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In products liability law, many courts have struggled with practical problems created by the applicability of both implied warranty and tort theories of recovery. In this article, Professor Brickey examines several Kentucky products liability decisions which apply the standards of Restatement (Second) of Torts § 402A to actions pleaded in warranty. In criticizing the present Kentucky approach, the author reviews the standards of liability under each theory and the various approaches employed by other courts to determine which theory will govern a particular case. Professor Brickey concludes that judicially adopted tort theories cannot pre-empt the comprehensive legislative remedies of the U.C.C. and that there should exist two distinct but parallel theories of recovery.

I. Introduction

Products liability is the name given an area of law which allows a purchaser injured by a defective product to recover damages from a remote seller.[1] Generally, injured purchasers have predicated liability on one of two theories: implied warranty under the Uniform Commercial Code or strict liability in tort. Regardless of which theory recovery is based upon, the policy objectives remain the same; yet, the two theories are distinguishable.[2]

In 1966, in *Dealers Transport Co. v. Battery Distributing*

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[1] W. Prosser, The Law of Torts 641 (4th ed. 1964). For recent scholarly treatment of various products liability issues, *see, e.g.*, Cohen, *Product Design and Restatement (Second) of Torts, Section 402A*, 61 Mass. L.Q. 103 (1976); Deane, *Industrial Toxicology: A New Frontier for Products Liability*, 11 Trial Law. Q. 36 (1975); Juenger & Schulman, *Assets Sales and Products Liability*, 22 Wayne St. L. Rev. 39 (1975); Mitchell, *Products Liability, Workmen's Compensation, and the Industrial Accident*, 14 Duq. L. Rev. 349 (1976); and Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976).

[2] *See generally* note 13 *infra*.

Co.,[3] the Kentucky Court of Appeals adopted the Restatement (Second) of Torts § 402A[4] and recognized strict liability in tort in a products liability context. Even though the plaintiff in that case sought to impose liability on the basis of an implied warranty, the Court felt that "the pragmatic view impels us to recognize that recovery against a remote vendor . . . even when based on implied warranty, truly sounds more in tort than contract."[5] Thus, the Kentucky Court took the first step toward equating implied warranty and tort liability in a single doctrine of products liability.[6]

More recently, in 1975, the union of the two theories was consummated in *McMichael v. American Red Cross.*[7] In this case the plaintiff claimed that blood he received in a transfusion had been infected with serum hepatitis and that as a result he contracted the disease. The suit was based upon breach of implied warranties of merchantability[8] and fitness for a partic-

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[3] 402 S.W.2d 441 (Ky. 1966).

[4] RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[5] 402 S.W.2d at 445.

[6] In addition, *see* Allen v. Coca-Cola Bottling Co., 403 S.W.2d 21 (Ky. 1966).

[7] 532 S.W.2d 7 (Ky. 1975).

[8] U.C.C. § 2-314 reads:

(1) Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to the consumer either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

ular purpose,[9] and upon Restatement Section 402A strict liability. At the conclusion of plaintiff's opening statement, the trial court directed a verdict for the defendant on the strength of Kentucky Revised Statutes § 139.125.[10] Citing that statute for the proposition that the distribution of whole blood does not constitute a sale, the trial court concluded that this essential element of both the warranty and tort causes of action was lacking.

The Court of Appeals affirmed the directed verdict on a different basis. Since the parties stipulated that at the time the transfusion was given the presence of hepatitis virus in the blood was undetectable and could not be eliminated, the Court of Appeals affirmed the judgment of the trial court on the basis of comment *k* to Restatement § 402A. Comment *k* recognizes that some products, such as certain vaccines, are "unavoidably unsafe" and that sellers of these products should not be held strictly liable for consequences incidental to their use.[11] In applying comment *k,* the Court stated:

(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.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

[9] U.C.C. § 2-315 reads:

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 [Section 2-316] an implied warranty that the goods shall be fit for such purpose.

[10] KY. REV. STAT. § 139.125 [hereinafter cited as KRS] provides in pertinent part: "The procurement, processing, distribution, or use of whole blood, plasma, blood products, blood derivatives and other human tissue . . . is declared not to be a sale . . . ." The plaintiff argued that this statute was inapplicable since it was compiled in a chapter relating to sales and use taxes.

[11] RESTATEMENT § 402A, comment k, states in relevant part:

Unavoidably unsafe products. There are some products which in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use . . . . An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious or damaging consequences when it is injected. Since the disease

> We do not find it necessary to discuss . . . whether . . . the transfer of donor blood by Red Cross to a hospital for a service fee is a *sale* under the Uniform Commercial Code . . . so as to give rise to an implied warranty. . . . Our conclusion is that . . . even if the transfer be deemed a sale and Red Cross a seller . . . the blood involved in the instant case, to the extent that it may have contained hepatitis virus, was unavoidably unsafe as discussed in Comment *k* under Section 402A of the Restatement and for that reason it was not unreasonably dangerous within the terms of Section 402A and it did not fail to be fit within the Uniform Commercial Code, KRS 355.2-314, 355.2-315.[12]

Remarkably, the *McMichael* Court applied comment *k* not only to the strict liability provisions of Restatement § 402A for which it was intended but also to the implied warranty provisions of the U.C.C. Although the Court did not determine if the transaction was even within the scope of Article Two, it found that since the blood was not unreasonably dangerous for purposes of Section 402A, it was likewise not unmerchantable by the standards articulated in U.C.C. § 2-314. This fusion of standards of product acceptability under strict liability in tort and the implied warranties represents a further step of the Court toward the inextricable intertwining of the two theories. The Kentucky Court has ignored some fundamental substantive and procedural distinctions between tort and warranty liability.[13]

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itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidably high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous . . . [and a seller] is not to be held to strict liability for unfortunate consequences attending [its] use . . . .

[12] 532 S.W.2d at 9.

[13] To treat the two theories as interchangeable ignores at least six fundamental substantive and procedural differences between them. First, while U.C.C. § 2-314 and Restatement § 402A both impose liability upon sellers of goods without proof of fault, strict liability in tort arises only when it is proved that the product left the seller's hands in a defective condition unreasonably dangerous to the user, consumer, or to his property. In contrast, a product is deemed unmerchantable under U.C.C. § 2-314 if it contains a defect which presents no peril to person or property. Or the product may not even be "defective" in the common sense of the word. Proof that goods are unsafe for purposes of Restatement § 402A will probably establish unmerchantable quality, but the converse is not necessarily true. Second, warranty liability extends to a broader

II. SHORTCOMINGS IN THE CURRENT APPROACH: SOME METHODOLOGICAL CONSIDERATIONS

A. *The Scope of the Two Theories*

In *McMichael,* the Court declined to consider the threshold scope provisions of Article Two of the U.C.C. but nevertheless proceeded to dismiss the warranty claims on the basis of comment *k.* A careful consideration of the scope and policy of sales law would provide a better foundation for the development of a cogent body of case law in this area.

