Central Soya*, 246 A.2d 848, 852 (Pa. 1968) (finding that cattle feed was unmerchantable because contents were not properly labeled).

104. See *Hauter v. Zogarts*, 534 P.2d 377, 385 (Cal. 1975) (stating "Golfing Gizmo" training equipment was unmerchantable because it did not conform to safety promises on carton).

105. See *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024, 1026-27 (Miss. 1982) (upholding jury determination that new car with oil leaks, malfunctioning air conditioner, and peeling vinyl top was not fit for ordinary purposes); *Nerud v. Haybuster Mfg. Co.*, 340 N.W.2d 369, 376 (Neb. 1983) (finding that haystacking machine that consumed itself in flames after half-day of use not suitable for ordinary use); *Murphy v. Mallard Coach Co.*, 582 N.Y.S.2d 528, 532 (N.Y. App. Div. 1992) (concluding that motor home with serious plumbing leaks was not fit for ordinary purposes).

106. See *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795, 798-99 (Mo. 1972) (en banc) ("Of course, an implied warranty of merchantable quality . . . does not require a perfect product, only one of reasonable quality or fitness."); *Tracy v. Vinton Motors, Inc.*, 296 A.2d 269, 272 (Vt. 1972) ("Merchantability of even a new car . . . imported no more than it be reasonably suited for ordinary use. It does not mean that it be a car perfect in every detail, but only reasonably fit for the ordinary uses it was manufactured to meet.").

107. See *Prosser*, *supra* note 96, at 133 ("Goods may be merchantable and still be unfit for some unusual use intended; they may even be unmerchantable and still fit, as where stale bread is sold for chicken feed.").

108. U.C.C. § 2-315 (1997). This provision provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purposes.

Id.

109. Compare *ITT Corp. v. LTX Corp.*, 732 F. Supp 1225, 1238 (D. Mass. 1990) (finding that seller of cable assemblies was aware of buyer's particular uses for goods and that buyer had relied on seller to modify cable assemblies for such uses), with *Jones v. Marcus*, 457 S.E.2d 271, 272-73 (Ga. Ct. App. 1995) (ruling that no fitness warranty arose from sale of retreaded tires when seller was not aware that buyer intended to use vehicle for business purposes), and *Bergquist v. Mackay Engines, Inc.*, 538 N.W.2d 655, 658-59 (Iowa Ct. App. 1995) (holding that there was no implied warranty of fitness with respect to automobile engine when buyer did not inform seller that he intended to install it in race car).

3. Buyers' Remedies for Breach of Warranty

Various types of damages may be recovered under the Code for breach of warranty. The basic measure of damages is the difference between the value of the goods as accepted and their value as warranted.¹¹⁰ However, the Code also permits a buyer to recover incidental¹¹¹ and consequential damages.¹¹² Incidental damages include such things as the cost of transporting or storing nonconforming or defective goods.¹¹³ Consequential damages include physical injuries¹¹⁴ and property damage¹¹⁵ caused by defective products.

C. Assumptions

The argument for replacing strict liability with a contract-based alternative is greatly strengthened if one makes certain assumptions about the market environment in which buyers and sellers would operate. The first assumption is that buyers and sellers will rely primarily on express warranties rather than implied warranties to determine product quality and warranty protection. The second assumption is that competitive pressures will force

110. U.C.C. § 2-714 (2) (1997). This provision provides that: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Id.*

111. U.C.C. § 2-715 (1) (1997). This provision declares that: "Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incidental to the delay or other breach." *Id.*

112. U.C.C. § 2-715 (2) (1997). This provision declares that:

Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

Id.

113. See *S & R Metals, Inc. v. C. Itoh & Co.*, 859 F.2d 814, 818 (9th Cir. 1988) (allowing buyer to recover transportation and storage costs of defective steel as incidental damages notwithstanding provision in sales contract limiting "consequential" damages); *Western Conference Resorts, Inc. v. Pease*, 668 P.2d 973, 977 (Colo. Ct. App. 1983) (allowing buyer to recover storage and maintenance costs of defective airplane as incidental damages); *Duff v. Bonner Bldg. Supply, Inc.*, 649 P.2d 391, 395 (Idaho Ct. App. 1982) (ruling that buyer could recover cost of removing and replacing defective paneling as incidental damages).

114. See *Di Prospero v. R. Brown & Sons, Inc.*, 494 N.Y.S.2d 181, 182 (N.Y. App. Div. 1985) (concluding that personal injuries suffered by car buyer should be treated as consequential damages); *Maybank v. S.S. Kresge Co.*, 266 S.E.2d 409, 412 (N.C. Ct. App. 1980) (finding that personal injuries caused by exploding flashcube were recoverable as consequential damages).

115. See *Fire Supply & Servs., Inc. v. Chico Hot Springs*, 639 P. 2d 1160, 1165 (Mont. 1982) (upholding lower court award of consequential damages to hotel for fire damage to premises); *Doty v. Parkway Homes Co.*, 368 S.E.2d 670, 671 (S.C. 1988) (allowing plaintiff to recover value of contents of mobile home destroyed by fire); *Lidstrand v. Silvercrest Indus.*, 623 P.2d 710, 715 (Wash. Ct. App. 1981) (concluding that damage to contents of mobile home resulting from leaks were compensable as consequential damages).

sellers to offer buyers a wide range of choices with respect to warranty/insurance coverage.

1. The Primacy of Express Warranty

Commentators traditionally have thought of implied warranty of merchantability as the Code's principal mechanism for protecting the rights of ordinary consumers.¹¹⁶ Consequently, we might reasonably expect a contract-based products liability regime to rely heavily on the merchantability warranty. Under such an approach, the basic requirements of product quality and safety would be determined by the standard of merchantability. Privity and notice requirements would be relaxed or abandoned so that consumers could sue the manufacturers directly for breach of warranty and disclaimers would be barred in personal injury cases.

Unfortunately, a regime of this sort would be nothing more than tort law under another name. The substantive product quality standard required to meet the implied warranty of merchantability would be virtually identical to the standard imposed by tort law.¹¹⁷ Consequently, if sellers were unable to disclaim the merchantability warranty, the resulting liability system would be very similar to the discredited strict liability approach discussed above. For this reason, it is better to eschew the implied warranty route and focus instead on a liability regime based principally on express warranty.

The advantage of an express warranty, when coupled with limitations and partial disclaimers, is that it allows the seller to define its insurance obligation very precisely. For example, under this approach, a seller could specify the performance characteristics of the product, indicate how long the product could be used safely, identify both proper and improper uses of the product, and specify the extent of its liability for any injuries that might occur. This would enable sellers to insulate themselves against unexpected changes in liability rules and it also would permit them to deal with adverse selection problems. Of course, sellers would be free to offer very broad warranty protection, even broader than that provided by the implied warranty of merchantability, if they desired to do so. Moreover, if sellers were concerned about moral hazard issues, they could contract to pay claims on a scheduled basis or they could agree to pay only a certain percentage of the victim's out-of-pocket expenses. Finally, the parties could reduce litigation costs by pro-

116. See Reed Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 442 (1969) ("Under the Uniform Commercial Code, the consumer depends mainly on the warranty of merchantability.").

117. See Donald J. Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 700 (1965) ("It appears, then, that the criterion for establishing that an article is 'defective' for purposes of strict liability in tort is synonymous with the fitness criterion of merchantability set forth in section 2-314 (2)(c)."); Morris G. Shanker, *A Reexamination of Prosser's Products Liability Crossword Game*, 29 CASE W. RES. L. REV. 550, 556 (1979) ("Almost every commentator who has seriously studied the problem has concluded that there is no difference; that strict tort liability requires the seller to deliver the same quality of goods as that required under the merchantability warranty.").

viding for alternative methods of dispute resolution or by relaxing proof requirements for certain issues.

I believe that consumers as well as sellers would benefit from this approach. Although they could not bargain face-to-face with sellers, consumers would be able to choose among various levels of insurance protection, just as they do when they purchase conventional first-party insurance. Presumably, warranty coverage would vary from seller to seller, but even if it did not, market pressure would induce most vendors to offer more than one kind of protection. Consequently, consumers would be able to select the type of warranty/insurance protection that best suited their needs.

2. Consumer Bargaining Power

The traditional view of buyer-seller relations assumed that sellers invariably had the advantage.¹¹⁸ Studies of consumer conduct in the marketplace focused on how consumers behaved as individuals. These studies showed that most consumers were not very well-informed about product safety¹¹⁹ and that they tended to underestimate low-probability risks.¹²⁰ Furthermore, even when consumers were fully aware of product-related risks, they seldom had sufficient bargaining power to overcome the reluctance of product sellers to provide meaningful protection against the risk of personal injury or property damage.¹²¹

However, this notion of consumer ignorance and economic weakness may have to be revised in light of new research and changing circumstances. For example, some commentators believe that consumers can make knowledgeable choices about the products they buy even though they do not know

118. See Dickerson, *supra* note 116, at 440 ("The key idea, then, is consumer vulnerability to an unknown risk that is largely controllable by a sophisticated and well-heeled professional."); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 328 (1963) ("In effect, the ordinary contracts of sale are contracts of adhesion, presented to consumers under conditions of haste, ignorance, and compulsion.") (citation omitted).

119. See Marc A. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 1008 (1966) ("It seems totally unrealistic to presuppose that a casual buyer is ever in a position to assess risks as perceptively as the party who is trying to unload them through the disclaimer.").

120. See Howard A. Latin, *Symposium: Alternative Compensation Schemes and Tort Theory: Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 687 (1985) ("Because any risk assessment makes demands on time, money, and psychological resources, people often do not consider low-frequency hazards even when catastrophic losses would occur if the risks materialize."); Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37, 65 (1986) ("[O]rdinary people, operating under a variety of psychological limitations, may be likely to do a particularly bad job in making decisions about very low probability catastrophes.").