The basic scope language of U.C.C. § 2-102 provides that unless the context otherwise requires, the provisions of the sales article apply to transactions in goods. Although the term "transaction" is not defined by the Code,[14] it is clear from the official commentary that the scope provisions need not be interpreted narrowly, at least with respect to warranties.

> [T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales contracts . . . . They may arise in other appropriate circumstances. . . . [It is] the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.[15]

When read in conjunction with other Code policies which seek to simplify and clarify sales law, facilitate the continued ex-

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class of injuries than personal injury or property damage, the only compensable harms under the strict liability theory. Third, warranties may be disclaimed or modified by sellers and damages liquidated or remedies limited pursuant to §§ 2-718 and 2-719. But limiting liability under strict liability in tort is not allowed. Fourth, a seller's warranties extend to a limited class of third-party beneficiaries under § 2-318. In strict liability in tort, a seller is liable to the ultimate user or consumer, and in many jurisdictions to a bystander whose injury is reasonably forseeable. Fifth, an injured party who fails to notify a seller of a breach within a reasonable time after the breach was discovered is barred from recovery by § 2-607(3)(a), but there is no such condition for a § 402A tort action. Sixth, and finally, warranty actions may be brought within four years following breach, which ordinarily occurs upon tender of delivery. U.C.C. § 2-725. Personal injury actions on the other hand, must be brought within one year of the date of injury, and actions for injury to personal property must be commenced within five years after they accrue. KRS §§ 413.120 and 413.130. These distinctions are obscured by the present approach of the Kentucky Court.

[14] U.C.C. § 2-102 does, however, specifically exempt secured transactions from the coverage of Article Two.

[15] U.C.C. § 2-313, comment 2.

pansion of commercial practices, and promote liberal construction of Code provisions,[16] this comment encourages, in certain mercantile settings, an expansive interpretation of Article Two warranty provisions. Similarly, another comment states:

> [S]ince [the Code] is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforseen and new circumstances and practices.[17]

Some jurisdictions have followed these comments and have extended Article Two by analogy to transactions which resemble a simple sale but which are nevertheless characterized as something other than a sale.[18] Other courts, however, have limited the scope of statutory sales law in genuine sales and sales-related transactions by focusing upon whether the dominant purpose of the transaction is the sale of goods or the rendition of services.[19]

The majority of courts confronted with the issue of whether supplying blood for transfusions constitutes a sale have adopted a limited construction of Article Two and have concluded that such transactions are outside its scope, so no warranties arise.[20] These courts view the bargain as one for health services in which furnishing blood is incidental to the

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[16] *See* U.C.C. § 1-102.

[17] *Id.*, comment 1.

[18] *See generally* cases cited in note 33 *infra.*

[19] If the principal object of the contract is not the sale of goods, then the contract is not governed by Article Two. *See, e.g.,* Schenectady Steel Co. v. Bruno Trimpoli Gen. Const. Co., 350 N.Y.S.2d 920 (1974), *aff'd* 316 N.E.2d 875, 359 N.Y.S.2d 560 (1974); Robertson v. Ceola, 501 S.W.2d 764 (Ark. 1973). *But see* Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 196 N.W.2d 316 (Mich. 1972); Worrell v. Barnes, 484 P.2d 573 (Nev. 1971); Newmark v. Gimbel's, Inc., 246 A.2d 11 (N.J. 1968), *aff'd* 258 A.2d 697 (N.J. 1969).

[20] *See, e.g.,* St. Luke's Hosp. v. Schmaltz, 534 P.2d 781 (Colo. 1975); Foster v. Memorial Hosp. Assoc. of Charleston, 219 S.E.2d 916 (W. Va. 1975); Lovett v. Emory Univ., Inc., 156 S.E.2d 923 (Ga. App. 1967); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805 (Minn. 1965); Koenig v. Milwaukee Blood Center, Inc., 127 N.W.2d 50 (Wis. 1964); Goetz v. J.K. & Susie L. Wadley Research Inst. & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961); Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 364 P.2d 1085 (Utah 1961); Gile v. Kennewick Pub. Hosp. Dist., 296 P.2d 662 (Wash. 1956); Perlmutter v. Beth David Hosp., 123 N.E.2d 792 (N.Y. 1954).

performance of the service.[21] If the *McMichael* Court had used this theory to resolve the case, there would have been no reason for construing the merchantability standards of U.C.C. § 2-314.

As another option, the Kentucky Court could have found that supplying blood for a transfusion did qualify as a transaction within the scope of Article Two. Courts adopting this minority position have held that a supplier of blood may be liable in warranty, either by determining that the transaction is a sale rather than a service,[22] or by holding that warranty liability may exist regardless of whether the transaction is characterized as a sale or a service.[23] The Kentucky Court chose not to examine whether the transaction was within the scope of Article Two, but it nevertheless interpreted the warranty provisions of the sales article. The Court found that there was no breach of the implied warranty of merchantability on the questionable basis that under tort principles the product was not unreasonably dangerous.

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[21] Although blood transfusions involve a transfer of personal property, these courts do not view every transfer as a sale.

> [W]here an individual contracts for *professional* services involving an incidental transfer of personal property as a necessary part of such service, and where the appropriate use of such personal property depends primarily upon the skill and judgment of the person rendering the service, such a transfer of personal property by the professional is not within the contemplation of [U.C.C. §§ 2-314 and 2-315] and any injury or damage resulting from such transferred personal property must be recovered by an action grounded in negligence and not by an action grounded in warranty.

Foster v. Memorial Hosp. Assoc. of Charleston, 219 S.E.2d 916, 921-22 (W. Va. 1975). Moreover, as a matter of policy it has been deemed necessary to lower the standard of care in such cases because of the circumstances under which transfusions frequently are given. "Otherwise the hospital leaves the healing business and enters the insurance business." 219 S.E.2d at 921.

[22] Rostocki v. Southwest Florida Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973); Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967). These cases are limited by the enactment of a statute defining such transactions as services if the defect is undetectable or unremovable. FLA. STAT. § 672.316(5) (1962).

[23] Hoffman v. Misericordia Hosp., 267 A.2d 867 (Pa. 1970). In Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970), the Illinois court held that a supplier of blood is engaged in the business of selling for purposes of imposing strict liability. This court found no reason to distinguish cases involving food for human consumption from those involving whole blood, pointing out that neither warranty nor strict tort is based upon fault. The argument against imposing liability upon charitable organizations which supply vital medical services was found unpersuasive in *Cunningham.* The court noted that charitable hospitals are one of the biggest businesses in the country.