121. See Prosser, *supra* note 1, at 1119 ("Undoubtedly the practice exists [of offering warranty protection] on a large scale; but it is limited, on the part of almost every one, to replacement, repair, or return of the purchase price to make good the original bargain; and it does not extend to compensation for injuries to the person of the buyer, or his other property.").

much about them.¹²² According to these theorists, the better the product is, the better the warranty is likely to be because the cost of such warranties to producers will be low if the products do not break down.¹²³ Manufacturers of high-quality products have an incentive to signal this fact to consumers by means of better warranties.¹²⁴ Therefore, consumers can treat warranties as signals about product quality and safety and do not have to actually investigate products in order to choose the best ones.¹²⁵

Furthermore, although individual consumers do not have much clout with producers, collective behavior in consumer markets does make a difference. This suggests that consumers as a group can obtain better warranty protection if they want it.¹²⁶ Although consumers cannot bargain individually with producers for greater warranty protection, they can shop around for the best deal. Moreover, if enough consumers shop around, nonshoppers will be able to obtain the same terms because producers respond to markets, not to individuals.¹²⁷ Thus, arguably consumer preferences can play an important role in determining product quality and the level of warranty protection that sellers provide.

Of course, there is always a risk that producers will take advantage of a contract-based regime to strip consumers of existing warranty protection without giving them anything in return. For example, producers might refuse to compete in the area of insurance/warranty protection and, instead, conspire to offer only highly-restrictive warranties as the automobile industry did in the 1950s.¹²⁸ Another concern is that consumers, when given a choice, might refuse to pay for warranty protection even when they need it. If either of these happen on a large scale, the approach proposed above could be a

122. See Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1396-97 (1983) (analyzing signalling theory of warranties, which holds that consumers utilize warranties to assess overall product quality).

123. See *id.* (finding warranty costs to manufacturers vary inversely with product quality, and low quality manufacturers will be unable to make "strong" warranties because of high cost of replacement).

124. See *id.* at 1397 ("Firms with products whose quality is better than the low expectation consumers start with have an incentive to signal this better quality. . . . [T]hey can best do this by making 'strong' warranties.").

125. See Priest, *supra* note 19, at 1303 ("Thus, although a consumer has neither experience with nor knowledge of a product, he may infer its mechanical reliability by inspecting the terms of the warranty alone.").

126. See Schwartz & Wilde, *supra* note 122, at 1414 ("[W]hen consumers prefer warranties, markets frequently will supply just the warranty coverage they desire.").

127. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979) ("Thus, if enough searchers exist, firms have incentives both to compete for their business and to offer the same terms to nonsearchers.").

128. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 87 (N.J. 1960) (finding inadequate warranty that was imposed on consumers was standard form used by both Chrysler and Automobile Manufacturers Association).

disaster for many consumers. However, I am relatively optimistic that neither of these scenarios will occur.

As mentioned earlier, recent studies indicate that producers are willing to compete for business by offering more comprehensive warranty protection. This is to be expected in a market environment that is much less monolithic than it was forty or fifty years ago. In many industries, the entry of foreign competitors has forced American firms to abandon the monopolistic practices of an earlier period.¹²⁹ For this reason, it would be very difficult for an entire industry to exculpate itself by using standardized disclaimers unless it made significant price concessions. Even if most firms within an industry wished to limit their liability, one maverick company could thwart these efforts by offering better warranty terms. Once this happened, other firms would be forced to follow suit in order to preserve their existing market shares.¹³⁰

Another concern is that consumers will not make utility-maximizing decisions if they are given the opportunity to choose among various levels of warranty/insurance protection. Ideally, those who are fully insured will decline additional warranty/insurance protection, while those who are not insured will seek greater protection. Unfortunately, some of the uninsured may refuse to purchase insurance from product sellers. When this happens, uninsured accident victims and their families will either have to bear these losses unaided or their losses will be shifted to the public in the form of welfare or medicaid assistance.

These problems do not arise under the existing system of products liability because consumers are forced to obtain a certain level of protection against product-related injury whether they need it or not. The issue, therefore, is whether we should retain a paternalistic, but arguably inefficient system, in order to protect against the consequences of bad judgment on the part of some consumers, or whether we should adopt a more efficient approach and accept the fact that some consumers will fare less well under it. I believe that the second choice is the better one. The efficiency gains that will result from a contract-based system of products liability should greatly outweigh the costs that will be imposed on consumers who fail to purchase adequate insurance protection against product-related injuries.

IV. PROBLEM AREAS

In its present form, the Uniform Commercial Code contains a number of provisions that might unduly limit the scope of Article Two warranties. These include privity requirements, notice requirements, disclaimers, limita-

129. For example, the automobile industry now competes extensively in the area of non-personal-injury warranty protection. See Schwartz & Wilde, *supra* note 127, at 667 (finding that market correction was more effective than state regulation would have been in increasing automobile warranty protections).

130. I assume that these same competitive pressures would prevent firms from reducing the current level of protection without also reducing product prices.

tions on remedies, and statutes of limitation. Arguably, these provisions, at least in their present form undercut the Code's usefulness as a foundation for contract-based system of products liability.

A. The Privity Requirement

Privity of contract refers to the relationship between contracting parties. Those who have entered into a contract with one another are in privity; those who have not contracted directly with one another are not in privity.¹³¹ Commentators have identified two types of privity: vertical and horizontal. Vertical privity governs the liability of parties in the marketing chain; only parties who have contracted directly with one another are in vertical privity.¹³² Thus, if vertical privity is required, only the immediate buyer can recover against a seller.¹³³ Horizontal privity describes the relationship between the seller and the ultimate user; if horizontal privity is required, the seller will be liable only to the buyer and not to others who may use or consume the product.¹³⁴

The drafters of the Code made no changes in the common-law requirements with respect to vertical privity.¹³⁵ Consequently, each state is free to adopt its own vertical privity rules. Although some states have abolished the vertical privity requirement entirely,¹³⁶ many continue to require vertical privity when the retail buyer has merely suffered an economic injury.¹³⁷ In

131. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 389-91 (4th ed. 1995) (describing both kinds of privity and discussing relaxation of privity in section 2-318 of UCC); *Article Two Warranties in Commercial Transactions: An Update*, *supra* note 77, at 1310-11 (describing horizontal and vertical privity and noting its slow demise in warranty law).

132. See *Article Two Warranties in Commercial Transactions: An Update*, *supra* note 77, at 1310-11 (finding that typically manufacturer is only in privity with wholesaler and buyer is only in privity with retailer).

133. See Edward H. Rabin & Jill Herman Grossman, *Defective Products or Realty Causing Economic Loss: Toward a Unified Theory of Recovery*, 12 Sw. U. L. REV. 4, 15 (1981) (examining three alternatives of UCC section 2-318 and how they utilize vertical privity requirements).

134. See generally Elizabeth A. Heiner, Note, *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.: What Recovery for Economic Loss—Tort or Contract?*, 1990 WIS. L. REV. 1337, 1342-43 (explaining difference between vertical and horizontal non-privity plaintiffs).

135. U.C.C. § 2-318, comment. 3 provides:

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section 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, extend to other persons in the distributive chain.

136. These states include Maine, Massachusetts, New Hampshire, and Virginia. See ME. REV. STAT. ANN. tit. 11, § 2-318 (West 1995); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1990); N.H. REV. STAT. ANN. § 382-A:2-318 (1994); see also WHITE & SUMMERS, *supra* note 131, at 393 n.8 (stating that Maine, Massachusetts, New Hampshire, and Virginia enacted expansive provisions that abolish vertical privity requirement).

137. See *Vermont Plastics, Inc. v. Brine, Inc.*, 824 F. Supp. 444, 454 (D. Vt. 1993) (holding that vertical privity was required in order to sue lacrosse manufacturer for economic damages); *Rhodes v. General Motors Corp.*, 621 So. 2d 945, 947 (Ala. 1993) (refusing to impose liability upon automobile manufacturer in absence of vertical privity); *Szajua v. General Motors Corp.*, 503 N.E.2d 760, 767 (Ill. 1986) (requiring vertical privity in order to bring claim, based on breach

personal injury cases, however, an increasing number of courts allow implied warranty claims to be brought against remote sellers even if there is no vertical privity.¹³⁸ The same principle has been extended to property damage cases as well.¹³⁹

The drafters of the Code addressed the issue of horizontal privity in section 2-318, entitled "third party beneficiaries of warranties express or implied." In its original form, now known as Alternative A, section 2-318 declared that express and implied warranties would extend not only to the buyer, but also to family members and household guests of the buyer when it was reasonable to assume that they would use, consume or be affected by the goods.¹⁴⁰ Twenty-eight states, as well as the District of Columbia, have

of implied warranty, against automobile manufacturer); *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 891 (Kan. 1984) (holding that implied warranty claim could not be brought against computer manufacturer when vertical privity did not exist between defendant and claimant). *But see Israel Phoenix Assur. Co. v. SMS Sutton, Inc.*, 787 F. Supp. 102, 103-05 (W.D. Pa. 1992) (holding that vertical privity was not required to sue manufacturer of hydraulic press cylinder for breach of implied warranty); *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 803-04 (D. Minn. 1980) (imposing liability on manufacturer of defective CB radios notwithstanding lack of vertical privity); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 289-92 (Alaska 1976) (allowing purchaser of mobile home to sue manufacturer for breach of implied warranty of merchantability); *Peterson v. North Am. Plant Breeders*, 354 N.W.2d 625, 631-32 (Neb. 1984) (allowing suit for breach of implied warranty of merchantability to be brought against seed company in absence of vertical privity); *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 797 (N.H. 1993) (holding that no privity was required under Alternative C for suit by ultimate consumer against manufacturer of wood stove).

138. *See Allen v. G.D. Searle & Co.*, 708 F. Supp. 1142, 1159-60 (D. Or. 1989) (concluding that patient who received defective IUD could sue manufacturer notwithstanding lack of vertical privity); *Bishop v. Sales*, 336 So. 2d 1340, 1344 (Ala. 1976) (declaring that vertical privity was unnecessary in personal injury cases); *Perfetti v. McGhan Med. Ctr.*, 662 P.2d 646, 655 (N.M. Ct. App. 1983) (holding that vertical privity was not needed for injured patient to sue manufacturer of implant). *But see Thomaston v. Fort Wayne Pools, Inc.*, 352 S.E.2d 794, 796 (Ga. Ct. App. 1987) (holding that manufacturer of swimming pool kit was not liable to personal injury victim who was not in privity with manufacturer); *Williams v. Fulmer*, 695 S.W.2d 411, 414 (Ky. 1985) (refusing to allow implied warranty claim by injured consumer against manufacturer of motorcycle helmet in absence of vertical privity).

139. *See Tamura, Inc. v. Sanyo Elec., Inc.*, 636 F. Supp. 1065, 1069-70 (N.D. Ill. 1986) (holding that remote buyer could sue manufacturer of defective cassette tape deck which caused property damage from fire); *Kassab v. Central Soya*, 246 A.2d 848, 856 (Pa. 1968) (announcing that vertical privity would no longer be necessary in implied warranty cases where property damage occurred). *But see Wear v. Chenault Motor Co., Inc.*, 293 So. 2d 298, 301 (Ala. Ct. App. 1974) (concluding that suit against automobile manufacturer for property damage was barred for lack of vertical privity).

140. Section 2-318, Alternative A, provides that:

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

U.C.C. § 2-318, Alternative A (1989).

adopted this version.¹⁴¹ Alternative B, which prevails in six states and the Virgin Islands,¹⁴² extends warranty protection to any natural person who suffers personal injury and who may be expected to use, consume or be affected by the goods.¹⁴³ Alternative C, enacted in eight states,¹⁴⁴ provides that an express or implied warranty may extend to any person, including business entities, who may use, consume or be affected by the product.¹⁴⁵ This means that Alternative C, unlike Alternatives A and B, is not limited to personal injury cases, but applies to economic loss cases as well.

The courts have applied the privity requirements of section 2-318 to both express warranty and implied warranty claims. Thus, family members and other protected parties have been allowed to bring express warranty claims against immediate or remote sellers,¹⁴⁶ while the express warranty claims of others generally have been rejected.¹⁴⁷ Likewise, the courts usually have required horizontal privity in implied warranty cases involving economic loss.¹⁴⁸ However, horizontal privity requirements also have been enforced in implied warranty cases involving personal injury or property damage.¹⁴⁹

141. These jurisdictions include Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Florida (with the addition of employees), Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin. See WHITE & SUMMERS, *supra* note 131, at 392 n.3.

142. These include Alabama, Colorado, Delaware, Kansas, New York, Vermont and the Virgin Islands. See WHITE & SUMMERS, *supra* note 131, at 393 n.6.

143. Section 2-318, Alternative B, provides that: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section." U.C.C. § 2-318, Alternative B (1989).

144. These include Hawaii, Iowa, Minnesota, North Dakota, Utah, and Wyoming. See WHITE & SUMMERS, *supra* note 131, at 393 n.7.

145. U.C.C. § 2-318, Alternative C, provides that:

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.

A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

U.C.C. § 2-318, Alternative C (1989).

146. See *Milbank Mut. Ins. Co. v. Proksch*, 244 N.W.2d 105, 110 (Minn. 1976) (allowing homeowner whose daughter purchased Christmas tree from seller to sue under express warranty for property damage caused by fire).

147. See *Keith v. Stoelting, Inc.*, 915 F.2d 996, 999 (5th Cir. 1990) (holding that express warranty claim by employee of purchaser against manufacturer of polygraph machine was barred by lack of horizontal privity).

148. See *id.* (holding that lack of horizontal privity between employer and dismissed employee barred implied warranty claim against manufacturer of polygraph machine); *Chandler v. Hunter*, 340 So. 2d 818, 822 (Ala. 1976) (finding sufficient horizontal privity between buyer of mobile home and ex-wife of buyer to permit breach of warranty action by ex-wife against manufacturer).

149. See *Hemphill v. Sayers*, 552 F. Supp. 685, 690 (S.D. Ill. 1982) (refusing to allow college football player to sue football helmet manufacturer because of lack of horizontal privity between victim and purchaser of helmet); *Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1066 (E.D. Pa. 1969) (denying recovery by injured passenger against manufacturer of automobile due to

Many of these cases involved employees. Although employees have occasionally been allowed to bring implied warranty claims against product manufacturers,¹⁵⁰ most of the time they have failed because of a lack of horizontal privity, at least in states that have adopted Alternative A.¹⁵¹

B. The Notice Requirement

Section 2-607 (3)(a) of the Uniform Commercial Code provides that a buyer who accepts tender must notify the seller within a reasonable time that the goods are defective.¹⁵² The purpose of the notice provision is to give the seller an opportunity to inspect the goods,¹⁵³ and to repair or replace the goods if they are defective.¹⁵⁴ It also allows the seller time to negotiate with

lack of horizontal privity); *Weatherby v. Honda Motor Co., Ltd.*, 393 S.E.2d 64, 68 (Ga. Ct. App. 1990) (holding that passenger injured when gasoline ignited on motorcycle could not bring suit against manufacturer of motorcycle); *Miller v. Sears, Roebuck & Co.*, 500 N.E.2d 557, 559 (Ill. Ct. App. 1986) (denying claim by injured transmission shop customer against manufacturer of air compressor); *Crews v. W.A. Brown & Sons, Inc.*, 416 S.E.2d 924, 929-31 (N.C. Ct. App. 1992) (ruling that injured church member could not bring implied warranty claim against manufacturer of walk-in freezer due to lack of horizontal privity between him and church).

150. See *Carlson v. Armstrong World Indus., Inc.*, 693 F. Supp. 1073, 1077-78 (S.D. Fla. 1987) (allowing employees to sue asbestos manufacturer because state's version of § 2-318 specifically included employees within class of third-party beneficiaries); *Williams v. West Penn Power Co.*, 467 A.2d 811, 816 (Pa. 1983) (allowing suit by employee against manufacturer of ladder platform hoist notwithstanding lack of privity).

151. See *Watkins v. Barber-Colman Co.*, 625 F.2d 714, 716 (5th Cir. 1980) (concluding that lack of privity barred employee from bringing suit against cotton machine manufacturer); *Anderson v. Watling Ladder Co.*, 472 F.2d 576, 577 (6th Cir. 1973) (ruling that lack of horizontal privity barred suit by employee against manufacturer of defective ladder); *Bailey v. ITT Grinnel Corp.*, 536 F. Supp. 84, 89 (N.D. Ohio 1982) (holding that lack of horizontal privity prevented employee from suing manufacturer of punch press); *Teel v. American Steel Foundries*, 529 F. Supp. 337, 345-46 (E.D. Mo. 1981) (recommending refusing to permit suit by employee against manufacturer of "fifth wheel" device on tractor-trailer); *Armijo v. Ed Black's Chevrolet Ctr., Inc.*, 733 P.2d 870, 871-72 (N.M. 1987) (finding that no liability existed on the part of dump truck manufacturer for injuries sustained by employee of purchaser); *Bruns v. Cooper Indus., Inc.*, 605 N.E.2d 395, 397 (Ohio Ct. App. 1992) (holding that employee was not a third-party beneficiary under § 2-318 and, therefore, could not seek damages for personal injuries from ball peen hammer manufacturer); *Hester v. Purex Corp., Ltd.*, 534 P.2d 1306, 1308 (Okla. 1975) (prohibiting employee who inhaled toxic fumes from bringing implied warranty claim against manufacturer of solvent); *Anderson v. Dreis & Krump Mfg. Co.*, 739 P.2d 1177, 1182 (Wash. Ct. App. 1987) (concluding that employee was barred from bringing suit against manufacturer of punch press).

152. U.C.C. § 2-607 (3)(a) (1989). This provision provides: "Where a tender has been accepted: (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . ." *Id.*

153. See *General Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262, 1264 (Fla. Dist. Ct. App. 1980) ("The notice requirement also protects the seller's right to inspect the goods.").

154. See *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 409 (8th Cir. 1985) ("The first [purpose of the notice requirement] is to enable the seller to make adjustments or replacements or to suggest opportunities for cure.").

the buyer¹⁵⁵ and to prepare for litigation.¹⁵⁶ Finally, the notice requirement helps to protect sellers against stale claims.¹⁵⁷

In any action against the seller for breach of warranty, the buyer must allege and prove that he or she complied with the Code's notice requirements¹⁵⁸ and one who fails to do so will lose the right to sue the seller for breach of warranty.¹⁵⁹ Notice is usually given in writing; however, the buyer also may inform the seller orally,¹⁶⁰ or by other appropriate means,¹⁶¹ that the goods are defective. In addition, notice of breach must be communicated to the seller within a reasonable time after receipt of the goods.¹⁶² Finally, some courts insist that the buyer specifically charge the seller with breach of

155. See *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 826 (6th Cir. 1978) (“[E]xpress notice opens the way for settlement through negotiation between the parties.”); *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 512 (Alaska 1980) (“The overriding purpose of the notice requirement is to encourage consistent business practices and early settlement of disputes.”).

156. See *Courtesy Enters. v. Richards Lab.*, 457 N.E.2d 572, 577 (Ind. Ct. App. 1983) (“[N]otice should be provided to allow the seller to prepare for negotiation, and litigation.”); *Riley v. Ken Wilson Ford, Inc.*, 426 S.E.2d 717, 721 (N.C. Ct. App. 1993) (“Also, the seller must have a reasonable opportunity to discover facts and prepare for negotiation and his defense to a lawsuit.”).

157. See *L.A. Green Seed Co. v. Williams*, 438 S.W.2d 717, 720 (Ark. 1969) (“The purpose of the statutory requirement of notice to the seller of breach of warranty is . . . to give the seller some immunity against stale claims.”); *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661 (Colo. 1980) (“[N]otice provides the seller a safeguard against stale claims being asserted after it is too late for the manufacturer or seller to investigate them.”).