There are two problems with the methodology in *McMichael.* First, the Court offered little insight into the proper scope of statutory sales law, or its relationship to judicially adopted strict liability in tort theory. Second, the construction of the implied warranty provision was based on strong policy considerations peculiar to the allocation of unavoidable risks in connection with the performance of this vital health service.[24] The considerations favoring protection of the supplier in this context are unique and should not operate to restrict the definition of merchantability in other contexts. Aside from avoiding an undesirable interpretation of Code warranty provisions, careful consideration of the scope of Article Two would serve several important functions. It would clarify the status of a personal injury action which is grounded in warranty, resolve obvious conflicts between warranty and strict liability theories, and establish an analytical framework for deciding warranty actions regardless of how the injury is characterized.

If one rejects the premise of the Kentucky Court that implied warranty and strict liability in tort are "expressions of a single basic public policy as to liability for defective products,"[25] then it becomes necessary to examine each transaction to determine if one or both of the theories is applicable. Consider, for example, the following hypothetical cases.

Assume that a buyer enters a grocery store to purchase a carton of soft drinks. The carton selected contains a bottle which explodes before the buyer reaches the check-out counter, and the buyer suffers personal injury. In this situation, it is

[24] To date, no fewer than 13 jurisdictions have amended the Code to exclude the supplying of human tissues, blood products or derivatives from the warranty provisions and the definition of goods. *See* ALA. CODE tit. 7A, § 2-314(4)(Supp. 1973); ALASKA STAT. § 45.05.100(e)(Supp. 1976); ARK. STAT. ANN. § 85-2-316(3)(d)(Supp. 1975); DEL. CODE ANN. tit. 6, § 2-316(5)(1974); FLA. STAT. ANN. § 672.2-316(5)(Supp. 1977); GA. CODE ANN. § 109A-2-316(5)(1975); ME. REV. STAT. ANN. tit. 11, § 2-108 (Supp. 1976-77); MASS. ANN. LAWS ch. 106, § 2-316(5)(Supp. 1976); N.D. CENT. CODE § 41-02-33(3)(d) (Supp. 1975); S.D. COMPILED LAWS ANN. § 57-4-33.1 (Supp. 1976); TENN. CODE ANN. § 47-2-316(5)(Supp. 1976); TEX. [BUS. & COMM.] CODE ANN. tit. 1 § 2-316(e)(Vernon 1968); WYO. STAT. § 34-2-316(3)(d)(Supp. 1975). A majority of the remaining states have enacted other legislation limiting the liability of such suppliers. For a list of these statutes, *see* Comment, *Blood Transfusions and the Transmission of Serum Hepatitis: The Need for Statutory Reform,* 24 AMER. U.L. REV. 367, 404-05 n.143 (1975).

[25] McMichael v. American Red Cross, 532 S.W.2d 7, 11 (Ky. 1975).

clear that the standards of product acceptability would not be satisfied under either strict liability or warranty theory. Beverage containers which explode without any mishandling are neither safe nor merchantable. A prospective purchaser of goods has a Section 402A cause of action against the prospective seller who offers for sale defective goods which cause injury to a consumer on the premises.[26] In addition, Section 402A would allow the consumer to recover from the wholesaler or manufacturer. Given this breadth of the Section 402A remedy, it may be virtually exclusive since it would be more difficult for the injured plaintiff to establish the elements of a warranty cause of action: the existence of a sales contract containing a warranty, a breach of warranty, and proper notification of the seller.[27] The only circumstance in which pleading warranty would be to the litigant's advantage in a Section 402A jurisdiction would be if the action were filed more than one year after the date of injury when the personal injury statute of limitations had expired. In that event, the plaintiff who could successfully argue that the elements of an Article Two transaction were present[28] would be entitled to the four-year period of limitation in Section 2-725. Hence, the result in a warranty action would be different than the result under Section 402A because

[26] *See* Embs v. Pepsi-Cola Bottling Co. of Lexington, Inc., 528 S.W.2d 703 (Ky. 1975); Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. 1967); Rogers v. Karem, 405 S.W.2d 741 (Ky. 1966).

[27] U.C.C. § 2-607(3)(a).

[28] Three jurisdictions have held that facts similar to those in this example are sufficient to support finding a contract for sale and to impose liability under the warranty provisions of the Code. *See* Fender v. Colonial Stores, Inc., 225 S.E.2d 691 (Ga. App. 1976); Sheeskin v. Giant Food, Inc., 318 A.2d 874 (Md. App. 1974), *aff'd sub. nom.* Giant Food v. Washington Coca-Cola Bottling Co., 332 A.2d 1 (Md. 1975); Gillispie v. The Great Atl. and Pac. Tea Co., 187 S.E.2d 441 (N.C. App. 1972).

A self-service grocery store owner who places pre-priced goods on the shelf offers them for sale. A customer who removes the goods from the shelf with intent to purchase them has accepted the offer. The fact that the customer is at liberty to change his mind and return the goods to the shelf does not preclude finding a contract for sale. The power to terminate the contract other than by breach is created by the agreement. U.C.C. § 2-106(3). While each of the above cases used these flexible contract formation principles in order to impose warranty liability, the underlying policy in favor of recovery is identical to that incorporated in the bystander cases. *See* cases cited note 39 *infra.* One who markets a defective product that causes injury should be held responsible, notwithstanding the absence of a technical sale. The same result could be found in warranty cases without a strained interpretation of the facts to support the existence of a sale.

of procedural distinctions. Since Article Two expressly provides for the recovery of consequential damages for personal injury and damage to property,[29] characterizing the injury as one "sounding in tort" should not be sufficient to thrust the cause of action outside the scope of Code remedies.

Suppose, however, that recovery under Section 402A is uncertain. Consider this hypothetical: a consumer visits an optometry firm. Contact lenses are prescribed, sold and fitted, and the consumer pays the standard price charged for all prescription lenses. The curvature of the lenses is improper and they scratch the consumer's cornea. Contact lenses which are specially manufactured for a particular individual are not "a finished product offered to the general public in regular channels of trade," and therefore "[t]he considerations supporting the rule of strict liability are not present."[30] Also, such a product is neither unreasonably dangerous nor unmerchantable insofar as the *ordinary* user or consumer is concerned.[31] If the

[29] *See* note 34 *infra* for an explanation of what damages are recoverable in a warranty action.

[30] Barbee v. Rogers, 425 S.W.2d 342, 346 (Tex. 1968). In *Barbee,* optometrists were doing business as an optical company. They prescribed, fitted, and sold lenses manufactured by another corporation. The optical company employed over a hundred licensed optometrists and advertised in newspapers and the broadcast media to promote the sale of contact lenses. Moreover, the advertisements represented that the lenses would be properly fitted. According to the testimony of one of the defendants, the standard price charged was for the lenses and not for the labor of the optometrist. The price was not affected by the number of examinations required or the complexity of the eye problem.

In a suit against the optical company and the manufacturer, the jury found that the lenses were not fit for use in the plaintiff's eyes, but that the company had not failed to fulfill the representations made in the advertisements. Although the company was negligent in failing to fit the lenses properly, the negligence was not found to be a proximate cause of the injury.

The Texas Supreme Court agreed with the optical company that the jury's findings did not support an implied warranty and therefore limited its opinion to consideration of strict liability in tort. In this court's view, the presence of a professional relationship between the plaintiff and the company militated against finding tort liability. The company was not a seller, but rather one licensed to correct visual defects by prescribing lenses. The injury was not caused by a defect in the lenses themselves, but by a failure to properly fit the lenses.

A dissenting judge in a lower court noted, however, that reliance upon the superior skill and judgment of the vendor is the basis for imposing an implied warranty. The fact that the skill is characterized as "professional" by virtue of a licensing statute does not exempt the defendant from warranty liability. Texas State Optical, Inc. v. Barbee, 417 S.W.2d 750 (Tex. Civ. App. 1967).

[31] U.C.C. § 2-314 specifies a standard of fitness for the ordinary purpose for which

lenses are properly ground and polished so that they are in fact fit for use as eye glasses, then their failure to satisfy the particular needs of this consumer would be of little consequence under Section 402A or the implied warranty of merchantability. But if the transaction is within the scope of Article Two, the consumer might still recover. It is clear that the consumer is relying on the optometrist's skill and judgment to furnish suitable contact lenses and that the optometrist is aware of this reliance. Thus the consumer might recover under an implied warranty of fitness for a particular purpose.[32] As in blood transfusion cases, solving the threshold scope issue involves intermingling professional skills and services with the supplying of goods. In these types of cases it is important to identify the elements of the transaction and articulate the underlying policies of warranty law.

In a third example, a consumer leases an automobile for temporary use from a rental agency. Shortly thereafter the consumer is injured in an accident caused by defective brakes on the rental car. An automobile with defective brakes is both unreasonably dangerous and unmerchantable. Increasing numbers of courts have been willing to extend strict tort or warranty liability to lessors,[33] and regardless of which theory is used, the

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the goods are used. *See* note 8 *supra*. Restatement § 402A, comment *i*, indicates that courts should focus upon the danger that goods pose for the average consumer who has ordinary knowledge regarding the characteristics of the product. Only if the article is too dangerous for this ordinary consumer is it unreasonably dangerous.

[32] *See* note 9 *supra* for a reprint of U.C.C. § 2-315, the implied warranty of fitness for a particular purpose.

[33] For cases which recognize warranty as a theory of recovery against a lessor, *see* Quality Acceptance Corp. v. Million & Albers, Inc., 367 F. Supp. 771 (D. Wyo. 1973)(lease of business machines will create implied warranties, especially where it is probable that lease will end in purchase); KLPR TV, Inc. v. Visual Elec. Corp., 327 F. Supp. 315 (W.D. Ark. 1971)(lease of electronic equipment creates warranty where the lessee is responsible for maintenance and repair and has enforceable right to purchase at end of lease term); Sawyer v. Pioneer Leasing Corp., 428 S.W.2d 46 (Ark. 1968)(warranty provisions of U.C.C. applicable where lease analogous to sale); W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98 (Fla. 1970)(implied warranty of fitness may arise from lease where lessor deals in goods of the kind and transaction not an isolated occurrence); Redfern Meats, Inc. v. Hertz Corp., 215 S.E.2d 10 (Ga. App. 1975)(court will look to purpose of contract to determine its character and will apply U.C.C. warranty provisions to prevent merchants from escaping responsibilities by selling goods under guise of lease); All States Leasing Co. v. Bass, 538 P.2d 1177 (Idaho 1975)(U.C.C. warranty provisions considered statements of public policy concerning commercial transactions, including leases); Baker v. City of Seattle, 484 P.2d

rationale recognizes the growing use of lease agreements as substitutes for sales in commercial settings and the inability of the lessee to protect himself by examination of the goods. A court willing to extend the warranty or strict tort theories in this example would likely reach the same result under each. The main distinction between the two theories in this context is that Section 402A would benefit only the lessee who suffers personal injury or property damage; so the lessee who suffers only commercial loss would be denied recovery under Section 402A but could recover under Article Two warranty provisions.[34]

The greatest conflict arises when recovery would be allowed under one theory but not the other. Consider this situation: A consumer purchases food from a local manufacturer's retail store. The label on the container carries a conspicuous disclaimer of warranties, including the warranty of merchantability. The food is unwholesome and causes the consumer to become ill. A disclaimer of liability is ineffective in a tort strict

405 (Wash. 1971)(consumer who leases golf cart entitled to protection equivalent to consumer who purchases). *See also* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 S.W.L.J. 575 (1974). *But cf.* Bona v. Graefe, 285 A.2d 607 (Md. 1972)(U.C.C. warranty provisions apply only to sales); Garfield v. Furniture Fair-Hanover, 274 A.2d 325 (N.J. Super. 1971)(even though bailments are contractual in nature, U.C.C. warranty provisions apply only to contracts of sale). It should be noted that most of these cases seeking to extend Article Two by analogy have involved an attempted disclaimer of liability. Courts which have applied the warranty provisions to lease transactions have also held that the § 2-316 limitations on disclaimers are applicable.

Jurisdictions which extend liability in strict tort to lessors have done so only insofar as the lessor is in the business of leasing goods. Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); Price v. Shell Oil Co., 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Whitfield v. Cooper, 298 A.2d 50 (Conn. Super. 1972); Stewart v. Budget Rent-A-Car Corp.,470 P.2d 240 (Hawaii 1970); Galluccio v. Hertz Corp., 274 N.E.2d 178 (Ill. App. 1971); Stang v. Hertz Corp., 497 P.2d 732 (N.M. 1972); Hawkins Const. Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973); Ettin v. Ava Truck Leasing, Inc., 251 A.2d 278 (N.J. 1969); and Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ. App. 1974).

[34] U.C.C. § 2-714 permits recovery of the difference between the value of the goods accepted and the value they would have had if they had been as warranted, plus incidental and consequential damages. In addition to personal and property injuries, lost profits or other purely economic losses are also compensable. *See* Midland Forge, Inc. v. Letts Indus., Inc., 395 F. Supp. 506 (N.D. Iowa 1975); Matsushita Elec. Corp. of America v. Sonus Corp., 284 N.E.2d 880 (Mass. 1972); National Farmers Org., Inc. v. McCook Feed & Supply Co., 243 N.W.2d 335 (Neb. 1976); and Ford Motor Co. v. Taylor, 446 S.W.2d 521 (Tenn. App. 1969).

liability action. The seller is not allowed to disclaim liability because the Restatement policy allocates the risk of marketing products to the seller, who presumably will insure against those risks.[35] The Code, on the other hand, permits disclaimer of all warranties if the disclaimer satisfies mechanical requirements such as "conspicuousness"[36] and if the disclaimer is not unconscionable.[37] The theories conflict in this instance, and the result would differ under each. This dilemma requires consideration of several related issues: To what extent has the legislature pre-empted the field by adopting the U.C.C.;[38] will courts perceive actions "sounding in tort" to be outside the scope of Article Two despite its provision of recovery for tortious in-

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[35] RESTATEMENT (SECOND) OF TORTS § 402A, comment c. The Kentucky Court has expressly approved this rationale and has relied upon it as justifying extension of liability throughout the distributive chain.