158. See *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983) (“The buyer bears the burden of showing that he gave the required notice within a reasonable time.”); *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681, 683 (N.C. 1981) (“Thus, the burden of pleading and proving that reasonable notification has been given is on the buyer”).

159. See *Point Adams Packing Co. v. Astoria Maine Constr. Co.*, 594 F.2d 763, 765-66 (9th Cir. 1979) (concluding that failure to provide adequate notice by buyer of boat which sank barred suit against boatbuilder); *Romey v. Willett Lincoln-Mercury, Inc.*, 220 S.E.2d 74, 75 (Ga. Ct. App. 1975) (concluding that delay in notification by buyer of automobile to dealer was unreasonable and, hence, suit against dealer was barred).

160. See *Stelco Indus. v. Cohen*, 438 A.2d 759, 761-62 (Conn. 1980) (holding that oral complaints by buyer of building materials to various employees of seller constituted adequate notice); *Oregon Lumber Co. v. Dwyer Overseas Timber Prods.*, 571 P.2d 884, 887 (Or. 1977) (concluding that oral notification of seller was sufficient to comply with section 2-607); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 889 (Tex. Civ. App. 1979) (ruling that oral expression of dissatisfaction with quality of mobile home communicated to seller's repairmen was sufficient notice).

161. See *Cancun Adventure Tours, Inc. v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988) (shipping air compressor back to seller with complaint that it was overheating found to constitute effective notice); *Overland Bond & Investment Co. v. Howard*, 292 N.E.2d 168, 176 (Ill. Ct. App. 1972) (concluding that buyer's act of towing used car to dealer's lot and informing employee that it needed further repairs was sufficient notice); *Ragland Mills, Inc. v. General Motors Corp.*, 763 S.W.2d 357, 361 (Mo. Ct. App. 1989) (returning damaged automobile to dealer's lot found to constitute adequate notice).

162. See *White v. Mississippi Order Buyers*, 648 P.2d 682, 684 (Colo. Ct. App. 1982) (holding that notice given thirty-four days after delivery of cattle was unreasonable under the circumstances).

contract,¹⁶³ although others merely require that the buyer inform the seller that the goods are unsatisfactory in some respect and that further action by the seller will be required.¹⁶⁴

The Code's notice requirements appear to work well in commercial transactions between experienced and knowledgeable parties. However, the Code's notice requirements have sometimes proved to be "booby traps for the unwary"¹⁶⁵ when they have been enforced too strictly against ordinary consumers.¹⁶⁶ The drafters of the Uniform Commercial Code tacitly acknowledged the existence of this problem when they declared that the purpose of section 2-607 was to defeat commercial bad faith, not to deprive consumers who act in good faith of their remedies.¹⁶⁷

Over the years, courts have employed a number of techniques to ameliorate the harshness of the notice requirement where injured consumers are involved. For example, many courts hold ordinary consumers to a more relaxed standard of compliance with notice requirements than commercial buyers.¹⁶⁸ In addition, a few courts have ruled that filing a lawsuit is sufficient

163. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 973 (5th Cir. 1976) ("[I]t is not enough under section 2-607 that a seller has knowledge of the facts constituting a nonconforming tender; he must also be informed that the buyer considers him to be in breach of the contract."); *Cotner v. International Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977) ("[N]otice must be more than a complaint. It must, either directly or inferentially, inform the seller that the buyer demands damages upon an asserted claim of breach of warranty.").

164. See *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 359 (5th Cir. 1980) ("It is well established that 'notice under section 2-607 need not be a specific claim for damages or an assertion of legal rights.'"); *American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592, 596 (Okla. 1981) ("[Notice] is sufficient if it is informative to the seller of the general nature of the difficulty encountered with the warranted goods."); *Petro-Chem, Inc. v. A.E. Staley Mfg. Co.*, 686 P.2d 589, 592 (Wyo. 1984) ("The general rule is that notification is sufficient if the seller is informed that the transaction is still troublesome and that the transaction is claimed to involve a breach thus opening the way for normal settlements though negotiation.").

165. *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 900 (Cal. 1962). See *Prosser, supra* note 1, at 1130 (discussing how courts deal with troublesome requirement of Sales Act which provides that a buyer cannot recover on warranty unless he gives notice of breach to seller within reasonable time).

166. See, e.g., *Branden v. Gerbie*, 379 N.E.2d 7, 9 (Ill. Ct. App. 1978) (barring suit by injured IUD user against manufacturer because of fifteen-month delay in notification); *Fischer v. Mead Johnson Lab.*, 341 N.Y.S.2d 257 (N.Y. App. Div. 1973) (declaring that oral contraceptive user's personal injury claim was barred because of failure to notify manufacturer prior to filing suit); *San Antonio v. Warwick Club Ginger Ale Co.*, 248 A.2d 778, 782 (R.I. 1968) (holding that as matter of law eight-month delay in notifying retailer was unreasonably long).

167. See *Morris G. Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 28 (1965); see also *Shooshanian v. Wagner*, 672 P.2d 455, 463 (Alaska 1983) ("A consumer unfamiliar with commercial practices should not be barred from pursuing meritorious claim because he was unaware of need to notify remote seller of breach before bringing suit."); *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681, 685 (N.C. 1981) ("Fairness to the consumer dictates that he be given a reasonable time to learn of and to comply with this requirement."); *Riley v. Ken Wilson Ford, Inc.*, 426 S.E.2d 717, 721 (N.C. Ct. App. 1993) ("[A] consumer acting in good faith should not be deprived of a remedy.").

168. See *Cancun Adventure Tours, Inc. v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988) ("In addition, retail consumers—i.e. those who buy the item for their own use

notice to comply with the Code's requirements.¹⁶⁹ Furthermore, some courts have determined that the buyer is not obliged to notify anyone but his or her immediate seller that the goods are defective.¹⁷⁰ It is assumed that the seller, once notified, will inform the next party in the distributive chain, thereby ensuring that the manufacturer will ultimately be notified of the problem.¹⁷¹ Other courts, however, have insisted that the victim notify all parties against whom a breach of warranty claim will be made.¹⁷² Finally, a respectable number of courts have concluded that third-party beneficiaries under section 2-318 do not have to comply with the notice requirements of section 2-607.¹⁷³

rather than for resale in the course of business—are held to a lesser standard of notice than are merchant buyers.”).

169. See *Shooshanian*, 672 P.2d at 462 (holding complaint filed by retail consumer against mobile home manufacturer sufficient to satisfy notice requirement); see also *Pace v. Sagebrush Sales Co.*, 560 P.2d 789, 792 (Ariz. 1977) (declaring that pleadings could constitute notice if suit was brought within reasonable time). But see *Parrillo v. Giroux Co., Inc.*, 426 A.2d 1313, 1317 (R.I. 1981) (finding filing of lawsuit by injured consumer not sufficient to comply with code's notice provisions).

170. See *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661 (Colo. 1980) (holding that purchaser of defective farm equipment satisfied notice requirement by promptly informing dealer of problem); *Goldstein v. G.D. Searle & Co.*, 378 N.E.2d 1083, 1086 (Ill. Ct. App. 1978) (finding user of oral contraceptives, who suffered stroke, was only required to notify her immediate seller); *Firestone Tire & Rubber Co. v. Cannon*, 452 A.2d 192, 198 (Md. Ct. Spec. App. 1982), *aff'd*, 456 A.2d 930 (Md. 1983) (concluding that buyer of tire for tractor-trailer rig was not required to notify tire manufacturer).

171. See *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 206 (Colo. 1984) (“When consumer's notice of breach is given to his immediate seller, such person to preserve any right of action for breach of warranty will give notice to his immediate seller and so on upstream.”); *Ragland Mills, Inc. v. General Motors Corp.*, 763 S.W.2d 357, 361 (Mo. Ct. App. 1989) (declaring that notice to immediate seller inures to benefit of manufacturer); *Seaside Resorts, Inc. v. Club Car, Inc.*, 416 S.E.2d 655, 664 (S.C. Ct. App. 1992) (stating that sellers will notify others in distributive chain in order to preserve their rights).

172. See *Carlson v. Chevron Chem. Co. v. Johnson*, 635 P.2d 1248, 1256 (Kan. Ct. App. 1981) (holding that farmer who suffered crop loss because of defective herbicide was required to notify manufacturer before bringing suit); *Redfield v. Mead Johnson & Co.*, 512 P.2d 776, 781 (Or. 1973) (declaring that injured oral contraceptive user must notify manufacturer in order to bring breach of warranty action); *Wilcox v. Hillcrest Mem'l Park*, 696 S.W.2d 423, 424-25 (Tex. Civ. App. 1985) (barring suit by buyer of defective casket who notified retail seller but not casket manufacturer).

173. See *McKneely v. Sperry Corp.*, 642 F.2d 1101, 1107 (8th Cir. 1981) (refusing to require employee injured by defective winch to notify manufacturer); *Carlson v. Armstrong World Indus., Inc.*, 693 F. Supp. 1073, 1078 (S.D. Fla. 1987) (finding employee, as third party beneficiary, was not required to notify asbestos manufacturer that products were defective); *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1982) (holding that plaintiff injured in motorcycle accident was third party beneficiary and, therefore, not required to notify manufacturer); *Clemco Indus. v. Johnson*, 368 So. 2d 509, 513-15 (Ala. 1979) (declaring that employees of sandblasting company do not have to notify manufacturer of sandblasting hoods in order to bring suit against it); *Tomczuk v. Town of Cheshire*, 217 A.2d 71, 73-74 (Conn. Super. Ct. 1965) (declaring that social guest of buyer, injured while riding bicycle, was not buyer and, therefore, not required to notify seller of the defect); *Mattos, Inc. v. Hash*, 368 A.2d 993, 996-97 (Md. 1977) (ruling that employee injured by defective automotive alignment machine was not required to notify manufacturer); *Frericks v. General Motors Corp.*, 363 A.2d 460, 464 (Md. 1971) (holding

C. Disclaimers and Warranty Limitations

A disclaimer is a provision in a sales contract that prevents a warranty from arising;¹⁷⁴ a warranty limitation, on the other hand, restricts the remedies available to the injured party if a breach occurs.¹⁷⁵ Both of these devices are commonly used by sellers to shift product-related risks from themselves to the purchasers of their products.