> Our expressed public policy will be furthered if we minimize the risk of personal injury and property damage by charging the costs of injuries against the manufacturer who can procure liability insurance and distribute its expense among the public as a cost of doing business . . . . As a matter of public policy the retailer or middleman as well as the manufacturer should be liable since the loss for injuries resulting from defective products should be placed on those members of the marketing chain best able to pay the loss, who can then distribute such risk among themselves by means of insurance and indemnity agreements.

Embs v. Pepsi-Cola Bottling Co. of Lexington, 528 S.W.2d 703, 705-06 (Ky. 1975).

[36] U.C.C. § 2-316(2) requires that a disclaimer or modification of an implied warranty of merchantability mention the word merchantability. Also, if the attempted disclaimer is in writing, it must be conspicuous. U.C.C. § 2-316(3) permits other language or circumstances which clearly indicate that no implied warranties are made to substitute for mention of the word merchantability. The requirement that a written disclaimer be conspicuous is designed to protect against overreaching by the seller since "[t]he warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution." U.C.C. § 2-314, comment 11. *Compare* Childers & Ventors, Inc. v. Sowards, 460 S.W.2d 343 (Ky. 1970) *with* Massey-Ferguson v. Utley, 439 S.W.2d 57 (Ky. 1967).

[37] The relevant criterion for determining unconscionability is "the prevention of oppression and unfair surprise . . . and not [the] disturbance of allocation of risks because of superior bargaining power." U.C.C. § 2-302, comment 1. While § 2-719(3) declares that any limitation of consequential damages for personal injury by consumer goods is unconscionable, "[t]he seller in all cases is free to disclaim warranties . . . ." U.C.C. § 2-719, comment 3. Thus, the seller who effectively disclaims the existence of warranties may avoid liability for all types of harm caused by a defective product.

[38] *See generally* Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970); Markle v. Mulholland's, Inc., 509 P.2d 529 (Ore. 1973), *special concurrence* of O'Connell, C.J., at 537 *et seq.* In addition, *see* text accompanying notes 99-108 *infra.*

jury;[39] and, is there an absolute option to choose the more favorable litigation theory?[40]

B. *To Whom Does Liability Run?*

The Restatement (Second) of Torts specifically eliminates any requirement of privity for the ultimate user or consumer. While the American Law Institute did not resolve the issue of a seller's liability to non-users or third parties, Kentucky has joined a number of jurisdictions which extend the Section 402A protections to bystanders.[41] The Kentucky Court has also imposed strict liability on a merchant for an injury occurring before the actual transfer of the product by sale or bailment.[42]

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[39] *See* text accompanying notes 63-66 *infra.*

[40] *See generally* text accompanying notes 91-98 *infra.*

[41] To date, the § 402A protections have been extended to bystanders in at least 20 jurisdictions. *See* Julander v. Ford Motor Co., 488 F.2d 839 (10th Cir. 1973)(anticipating Utah law); Jorgenson v. Meade Johnson Lab., Inc., 483 F.2d 237 (10th Cir. 1973)(anticipating Oklahoma law); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972)(anticipating Iowa law); Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970)(anticipating Vermont law); White v. Jeffery Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971); Klimas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (D.R.I. 1969); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Caruth v. Mariani, 463 P.2d 83 (Ariz. App. 1970); Elmore v. American Motors Corp., 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 517 P.2d 406 (Colo. App. 1973); Mitchell v. Miller, 214 A.2d 694 (Conn. Super. 1965); Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968); Peterson v. Backrodt Chevrolet Co., 307 N.E.2d 729 (Ill. App. 1974); Embs v. Pepsi-Cola Bottling Co. of Lexington, 528 S.W.2d 703 (Ky. 1975); Landry v. Adam, 282 So. 2d 590 (La. App. 1973); Piercefield v. Remington Arms Co., 133 N.W.2d 129 (Mich. 1965); Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); Lamendola v. Mizell, 280 A.2d 241 (N.J. Super. 1971); Codling v. Paglia, 298 N.E.2d 622, 345 N.Y.S. 2d 461 (1973); Howes v. Hanson, 201 N.W.2d 825 (Wis. 1972).

[42] Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. 1967); Rogers v. Karem, 405 S.W.2d 741 (Ky. 1966). These cases were cited by the Texas Court of Civil Appeals as supporting the proposition that transfer of possession by sale, bailment, lease, gift or the like is not a condition precedent to imposition of strict liability. Davis v. Gibson Prod. Co., 505 S.W.2d 682 (Tex. Civ. App. 1973), *error ref. n.r.e.* 513 S.W.2d 4 (Tex. 1974). *Davis* was an action brought on behalf of a minor who was injured when he removed a machete from its sheath in the defendant's self-service store. Noting that neither of the Kentucky cases had addressed the question of whether there had been or should be required a sale or delivery of the product the Texas court explored the basis for imposing liability under § 402A. In light of the policy considerations of the strict liability theory, the court interpreted the word "seller" as a term which "designates a class and [which] is not a designation of limitation." 505 S.W.2d at 690. Thus, the seller was liable for foreseeable injuries. It is curious that the Kentucky Court did not cite either the *Kroger Co.* or the *Rogers* case as precedent for the

The absence of privity between the injured plaintiff and a seller of dangerous goods will have no bearing upon the outcome of an action based on Section 402A strict liability.

U.C.C. § 2-318 offers three alternatives from which each state can choose the extent of a seller's liability to third parties who may be injured by a product. Alternative A of U.C.C. § 2-318, which has been adopted in Kentucky,[43] abolishes the doctrine of horizontal privity for guests and members of the buyer's household who are personally injured by a defective product. This alternative does not indicate whether vertical privity may be required or whether warranties given to the buyer may extend to a broader class of third-party beneficiaries. The official comments indicate that Alternative A is intended to be neutral and to have no effect on the development of case law on these issues.[44]

In *Dealers Transport Co. v. Battery Distributing Co.*,[45] the Kentucky Court of Appeals considered the privity question in the context of an action to recover losses incurred when allegedly defective acetylene gas tanks exploded and caused considerable property damage. The trial court granted summary judgment for the manufacturer because of lack of privity, but the Court of Appeals stated that while true contractual liability requires privity, a products liability claim against a remote vendor "sounds more in tort than in contract" even if it is pleaded in warranty.[46] In light of policy considerations supporting Section 402A, the Court concluded that there is "no valid basis for requiring privity of contract in a products liability claim based upon breach of warranty and disregarding privity in such claims based on negligence."[47] If the discussion had ended on that note, the rule would be clearer, but unfortunately it was clouded by the following statement:

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extension of liability to bystanders in Embs v. Pepsi-Cola Bottling Co. of Lexington, 528 S.W.2d 703 (Ky. 1975).

[43] KRS § 355.2-318.

[44] U.C.C. § 2-318, comment 3. *See also* U.C.C. § 2-313, comment 2.

[45] 402 S.W.2d 441 (Ky. 1966). The cause of action accrued approximately four months before July 1, 1960, the effective date of the Uniform Commercial Code. The action was grounded in negligence and in warranty. While not cited by the Court, KRS § 361.150 presumably was the basis of the warranty claim.

[46] 402 S.W.2d at 445.

[47] *Id.*

> We think we would do no judicial violence to hold that the law in this jurisdiction is that privity is *not* a prerequisite to maintenance of an action for breach of implied warranty in products liability cases, upon the authority and reasoning enunciated in Henningson v. Bloomfield Motors. However, we are persuaded to the view expressed in Section 402A of the American Law Institute's revised Restatement of the Law of Torts . . . .[48]

The Court thereupon characterized the liability of the immediate and remote vendors as "strict liability."

Dealers Transport is consistently cited for the proposition that Kentucky has adopted a rule of strict liability.[49] However, the Court did not hold that warranty actions may be maintained in the absence of privity, nor did it hold that privity is a prerequisite to such an action. The case provides little guidance for the purchaser who discovers the defect before it causes physical harm but who nevertheless suffers commercial loss due to his inability to use the product in its dangerous condition. In such a case the element of physical injury which would provide a basis for imposing liability under Section 402A is missing. Since the action would not "sound in tort," *Dealers Transport* does not resolve the issue of whether the purchaser of unfit goods can maintain a warranty action against the remote manufacturer.[50]

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[48] *Id.* at 446 (citation omitted).

[49] *See* Embs v. Pepsi-Cola Bottling Co. of Lexington, 528 S.W.2d 703 (Ky. 1975); Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. 1967); Rogers v. Karem, 405 S.W.2d 741 (Ky. 1966); Allen v. Coca-Cola Bottling Co., 403 S.W.2d 21 (Ky. 1966).

[50] The Kentucky Court has not squarely confronted this issue since it decided *Dealers Transport.* Belcher v. Hamilton, 475 S.W.2d 483 (Ky. 1971), involved claims against the immediate seller and the manufacturer of a frozen food case which failed to function properly. The freezer was not alleged to have been in a defective condition which was unreasonably dangerous. The trial court permitted the action against the manufacturer but directed a verdict in its favor on the basis of its restricted warranty. The immediate seller was held liable notwithstanding the absence of any proof of negligence on his part. The issue of whether such an action could be maintained against the manufacturer was not involved in the appeal. Similarly, Leeper v. Banks, 487 S.W.2d 58 (Ky. 1972), involved the question of whether notice of a defect given to the manufacturer was sufficient to satisfy the requirements of U.C.C. § 2-607(3)(a) in a suit against the retailer. The notice was held to be inadequate for that purpose. Thus, the Court had no occasion to decide whether an action grounded in warranty could be maintained against the manufacturer. This case did, however, involve personal injury and the plaintiff clearly could have sued the manufacturer in tort. It is clear that the

One might speculate that the adoption of Section 402A signals a decision to forego any relaxation of the privity requirement in warranty litigation. If that were the case, the only party who could maintain a warranty action without demonstrating privity with the defendant seller would be a family member or guest of the purchaser who had been injured in person.[51] That party would be required, however, to prove the existence of privity between the defendant seller and the purchaser of the goods.[52] In other words, the third-party beneficiary of the warranty would have a cause of action against the buyer's immediate seller and no other. When the Court in *Dealers Transport* relied upon the nature of the injury to characterize the action as "sounding in tort," it consequently thrust cases involving the same legal issue back into uncharted waters. The warranty provisions of Article Two provide a remedy against a remote seller, but it appears that the Court has chosen to substitute a Section 402A cause of action instead. The extent to which this judicially recognized theory will pre-empt further development of warranty law is uncertain.

C. *Standards of Product Acceptability*

Formulating a method for determining standards of acceptable product quality under each theory also remains a problem under the present approach. U.C.C. § 2-314 sets forth minimum criteria which goods must satisfy in order to be deemed merchantable,[53] although these criteria are not intended to be exhaustive.[54] When a product is found to be defective so that it is unreasonably dangerous by the standards of Section 402A, this is tantamount to finding it to be unmerchantable as well. The converse, however, is not necessarily true. For example, a freezer may malfunction and fail to keep

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neutral position of the comments to §§ 2-313 and 2-318 leave courts free to extend warranty liability throughout the distributive chain in such cases.

[51] Alternative A to U.C.C. § 2-318 expressly creates such a cause of action. *See also* note 67 *infra* for an explanation of Alternatives A, B and C.

[52] Lack of privity with other sellers in the distributive chain would bar the buyer's recovery in a warranty action if *Dealers Transport* were so read. Since § 2-318 merely gives the third-party beneficiary the protections of such warranties as have been extended to the buyer, the beneficiary of the warranty would also be barred.

[53] *See* note 8 *supra* for the text of § 2-314.

[54] U.C.C. § 2-314, comment 6.

its contents frozen, in which case it would be unmerchantable,[55] but that malfunction would not render the freezer unreasonably dangerous to person or property. Moreover, a product may be found to be unmerchantable in the absence of any defect. For instance, goods which conform to contract specifications but which fail to conform to affirmations of fact made on the label are unmerchantable, even though the contract may not have required the labeling.[56] Thus, a basic distinction between warranty and strict tort liability is proof of product unsuitability in the former case, and proof of a dangerous product defect in the latter case.

Notwithstanding the different standards of product acceptability expressed in U.C.C. § 2-314 and Restatement Section 402A, the *McMichael* Court construed the two provisions as

> expressions of a single basic public policy as to liability for defective products. If the policy as to Section 402A is that unavoidable unsafeness of the character involved in the blood in the instant case is a basis for denying strict liability, it would seem that the same policy should prevail with respect to liability under implied warranty.[57]

Application of comment *k* in blood transfusion cases to deny recovery in tort is not inconsistent with judicial development of the doctrine of strict liability in other jurisdictions. However, the language of U.C.C. § 2-314 makes clear that a product which is unwholesome or unfit for the purpose for which it is ordinarily used is definitely unmerchantable. Blood which is infected with hepatitis virus and which in fact causes hepatitis clearly is neither wholesome nor fit to be used in a transfusion. Unlike comment *k* to Section 402A, which recognizes that "[t]here are some products which . . . are quite incapable of being made safe for their intended and ordinary use, [and which are therefore] not defective,"[58] the official comments to U.C.C. § 2-314 specify that "[f]itness for the ordinary purposes for which goods of the type are used is a fundamental

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[55] *See* Belcher v. Hamilton, 475 S.W.2d 483 (Ky. 1972).