Section 2-316 permits a seller to disclaim warranties if certain requirements are satisfied. Generally speaking, express warranties cannot be disclaimed if this would create a conflict between two contractual provisions.¹⁷⁶ However, a seller can disclaim the implied warranties of merchantability and fitness. To exclude an implied warranty of merchantability, section 2-316 (2)¹⁷⁷ provides that the disclaimer must be conspicuous¹⁷⁸ and must expressly refer to merchantability.¹⁷⁹ Disclaimers of fitness warranties also

that third-party beneficiary does not have to notify automobile manufacturer in order to sue for breach of implied warranty).

174. See Prosser, *supra* note 107, at 157 ("A disclaimer is a refusal of the seller to warrant.").

175. See *Article Two Warranties in Commercial Transactions: An Update*, *supra* note 77, at 1289 ("Warranty limitations, on the other hand, do not prevent warranties from arising; rather they allow sellers to narrow the scope of their potential liability under existing warranties.").

176. See *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 412-13 (8th Cir. 1985) (declaring disclaimer to be inconsistent with express warranty given by seller of power transmission tower components); *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 56-57 (8th Cir. 1980) (concluding that "as is" clause in contract for sale of used airplane did not exclude express warranty that plane was airworthy); *Auto-Teria, Inc. v. Ahern*, 352 N.E.2d 774, 782-83 (Ind. Ct. App. 1978) (holding that general disclaimer was not effective to exclude express warranty that automatic car wash could be coin operated); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 384 (Minn. 1978) (ruling that express warranty with respect to carryover characteristics of herbicide overrode general disclaimer); *Paulson v. Olson Implement Co.*, 319 N.W.2d 855, 859-60 (Wis. 1982) (finding disclaimer to be inconsistent with express warranty given in connection with sale of grain drying bin). A seller, however, can place time limits or other restrictions on the scope of an express warranty. See, e.g., *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986) (upholding time/mileage limitation on express warranty); *Tracey v. Vinton Motors, Inc.*, 296 A.2d 269, 271 (Vt. 1972) (concluding that 30-day/1000-mile limitation in connection with sale of used car was effective).

177. U.C.C. § 2-316 (2) (1989). This provision provides: "Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous." *Id.*

178. See *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 909 (D. Minn. 1985) (concluding that disclaimer on back of contract for sale of animal feed storage system was not conspicuous); *Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194, 1200 (Ill. Ct. App. 1980) (ruling that disclaimer printed on back of contract to sell breeding pigs was not conspicuous); *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195, 199 (N.J. Super. 1968) (ruling that fine print disclaimer on back of sales contract was not conspicuous); *Christopher v. Larson Ford Sales, Inc.*, 557 P.2d 1009, 1012 (Utah 1976) (holding that disclaimer which appeared in fine print on back of contract for sale of mobile home was not conspicuous and, therefore, not effective). *But see Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 948 (Ind. Ct. App. 1982) (finding written modification of warranty for new automobile to be conspicuous).

179. See *McCormick Mach., Inc. v. Julian E. Johnson & Sons, Inc.*, 523 So. 2d 651, 653-54 (Fla. Dist. Ct. App. 1988) (concluding that disclaimer in connection with sale of used bulldozer was ineffective because it failed to mention merchantability); *Lee v. Peterson*, 716 P.2d 1373,

must be conspicuous, but no particular language is required to make a valid disclaimer.¹⁸⁰

Section 2-316 (3)(a) permits a seller to disclaim implied warranties by selling the product "as is" or "with all faults."¹⁸¹ The courts generally have allowed sellers of used products to disclaim liability by using such terms,¹⁸² even when the product has caused personal injuries.¹⁸³ However, the courts have consistently refused to apply the provisions of section 2-316 (3)(a) to new products.¹⁸⁴

Section 2-316 (3)(b) states that no implied warranties arise with respect to defects that can be discovered by inspection if the seller requests the buyer to inspect the goods and the seller either inspects the goods or declines to do so.¹⁸⁵ Thus, a buyer who has inspected (or has been asked to inspect) goods before purchasing them cannot rely on the seller to protect against discovera-

1375-76 (Idaho Ct. App. 1986) (holding disclaimer by seller of defective copier machine to be effective because of failure to mention merchantability); *Agrarian Grain Co., Inc. v. Meeker*, 526 N.E.2d 1189, 1192 (Ind. Ct. App. 1988) (holding disclaimer by seller of grain bins to be ineffective because it did not refer to merchantability); *Wright v. T & B Auto Sales, Inc.*, 325 S.E.2d 493, 495-96 (N.C. Ct. App. 1985) (holding that disclaimer by seller of used car was invalid because it failed to mention merchantability); *P.E.A.C.E. Corp. v. Oklahoma Nat'l Gas Co.*, 568 P.2d 1273, 1278 (Okla. 1977) (refusing to give effect to attempted disclaimer of implied warranty of merchantability because disclaimer failed to mention merchantability).

180. U.C.C. § 2-316 (2) (1989). This provision declares that: "[T]o exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'" *Id.*

181. *Id.* § 2-316 (3)(a). This provision declares that: "[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes it plain that there is no implied warranty." *Id.*

182. *See Pell City Wood, Inc. v. Forke Bros. Auctioneers, Inc.*, 474 So. 2d 694, 695-96 (Ala. 1985) (ruling that sale of used truck "as is" effectively disclaimed implied warranties); *O'Neill v. International Harvester Co.*, 575 P.2d 862, 865 (Colo. Ct. App. 1978) (holding that sale of used truck "as is" was sufficient to disclaim all implied warranties); *Pelc v. Simmons*, 620 N.E.2d 12, 15 (Ill. Ct. App. 1993) (declaring that "as is" sticker on used car was sufficient to disclaim implied warranties); *De Voe Chevrolet-Cadillac, Inc. v. Cartwright*, 526 N.E.2d 1237, 1240 (Ind. Ct. App. 1988) (finding that used car sold "as is" was not warranted); *Ace, Inc. v. Maynard*, 423 S.E.2d 504, 509 (N.C. Ct. App. 1992) (concluding that sale of used airplane "as is" effectively disclaimed all implied warranties).

183. *See Masker v. Smith*, 405 So. 2d 432, 434 (Fla. Dist. Ct. App. 1981) (holding that sale of used car "as is" excused seller from liability for personal injuries suffered as result of brake failure). *But see Knipp v. Weinbaum*, 351 So. 2d 1081, 1084-85 (Fla. Dist. Ct. App. 1977) (declaring that sale of used motorcycle "as is" did not necessarily exclude implied warranties where personal injuries were involved).

184. *See Gaylord v. Lawler Mobile Homes, Inc.*, 477 So. 2d 382, 383 (Ala. 1985) (holding that sale of new mobile home "as is" did not exclude implied warranty of merchantability).

185. U.C.C. § 2-316 (3)(b) (1989). This provision provides:

[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

Id.

ble defects;¹⁸⁶ such a buyer, however, still may maintain a breach of warranty claim for latent defects that could not have been discovered by a reasonable inspection.¹⁸⁷

Finally, section 2-316 (3)(c) provides that implied warranties can be disclaimed by course of dealing or trade usage.¹⁸⁸ Thus, either a course of dealing between the parties themselves¹⁸⁹ or usage of the trade in general¹⁹⁰ may prevent implied warranties from arising.

Lest sellers be unduly tempted to take advantage of less sophisticated buyers, the courts and the Code have placed some limitations on the power to disclaim liability for defective goods. For example, in order for a disclaimer to be effective, the seller must communicate the substance of the disclaimer to the purchaser prior to the time of sale;¹⁹¹ a disclaimer cannot be imposed on the buyer after the sale has been completed.¹⁹² Furthermore, some courts¹⁹³ will invalidate disclaimers that comply with the formal re-

186. See *David v. Davenport*, 656 So. 2d 952, 953 (Fla. Dist. Ct. App. 1995) (declaring that inspection of used car by buyer's agent would preclude claim for breach of implied warranty); *Cardwell v. Hackett*, 579 S.W.2d 186, 191 (Tenn. Ct. App. 1978) (concluding that there was no implied warranty as to defects in mobile home that were apparent to buyer who examined product twice before purchase); *Richards Mfg. Co. v. Gamel*, 489 P.2d 366, 367 (Wash. Ct. App. 1971) (holding that commercial buyer of lamps, who inspected merchandise before buying, should have discovered defects). *But see* *Holm v. Hansen*, 248 N.W.2d 503, 510 (Iowa 1971) (finding that §2-316 (3)(b) did not apply if seller did not ask buyer to inspect goods).

187. See *Twin Lakes Mfg. Co. v. Coffey*, 281 S.E.2d 864, 866-67 (Va. 1981) (finding no waiver of implied warranty with respect to latent defects which could not have been discovered by careful inspection of mobile home).

188. U.C.C. § 2-316 (3)(c) (1989). This provision provides: "[A]n implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade." *Id.*

189. See *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 185-86 (D. Conn. 1984) (concluding that sixty-two year course of dealing between parties made it clear to buyer that structural steel was being sold without any implied warranties).

190. See *Spurgeon v. Jamieson Motors*, 521 P.2d 924, 927-28 (Mont. 1974) (finding sale of used combine to be without warranties according to trade usage); *R.D. Lowrance, Inc. v. Peterson*, 178 N.W.2d 277, 279 (Neb. 1970) (declaring that usage of trade prevented implied warranties relating to health of cattle from arising); *Kincheloe v. Geldmeier*, 619 S.W.2d 272, 274-75 (Tex. Ct. App. 1981) (holding that custom among cattle buyers was that cattle purchased at auction were sold without any implied warranties).