[56] U.C.C. § 2-314(2)(f). In addition *see* comment 10 to § 2-314.

[57] 532 S.W.2d at 11.

[58] RESTATEMENT (SECOND) OF TORTS § 402A, comment *k*.

concept of the present section."[59] There is no indication that the drafters of the Code intended to create exceptions to this basic standard of merchantability when a defect is difficult or incapable of discovery. For example, fish contaminated with a toxin which can cause serious illness if consumed are not merchantable even though no amount of care in handling or preparing the fish would have revealed the presence of the toxin or eliminated the danger.[60] The relevant criteria under the Code are the wholesomeness of the product and its fitness for human consumption, regardless of the social utility of the product. Sellers of products containing undiscoverable defects may avoid the risk of warranty liability only by exercising the power to disclaim the existence of warranties,[61] by refuting the causal link between the alleged defect and resulting injury,[62] or by successfully arguing that the transaction in question is not within the proper scope of Article Two.

III. THE NATURE OF THE CAUSE OF ACTION: SOME DOCTRINAL CONSIDERATIONS

The foregoing discussion highlights some of the problems created by the Kentucky Court's approach to products liability cases. The importance of unraveling U.C.C. § 2-314 and Re-

[59] U.C.C. § 2-314, comment 8.

[60] *See* Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D.V.I. 1968). Even though the fish was unmerchantable, the plaintiff was denied recovery because she had assumed the risk. The plaintiff had heard about cases of fish poisoning but nevertheless proceeded to order a fish platter. While the policy of § 402A comment *k* would not be promoted by treating the unavoidably unsafe fish in the same manner as unavoidably unsafe blood or vaccine, there is no authority in the text or comments of Article Two for creating an exception to the rule of liability in either case.

[61] U.C.C. § 2-316.

[62] U.C.C. § 2-714(2) limits damages to the difference between the value of the goods accepted and the value they would have had if they had been as warranted, unless the buyer is able to prove "proximate damages of a different amount." Consequential damages for personal injury or property damages are recoverable if they proximately result from a breach of warranty. U.C.C. § 2-715(2)(b). U.C.C. § 2-715, comment 5 makes clear that an injury occurring after discovery of the defect is not proximately caused by the defect. This principle is reiterated in § 2-314, comment 13. Assumption of the risk and misuse of the product negate the causal relationship between the breach and the injury. Notwithstanding the implications of these comments, the weight of authority denies contributory negligence as a defense in an action for breach of warranty. *See generally* Gregory v. White Truck Equip. Co., 323 N.E.2d 280 (Ind. App. 1975), and cases cited therein. Of course, a person whose conduct, negligent or otherwise, is the sole cause of the injury cannot establish causation.

statement Section 402A is not limited to the need for a methodology for formulating appropriate standards of liability. When warranty actions are characterized as "sounding in tort" the status of a personal injury action grounded in warranty is left in confusion. Without a sound analytical foundation upon which to proceed, an attempt to determine whether a suit is timely or whether it is barred by the statute of limitations may be sheer guesswork. The following hypothetical situation illustrates the complexity of this problem which has not yet confronted the Kentucky Court.

Assume that B purchases goods from S, a retail merchant, early in 1976. Shortly thereafter an unknown and unreasonably dangerous defect causes B to suffer personal injuries. Late in 1977, B files suit against S, the merchant, and M, the manufacturer of the defective product, alleging breach of warranty and strict liability in tort. Since the tort action was filed more than one year after the accrual of the cause of action, *i.e.,* the date of injury, both defendants could successfully raise the personal injury statute of limitations as a bar to the tort claim. Can the warranty action, however, with less stringent standards of product acceptability be maintained? It is timely since it is brought within four years of the accrual of the cause of action, *i.e.*, date of tender of delivery, but it is also an attempt to impose liability upon the immediate seller and the manufacturer for injuries caused by the defective product. More is involved than simply selecting the appropriate statute of limitations. This problem raises questions of whether the entire panoply of Code rights and remedies is available to the plaintiff, or whether the language in Kentucky products liability decisions regarding the tortious nature of such claims will compel an injured plaintiff to litigate in tort.

There are three distinct but related approaches employed by courts to determine whether the U.C.C. statute of limitations or a general personal injury or property damage statute of limitations governs products liability cases. They are characterization of the injury, characterization of the relationship between the parties, and characterization of the litigation theory.

A. *Characterization of the Injury*

Courts which have held that all actions for personal injury fall outside of the U.C.C. contend that the distinction between warranty and strict liability is "more fancied than real."[63] If the action is "essentially a personal injury action,"[64] then liability is "essentially tort liability"[65] and the personal injury statute of limitations must govern the action. These courts conclude that "the four-year provision of section 2-725 is to apply only to nonpersonal injury claims otherwise within the scope of the chapter."[66]

The drafters of the Code considered the possibility that a purchaser or user of unmerchantable or unfit goods might suffer personal injury as a result of the product's unfitness. Consequently, they imposed certain limitations upon sellers and afforded certain remedies to a limited class of consumers injured by defective products. There are two limitations on sellers. First, as long as warranties have not been disclaimed, a seller may not escape liability for personal injuries to members of the buyer's family or household who might reasonably be expected to use, consume, or be affected by the goods.[67] Second, a seller may not limit consequential damages for personal injuries caused by consumer goods because such a limitation is uncon-

[63] Heavner v. Uniroyal, Inc., 286 A.2d 718, 719 (N.J. Super. 1972), *aff'd*, 305 A.2d 412 (N.J. 1973).

[64] Campbell v. Colt Indus., Inc., 349 F. Supp. 166, 167 (W.D. Va. 1972).

[65] Abate v. Barkers of Wallingford, Inc., 229 A.2d 366, 369 (Conn. Super. 1967).

[66] Heavner v. Uniroyal, Inc., 305 A.2d 412, 421 (N.J. 1973). The New Jersey court held that Article Two was designed to apply to breach of warranty actions involving injury to person or property only when the action is against the plaintiff's immediate seller, or when the action is brought by a § 2-318 third-party beneficiary against that seller. After examining the development of strict liability in New Jersey products liability cases, the court concluded that application of Article Two to these cases would result in two different sets of rules for virtually identical claims, depending upon who is being sued. The court concluded: "When the gravamen is a defect in the article and consequential personal injury and property damages are sought, they will be taken for what they actually are, no matter how expressed." 305 A.2d at 427. This statement effectively eliminates §§ 2-318, 2-715(2)(b), and 2-719(3) from Article Two.