191. See *Wright v. Dow Chemical U.S.A.*, 845 F. Supp. 503, 511 (M.D. Tenn. 1993) (holding that disclaimers on pesticide labels were not effective against homeowners who never had chance to see them).

192. See *Winter Panel Corp. v. Reichhold Chems., Inc.*, 823 F. Supp. 963, 968-71 (D. Mass. 1993) (declaring that disclaimer received by purchaser after sale of goods not part of bargain); *Whitaker v. Farmhand, Inc.*, 567 P.2d 916, 922 (Mont. 1977) ("A disclaimer or limitation of warranty contained in a manufacturer's manual received by the purchaser subsequent to the sale does not limit recovery for implied or express warranties made prior to or at the time of sale.").

193. See *Martin v. Joseph Harris Co.*, 767 F.2d 296, 301-02 (6th Cir. 1985) (holding that disclaimer and limitation provisions used by all producers of cabbage seed were unconscionable); *Schmaltz v. Nissin*, 431 N.W.2d 657, 661-62 (S.D. 1988) (finding disclaimer and limitation provision in contract for sale of seed to be unconscionable). *But see* *Arthur A. Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (arguing that disclaimers that meet the formal requirements of §2-316 should not be invalidated on general unconscionability grounds); *Article Two Warranties in Commercial Transactions*, *supra* note 77,

quirements of section 2-316 on the theory that they are unconscionable under the provisions of section 2-302 (1).¹⁹⁴

The Code also permits sellers to limit remedies that would otherwise be available for breach of warranty.¹⁹⁵ For example, the parties may agree that the buyer's remedies shall be limited to repair or replacement of defective goods.¹⁹⁶ Another common practice is to exclude damages for consequential losses if the goods are not up to par.¹⁹⁷ At the same time, the Code provides that a limitation may be declared ineffective if it causes the warranty to "fail of its essential purpose."¹⁹⁸ In other words, a seller cannot offer warranty protection in one part of the contract and then vitiate it completely by unreasonably limiting the remedies available to the buyer if a breach of warranty occurs. Moreover, courts have interpreted this provision liberally in order to protect buyers, especially in consumer sales transactions.¹⁹⁹ In addition, the Code provides that attempts to limit liability for personal injuries is *prima*

at 216 ("The Code's explicit authorization of implied warranty disclaimers suggests that courts are not free to brand such clauses substantively unconscionable.").

194. U.C.C. § 2-302 (1) (1989). This provision provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result.

Id.

195. *Id.* § 2-719 (1). This provision provides:

Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages:

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

Id.

196. See Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28, 61 (1977).

197. U.C.C. § 2-719 (3) (1989). This provision provides, in relevant part, that: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." *Id.*

198. *Id.* § 2-719 (2). This provision provides: "Where circumstances cause an exclusive or limited remedy to fail its essential purpose, remedy may be had as provided in this Act." *Id.*

199. See *Riley v. Ford Motor Co.*, 442 F.2d 670, 673 (5th Cir. 1971) (upholding jury verdict that limitations in new car warranty caused it to fail of its essential purpose); *Liberty Truck Sales, Inc. v. Kimbrel*, 548 So. 2d 1379, 1384 (Ala. 1989) (holding that repair or replace limitation failed of its essential purpose since seller was unable to repair truck); *Ehlers v. Chrysler Motor Corp.*, 226 N.W.2d 157, 161 (S.D. 1975) (concluding that unreasonable delays in repairing new car caused available remedy to fail of its essential purpose). But see *Middletown Eng'g Co. v. Climate Conditioning Co.*, 810 S.W.2d 57, 59-60 (Ky. Ct. App. 1991) (finding no failure of essential purpose even though seller took 126 days to repair product).

facie unconscionable,²⁰⁰ and courts routinely invalidate such limitations unless the seller can rebut this presumption.²⁰¹

D. Statute of Limitations

Statutes of limitation prescribe the period during which the plaintiff can bring suit once a cause of action has accrued.²⁰² Section 2-725 (1) establishes a four-year statute of limitations for breach of warranty claims.²⁰³ The Code allows the parties to shorten the statutory period in their original agreement,²⁰⁴ however, they may not extend the limitation period beyond the four years permitted by section 2-725 (1).²⁰⁵

A major concern with statutes of limitations is determining when a cause of action accrues. The accrual period in tort actions usually starts at the time the injury occurs, although if the injury is a latent one, the cause of action ordinarily accrues when the injury was, or should have been, first discovered.²⁰⁶ In contrast, section 2-725 (2) declares that a cause of action for

200. U.C.C. § 2-719 (3) (1989). This provision provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." *Id.*

201. See *Matthews v. Ford Motor Co.*, 479 F.2d 399, 402 (4th Cir. 1973) (holding that seller failed to rebut presumption that limitation on consequential damages in automobile sales contract was unconscionable); *Ford Motor Co. v. Tritt*, 430 S.W.2d 778, 781-82 (Ark. 1968) (characterizing truck manufacturer's disclaimer as unconscionable to extent that it applied to personal injuries); *Collins v. Uniroyal, Inc.*, 315 A.2d 16, 18 (N.J. 1974) (declaring that limitation of consequential damages was unconscionable when driver of automobile was killed by tire blowout); *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116, 1120 (Okla. 1978) (invalidating limitation of remedy in personal injury case on grounds of unconscionability); see also *Gladden v. Cadillac Motor Car Division*, 416 A.2d 394, 402 (N.J. 1980) (refusing to give effect to limitation provision in contract for sale of new car when purchaser suffered property damage).

202. See Josephine H. Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 629 (1985).

203. U.C.C. § 2-725 (1) (1989). This provision provides: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." *Id.*

204. See *Shur-Value Stamps, Inc. v. Phillips Petroleum Co.*, 50 F.3d 592, 599 (8th Cir. 1995) (giving effect to one-year limitation period in contract for sale of resin); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 821 (6th Cir. 1978) (upholding one-year limitation period); *Aceros Industriales, S.A. de C.V. v. Florida Steel Corp.*, 528 F. Supp. 1156, 1158 (S.D.N.Y. 1982) (concluding that one-year limitation period in contract for sale of steel billets was valid); *Snyder v. Gallagher Truck Ctr.*, 453 N.Y.S.2d 826, 827-28 (N.Y. App. Div. 1982) (declaring that claim by purchaser of tractor was subject to one-year limitation period); *Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers, Inc.*, 597 N.Y.S.2d 884, 886 (N.Y. Sup. Ct. 1993) (upholding two-year limitation period on sale of electrical transformers); *Jandreau v. Sheesley Plumbing & Heating Co.*, 324 N.W.2d 266, 270-71 (S.D. 1982) (validating one-year limitation period in contract for sale of irrigation equipment); *Poppenheimer v. Bluff City Motor Homes*, 658 S.W.2d 106, 110-11 (Tenn. Ct. App. 1983) (upholding twelve month, 12,000 mile warranty for motor home).

205. See Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1327 (1987).

206. See Andrew R. Turner, *The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449,

breach of warranty accrues when the breach occurs, usually when the goods are first tendered for delivery.²⁰⁷ However, the Code provides an exception to the four-year limitation period in the case of warranties relating to future performance.²⁰⁸ If the seller explicitly warrants the future performance of the goods, the limitation period will not begin to run until the buyer discovers, or should have discovered, the defect.²⁰⁹ An example of a warranty of future performance is one that warrants the product for a specified period of time.²¹⁰ It should be noted, however, that courts generally require a warranty regarding future performance to be made in very explicit terms.²¹¹ In addition, courts almost uniformly refuse to apply the future performance exception to implied warranties because such warranties cannot explicitly apply to future performance.²¹²

There is a split of authority over when a breach of warranty claim accrues when the victim has suffered a nonpecuniary loss. Most courts have

455-56 (1981) ("The modern rule, often termed the 'discovery rule,' is that the statute of limitations does not begin to run until an injury is or should have been discovered.").

207. U.C.C. § 2-725 (2) (1989). This provision provides:

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.

208. *Id.*

209. See *Kodiak Elec. Ass'n v. Delaval Turbine, Inc.*, 694 P.2d 150, 157 (Alaska 1984) (stating that when seller warranted future performance of used diesel generator, cause of action accrued at time defect was, or should have been, discovered); *Executone Bus. Sys. Corp. v. IPC Communications, Inc.*, 442 N.W.2d 755, 759 (Mich. Ct. App. 1989) (declaring that limitation period would begin to run from day defect was, or should have been, discovered).

210. See *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 820-21 (6th Cir. 1978) ("If a seller expressly warrants a product for a specified number of years, it is clear that, by this action alone, he is explicitly warranting the future performance of the product or goods for that period of time."); *Snyder v. Boston Whaler, Inc.*, 892 F. Supp. 955, 958 (W.D. Mich. 1994) ("A warranty extends to future performance when the warranty explicitly provides that the goods will be free from defects for a specific period of time.").

211. See *Economy Hous. Co. v. Continental Forest Prods.*, 805 F.2d 319, 320-21 (8th Cir. 1986) (requiring explicit reference to future performance in contract for sale of plywood siding); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 822 (8th Cir. 1983) (declaring that warranty of future performance must be clearly stated); *Rutland v. Swift Chem. Co.*, 351 So. 2d 324, 325-26 (Miss. 1977) (holding that promise of future performance of fertilizer must be explicit).

212. See *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1325 (5th Cir. 1981) (finding that implied warranty, which arose in connection with sale of milking machinery for dairy farm, could not relate to future performance); *May v. AC & S, Inc.*, 812 F. Supp. 934, 944 (E.D. Mo. 1993) (declaring that implied warranty of merchantability associated with sale of asbestos products cannot extend to future performance); *Providence & Worcester R.R. Co. v. Sargent & Greenleaf, Inc.*, 802 F. Supp. 680, 689 (D.R.I. 1992) (concluding that no promises concerning future performance of railroad switchblock would arise in connection with implied warranties); *Murphy v. Spelts-Schultz Lumber Co.*, 481 N.W.2d 422, 430 (Neb. 1992) (holding that future performance exception only applies to express warranties).

concluded that section 2-725 governs both personal injury²¹³ and property damage²¹⁴ claims. These courts have rejected the discovery rule and have sometimes left injured parties without any remedy.²¹⁵ A smaller group of courts have decided that a tort statute of limitations should be applied when the victim has suffered a personal injury, even when the cause of action

213. See *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1104 (N.D.N.Y. 1977) (holding that implied warranty suit by recipient of breast implant was barred by four-year statute of limitation); *Boains v. Lasar Mfg. Co.*, 330 F. Supp. 1134, 1135 (D. Conn. 1971) (concluding that claim by employee of purchaser against manufacturer of meat grinding machine was barred by statute of limitations); *Armour v. Alaska Power Auth.*, 765 P.2d 1372, 1375 (Alaska 1988) (stating that statute of limitation begins to run when product is purchased, not when injury occurs); *Johnson v. Hockessin Tractor, Inc.*, 420 A.2d 154, 158 (Del. 1980) (applying § 2-725 to suit by injured purchaser of defective tractor); *PPG Indus., Inc. v. Genson*, 217 S.E.2d 479, 480 (Ga. Ct. App. 1975) (holding that plaintiff's personal injury claim against glass supplier was barred by § 2-725); *Stoltzner v. American Motors Jeep Corp.*, 469 N.E.2d 443, 444 (Ill. Ct. App. 1984) (ruling that § 2-725 applies to breach of warranty claims, including those involving personal injuries); *Fernandez v. Char-Li-Jon, Inc.*, 888 P.2d 471, 475 (N.M. 1994) (holding that four-year statute of limitation was applicable to nightclub patron injured by glass in his drink); *Heller v. U.S. Suzuki Motor Co.*, 477 N.E.2d 434, 436 (N.Y. 1985) (holding that cause of action against motorcycle manufacturer accrued when manufacturer or distributor tendered delivery of product); *Spieker v. Westgo, Inc.*, 479 N.W.2d 837, 848 (N.D. 1992) (concluding that four-year statute of limitation barred suit by accident victim against manufacturer of farm machinery).

214. See *Reece v. Homette Corp.*, 429 S.E.2d 768, 769 (N.C. Ct. App. 1993) (concluding that § 2-725 barred claim against seller of mobile home for damage to product itself).

215. See *O'Brien v. Eli Lilly & Co.*, 668 F.2d 704, 711 (3d Cir. 1981) (rejecting discovery rule in personal injury suit by DES daughter); *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 14 (D.D.C. 1995) (declining to apply discovery rule in warranty cases); *Thomas v. King Ridge, Inc.*, 771 F. Supp. 478, 482 (D.N.H. 1991) (refusing to apply discovery rule in personal injury action by user of defective ski equipment); *Brownstein v. Dow Corning Wright*, 678 F. Supp. 1151, 1155 (E.D. Pa. 1988) (rejecting discovery rule in personal injury suit by breast implant recipient).

sounds in warranty.²¹⁶ Finally, a few courts have restricted the application of section 2-725 (2) to cases where the parties were in privity with each other.²¹⁷

V. PROPOSED CHANGES TO THE CODE

In Part IV, I identified privity, notice, disclaimers, and statutes of limitation as potential problem areas. In this portion of the article, I will consider what changes should be made, if any, in the Code to enable it to function as an effective insurance mechanism for injured consumers.

A. The Privity Requirement

It appears that very few jurisdictions presently require vertical privity when the injured party brings an express warranty claim against a product manufacturer. A number of states, however, continue to enforce vertical privity requirements against injured consumers who bring implied warranty claims against remote sellers. These vertical privity requirements make no sense in personal injury cases because they require the injured party to sue the retailer instead of the real party in interest, the manufacturer. Such suits are wasteful because the retailer must in turn implead his or her immediate

216. See *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1043 n.1 (4th Cir. 1983) (applying time-of-injury approach to personal injury claim against truck manufacturer); *Hahn v. Atlantic Richfield*, 625 F.2d 1095, 1105 (3d Cir. 1980) (concluding that personal injury statute of limitation, not § 2-725, should apply to claim by injured employee against seller of chain hoist); *Tyler v. R.R. Street & Co.*, 322 F. Supp. 541, 543 (E.D. Va. 1971) (stating that two-year personal injury statute of limitation was applicable to breach of warranty claim against seller of chemical spot remover); *Becker v. Volkswagen of Am., Inc.*, 125 Cal. Rptr. 326, 331 (Ca. Ct. App. 1975) (holding that one-year personal injury statute of limitation was applicable to accident victim's claim against car manufacturer); *Brown v. Ellison*, 304 N.W.2d 197, 201 (Iowa 1981) (applying discovery rule in personal injury case); *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 421 (N.J. 1973) (concluding that personal injury statute of limitation applies to suit by injured party against truck tire manufacturer); *Sun Ref. & Mktg. Co. v. Crosby Valve & Gage Co.*, 627 N.E.2d 552, 555 (Ohio 1994) ("Therefore, in a products-liability action between sophisticated commercial parties, the character of the loss determines the applicable statute of limitations."); *Pirri v. Toledo Scale Corp.*, 619 A.2d 429, 431-32 (R.I. 1993) (declaring that personal injury statute of limitation would be used instead of U.C.C. statute where employee was injured by meat-cutting machine); *Taylor v. Ford Motor Co.*, 408 S.E.2d 270, 274 (W. Va. 1991) (applying tort statute of limitation instead of § 2-725 in personal injury actions); see also *Lloyd F. Smith Co., Inc. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992) (purporting to limit §2-725 to "commercial transactions" between merchants).

217. See *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747, 750-51 (S.D. Ala. 1976) (concluding that cause of action for third party beneficiaries accrued at time of injury), *aff'd*, 560 F.2d 1021 (5th Cir. 1977); *Knox v. North Am. Car Corp.*, 399 N.E.2d 1355, 1367 (Ill. Ct. App. 1980) (holding that, in absence of privity, § 2-725 was not applicable to personal injury claim against supplier of boxcar); *Infante v. Montgomery Ward & Co.*, 371 N.Y.S.2d 500, 502 (App. Div. 1975) (declining to apply § 2-725 to injured plaintiff who was not in privity with manufacturer of pajamas which caught fire); *United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 257 N.E.2d 380, 384 (Ohio 1970) (concluding that § 2-725 was applicable in the absence of privity to suit by truck owner whose property was damaged); *Plouffe v. Goodyear Tire & Rubber Co.*, 373 A.2d 492, 495 (R.I. 1977) (declaring that § 2-725 was not applicable to suits by parties who were not in privity with each other).

vendor. Additional parties in the distributive chain also must be brought into the litigation if the manufacturer is reached. Thus, what ought to be a simple dispute between the injured party and the manufacturer instead becomes a complicated multiparty lawsuit. This is wasteful because each party must incur substantial legal costs even though only the manufacturer ultimately will pay if the plaintiff wins.²¹⁸

The vertical privity requirement is also at odds with the notion that products liability operates as an insurance mechanism. The insurance theory assumes that the manufacturer, not the retailer, provides insurance protection. If this is so, the injured party should be allowed to seek compensation directly from the insurer, that is, the manufacturer. However, a vertical privity requirement requires the injured consumer to deal, at least initially, with an intermediary instead of being able to proceed directly against the manufacturer.

For these reasons, it seems reasonable to do away with the vertical privity requirement in personal injury and property damage claims, at least where ordinary consumers are involved. It also makes sense to bar personal injury actions against retailers and other intermediaries in cases where manufacturers are solvent and subject to suit.

The horizontal privity requirement is somewhat more complicated. At first blush, it is tempting to eliminate section 2-318 Alternative A, which restricts the scope of horizontal privity to family members and household guests, and substitute in its stead Alternative B, which defines horizontal privity broadly enough to include all foreseeable accident victims. This would allow employees and bystanders to bring warranty claims against product sellers. A case can be made, however, for retaining the prevailing horizontal privity rule.

I have argued elsewhere that employees should not be allowed to recover against product sellers because they already are covered by workers compensation programs.²¹⁹ In most states, the benefits provided by workers' compensation statutes constitute the exclusive remedy of an employee against an employer.²²⁰ A worker who has received an award under workers' compensation also can recover against a product seller,²²¹ but the em-

218. See Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 NOVA L. REV. 213, 229 (1987) ("Product retailers, wholesalers, and distributors, routinely sued in product liability cases, are forced to incur substantial legal costs to achieve this 'shifting' process.").

219. See Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 706-08 (1997).

220. See Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241, 255 (1993) (stating that employee is statutorily limited to workers' compensation provisions); Nina G. Stillman & John R. Wheeler, *The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969, 971-72 (1987) ("The exclusive remedy doctrine is at the heart of worker's compensation systems.").

221. See Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 919 (1980) ("The employee can file suit against third parties: either the manufacturer of the machine or the party who supplied it to the employer.").

ployer is entitled to subrogation for the amount of the workers compensation award.²²² Arguably, it is inefficient to shift losses from one compensation system to another in this fashion;²²³ therefore, it might make more economic sense to exclude employees from the warranty/insurance coverage provided by product sellers. On the other hand, it might be better to let the parties resolve the coverage issue by contract. An employer who did not wish to provide additional protection for employees could expressly exclude them from warranty/insurance protection.

The other class of victims excluded by Alternative A, but not by Alternative B, are bystanders who are not associated in some way with the buyer.²²⁴ The reason bystanders should not be allowed to recover against product sellers is that they have not purchased the product and, thus, have not contributed to the insurance fund. Consequently, if the privity barrier is waived for bystanders, they will be subsidized by those who have purchased the product. On the other hand, bystanders cannot bargain with the parties for protection and are essentially helpless victims of risks created by third parties. As such, they present a strong moral claim to compensation. There are various ways to deal with the problem of bystanders. One is to permit them to recover on humanitarian grounds. Because bystander recoveries would constitute only a tiny fraction of the funds paid to accident victims by producers, it would not offend our sense of justice very much to give them a free ride. The other solution is to prohibit bystanders from bringing warranty claims against product sellers but to allow them to bring negligence actions instead. I prefer the second alternative.

Notwithstanding the arguments just made against allowing employees and bystanders to recover, I think that it might be best to eliminate privity requirements altogether in consumer-related personal injury and property damage cases. Privity requirements are an unwarranted restriction on the right of buyers and sellers to allocate risk by private agreement. Parties can still exclude warranty/insurance coverage by express agreement and do not have to rely on default rules like privity requirements to achieve this result.

222. See Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and Non-Tort Regime*, 50 OHIO ST. L.J. 825, 836 (1989) ("[I]n all but three jurisdictions . . . the employer is given a statutory lien against the employee's tort right to secure reimbursement of WC [workers' compensation] benefits that the employer has or will pay to the injured worker.").

223. See O'Connell, *supra* note 34, at 441 ("However, as legal and insurance scholars have been pointing out for years, these so-called subrogation claims, whereby insured losses are shifted and reshifted in multiple insurance arrangements, always shortchange insureds in the end, since multiple and expensive layers of insurance are thereby required of everyone.").

224. I assume that customers who are intending to buy a product, but have not yet paid for it, would be considered buyers and not bystanders. See, e.g., *Lasky v. Economy Grocery Stores*, 65 N.E.2d 305, 306 (Mass. 1946) (holding that customer in self-service grocery store who was injured by soft drink she was about to purchase would be buyer for purposes of implied warranty); *Loch v. Confair*, 63 A.2d 24, 26-27 (Pa. 1949) (same).

B. The Notice Requirement

Section 2-607, the Code's notice provision, is presently applicable to ordinary consumers.²²⁵ As mentioned earlier, most courts have relaxed notice requirements significantly in personal injury cases involving retail purchasers.²²⁶ Moreover, accident victims normally obtain legal assistance immediately upon injury and lawyers are generally familiar with the Code's notice provisions even if consumers are not.²²⁷ Thus, legitimate claims will seldom be barred because unwitting consumers fail to comply with the requirements of section 2-607.

Even so, it might be better to scrap the notice requirement in consumer-related cases that involve either personal injury or property damage. To be sure, the notice requirement is useful in commercial transactions. However, in other cases, the notice requirement does little more than alert the seller to the fact that a demand for compensation will shortly be forthcoming. Consequently, the notice requirement appears to serve no useful purpose in such cases and probably ought to be dispensed with.

C. Disclaimers and Limitations

For years proponents of strict liability contended that warranty law was hostile to consumer interests because it allowed sellers to evade the obligations imposed upon them by the implied warranty of merchantability.²²⁸ This sort of thinking led the drafters of section 402A to strip sellers of the right to contract away their duty to provide nondefective products.²²⁹ Some states have gone further and enacted statutes that bar the use of disclaimers in certain kinds of warranty actions.²³⁰ Such legislation, of course, is in harmony with the traditional view that warranty law should require sellers to meet a minimum standard of product quality and safety as determined by the implied warranty of merchantability.

225. U.C.C. § 2-607 cmt. 4 (1989).

226. See William R. Clement, Jr., Note, *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the UCC in Cases Involving Economic Loss, Used Goods, and Nondangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347, 1359 (1982) ("Finally, the UCC's notice requirements put a minimal burden on the consumer, and courts interpret the notice requirements liberally in favor of consumers.").

227. See Franklin, *supra* note 119, at 997 ("[W]hen personal injury is involved the victim is quite likely to see an attorney well within the notice period contemplated by the Code, and it is unrealistic to fear that the attorney will be unfamiliar with the notice provisions.").

228. See, e.g., Prosser, *supra* note 1, at 1133 ("Commercial buyers are usually quite able to protect themselves. It is another thing to say that the consumer who buys at retail is to be bound by a disclaimer which he has never seen, and to which he would certainly not have agreed if he had known of it, but which defeats a duty imposed by the policy of the law for his protection.").

229. See Clement, *supra* note 226, at 1351-52 (observing that disclaimers are not recognized under section 402A).

230. See D.C. CODE ANN. § 28:2-316.1 (2) (1996); KAN. STAT. ANN. § 50-639 (a) (1996); ME. REV. STAT. ANN. tit. 11, § 2-316 (5) (West 1995); MD. CODE ANN., COM. LAW I § 2-316.1 (1997); MASS. GEN. LAWS ANN. ch. 106 § 2-316A (West 1990 & Supp. 1997); VT. STAT. ANN. tit. 9A § 2-316 (5) (1994).

However, the Code takes a more moderate position on this issue. It authorizes sellers to disclaim some or all warranties; it also allows sellers to modify express or implied warranties by, for example, limiting their duration; and it permits sellers to limit buyers' remedies for breach of warranty. Although the power to disclaim all warranties appears to be absolute as long as certain formalities are observed, the Code's other exculpatory devices are limited by such concepts as "basis of the bargain," "good faith," "fair dealing," and unconscionability.²³¹ This allows the parties to a sales contract to allocate risk between themselves while at the same time protecting consumers against overreaching by sellers.

The use of disclaimers and warranty limitations is essential to the contractual allocation of product-related risks. Sellers who wish to limit their responsibility to very specific risks must be able to disclaim implied warranties in order to ensure that liability will arise solely from their express undertakings. Arguably, sellers also should be permitted to limit the duration of their express warranties and should be allowed to exclude certain types of damages such as nonpecuniary losses and punitive damages.

All of this suggests that the Code's disclaimer and limitation of remedy provisions should be left largely intact. However, I would propose that one modification be made. Section 2-719 (3) provides that limitations of consequential damages for personal injuries are *prima facie* unconscionable. This provision is not consistent with a contract-based system of products liability. There are many situations where the parties may wish to exclude liability for personal injury without necessarily excluding warranty protection altogether. Examples of legitimate exclusions of liability include used products, products that are generically dangerous, like asbestos or cigarettes, products with potential but unknown risks like toxic chemicals or pharmaceuticals, and products that are used in dangerous activities. In addition, sellers should be allowed to limit their liability for specified uses of the product. Of course, courts still should be allowed to invalidate contractual limitations on consequential damages if they are found to be unconscionable, but there should be no presumption of unconscionability in such cases. Consequently, section 2-719 (3) should be amended to remove the presumption of unconscionability associated with attempts to limit liability for personal injuries.

D. Statute of Limitations

Tort statutes of limitation are of short duration, typically two years or less, but they ordinarily do not begin to run until the plaintiff suffers an injury, or in the case of latent injuries, until the plaintiff discovers, or should have discovered, that an injury has occurred.²³² In contrast, section 2-725 (1) establishes a four-year statute of limitations for warranty actions under the

231. See Mark A. Kaprelian, Note, *Privty Revisited: Tort Recovery by a Commercial Buyer for a Defective Product's Self-Inflicted Damage*, 84 MICH. L. REV. 517, 534-35 (1985) (pointing out ameliorative effects of such provisions).

232. See WHITE & SUMMERS, *supra* note 131, at 405.

Code,²³³ and section 2-725 (2) provides that the cause of action accrues when the warranty is breached, usually at the time of delivery.²³⁴ When section 2-275 is applied to personal injury and property damage claims, it is possible that some claims may be barred by the statute of limitations before a buyer has even been injured. This seems to be unduly harsh and unfair to accident victims.

The Code's four-year limitation period is especially troublesome where implied warranty claims are concerned. Because of the nature of implied warranties, it is not possible for the seller to increase the length of coverage; consequently, there is no way to prevent section 2-725 from cutting off implied warranty claims after four years. There are really only two options: one is to retain the existing statute of limitations and let the chips fall where they may; the other option is to apply a date-of-injury rule to implied warranty claims involving personal injuries or property damage. My own inclination is to keep tort rules out of warranty law as much as possible. Accordingly, I would retain section 2-725 in its present form.

The Code's statute of limitations presents less of a problem in the case of express warranty claims. This is because a seller who offers an express warranty can explicitly warrant the future performance of the goods, thereby effectively tolling the statute of limitations.²³⁵ This allows the seller to determine how long the buyer will be insured against product-related risks. The length of warranty/insurance protection is important to both buyers and sellers because it affects product prices; for this reason, the parties should be able to decide this issue for themselves.

CONCLUSION

The existing tort-based system of products liability, when viewed as an insurance mechanism, is seriously flawed. Under the present approach, product sellers are forced to act as insurance providers, but they cannot diversify risk, segregate insureds according to risk, or take measures to reduce moral hazard problems. It appears that product sellers could carry out their insurance functions much more efficiently if the current tort-based system was replaced by a contract-based system such as the Uniform Commercial Code.

If a contract-based products liability regime were established, buyers and sellers could allocate risk instead of being subjected to a universal and non-negotiable legal standard. Under this approach, sellers would be allowed to offer buyers, through the use of express warranties and disclaimers, various levels of warranty/insurance protection. Buyers, in turn, would be free to shop around for the warranty package that best met their needs. Of course, I assume that market conditions would force sellers to compete in the area of warranty protection. I also assume that consumers would make intelligent choices when given the opportunity to choose.

233. U.C.C. § 2-725 (1) (1989).

234. *Id.* § 2-725 (2).

235. *Id.*

If such a contract-based system is to be based on the Uniform Commercial Code, certain changes would have to be made. For example, vertical and horizontal privity requirements would have to be abolished to allow injured parties to pursue their claims directly against product manufacturers. The Code's notice requirement also should be waived in such cases. On the other hand, the Code's disclaimer and warranty limitation provisions should be retained in their present form. The current statute of limitations will not be particularly troublesome if buyers and sellers rely on express, rather than upon implied, warranties; this provision, therefore, should be kept in its present form.

The contract-based approach outlined in this article is superior in many respects to the present tort-based system of products liability. Nevertheless, there is no assurance that it will work in the real world. Market forces may not be strong enough to generate legitimate choices for consumers, and consumers may not behave rationally if they are given choices. Nevertheless, I believe that contract-based alternatives to strict products liability merit serious consideration.