[67] U.C.C. § 2-318, Alternative A. This provision prohibits limitation or disclaimer of warranties to guests or family members of the purchaser only with respect to personal injuries. Alternative B, however, extends the protection of warranties to all persons who may be reasonably expected to use, consume, or be affected by the goods, and who are injured in person. The most expansive provision, Alternative C, incorporates the broader class of beneficiaries of Alternative B but extends recovery to any injury caused by breach of the warranty.

scionable.[68] Neither of these limitations, however, prevent a seller from disclaiming all warranties[69] or contractually modifying or limiting remedies,[70] unless the seller is attempting to evade all personal injury liability.

In conjunction with these limitations, the drafters created a statutory remedy for breach of warranty which provides for recovery of consequential damages in appropriate cases.[71] Specifically, consequential damages include "injury to person or property proximately resulting from any breach of warranty."[72] It is significant that the U.C.C. statute of limitations does not contain any exceptions or special provisos for personal injury actions arising from a breach of warranty. The inescapable conclusion is that the drafters intended that some actions for personal injuries, regardless of whether they sounded in tort or in contract, would be governed by the Code's substantive provisions, statute of limitations, and elements of pleading and proof.

B. *Characterization of the Relationship Between the Parties*

A second approach courts use to determine which theory governs the products liability case focuses on theoretical distinctions between sales transactions and tortious conduct. A sales transaction reflects agreement by the parties, but tort liability is imposed with no concern for the presence or absence of an agreement or an attempted contractual disclaimer.[73]

> Although the genesis of strict liability lies in warranty theory, it is now clear that breach of warranty itself was originally considered a species of fraud or misrepresentation, sounding

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[68] U.C.C. § 2-719(3).

[69] U.C.C. § 2-316.

[70] U.C.C. § 2-719. *But see* McCarty v. E.J. Korvette, Inc., 347 A.2d 253 (Md. App. 1975); Collins v. Uniroyal, Inc., 315 A.2d 16 (N.J. 1974). The power to limit or modify remedies is subject to the additional proviso that if an exclusive or limited remedy fails in its essential purpose the aggrieved party may resort to appropriate Article Two remedy provisions.

[71] U.C.C. § 2-714(3).

[72] U.C.C. § 2-715(2)(b).

[73] *See* Parish v. B.F. Goodrich Co., 235 N.W.2d 570 (Mich. 1975); United States Fidelity and Guar. Co. v. Truck & Concrete Equip. Co., 257 N.E.2d 380 (Ohio 1970); International Union of Operating Eng'rs. Local 57 v. Chrysler Motor Corp., 258 A.2d 271 (R.I. 1969). *See also* Markle v. Mulholland's, Inc., 509 P.2d 529 (Ore. 1973).

> in tort. Even in its present form, strict liability is more nearly akin to tortious negligence than to contractual warranty, because no contract is required and because strict liability may not be disclaimed.[74]

Thus, where the parties are not in privity, there is no contractual relationship upon which warranty liability can be founded.

Courts adopting this approach view the drafters' neutrality on the privity issue[75] as explicit recognition that consumers who are not in privity do not have a warranty remedy against a manufacturer.[76] Incorporating Code provisions on notice and disclaimer[77] into personal injury actions is deemed to be undesirable, and the neutral official comments are construed as tacit authority for further judicial development of the anti-privity doctrine under theories other than warranty liability. Since remote sellers are subject to tort liability on the basis of a duty unrelated to contractual obligations, adoption of Section 402A becomes the preferred method of extending a remedy to a nonprivity purchaser. "In these situations, the Uniform Commercial Code is inapplicable."[78]

The availability of tort remedies has led some courts to conclude that privity is required in the warranty action.

> [N]o person injured by a product defect will . . . be denied a remedy . . . . Sellers of defective products are strictly liable, without regard to warranties or disclaimers, for personal injuries proximately caused by the defect . . . . [I]t seems clear that the remedy in strict liability is available in every

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[74] Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alas. 1973) (citations omitted).

[75] *See* notes 83 and 84 *infra.*

[76] Parish v. B.F. Goodrich Co., 235 N.W.2d 570 (Mich. 1975). "The UCC did not create a new and separate consumer's product liability claim against a manufacturer." *Id.* at 573.

[77] U.C.C. §§ 2-607(3)(a) and 2-316.

[78] Dippel v. Sciano, 155 N.W.2d 55, 62-63 (Wis. 1967). *Compare* Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970) *with* Helvey v. Wabash County REMC, 278 N.E.2d 608 (Ind. App. 1972), and Mahalsky v. Salem Tool Co., 461 F.2d 581 (6th Cir. 1972)(Ohio law). Also *compare* United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 257 N.E.2d 380 (Ohio 1970) *with* Val Decker Packing Co. v. Corn Prod. Sales Co., 411 F.2d 850 (6th Cir. 1969)(Ohio law); and *compare* Hargrove v. Newsome, 470 S.W.2d 348 (Tenn. 1971) *with* Layman v. Keller Ladders, Inc., 455 S.W.2d 594 (Tenn. 1970).

> personal injury case involving a breach of implied warranty of merchantability.[79]

It should be noted, however, that reliance upon tort remedies is misplaced in jurisdictions which have adopted Section 402A. Proof that a defective product caused physical harm is not sufficient to sustain recovery in tort; it must also be shown that the defect was unreasonably dangerous to the person or property of the user.[80]

Another consideration supporting the privity approach may be the Code design to establish uniform statute of limitations periods for businesses which operate on a nationwide scale.[81] However, application of the U.C.C. statute of limitations to consumer actions against remote sellers might eliminate a remedy which would be available if the actions were characterized as tort claims. A purchaser of defective goods who suffers personal injury four years after the purchase will be barred from recovering in warranty, even though the defect could not have been discovered before the injury occurred.[82] The commercial need for uniformity, therefore, has little relevance in the context of a consumer transaction.

While the drafters expressed neutrality on the privity issue in the comments to Sections 2-313[83] and 2-318,[84] the fair import

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[79] Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alas. 1973) (citations omitted). *But see* Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alas. 1976), in which the Alaska Supreme Court abolished the requirement of privity in all breach of warranty actions.

[80] The California Supreme Court withdrew its approval of § 402A and rejected the "unreasonably dangerous" requirement because lower courts had already expanded strict liability beyond the Restatement language. Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In addition, *see* Glass v. Ford Motor Co., 304 A.2d 562 (N.J. Super. 1973).

[81] *See* Rosenau v. City of New Brunswick, 238 A.2d 169 (N.J. 1968).

[82] U.C.C. § 2-725.

[83] U.C.C. § 2-313, comment 2 states:

> [T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

[84] U.C.C. § 2-318, comment 3 states:

> The first alternative expressly includes as beneficiaries within its provi-

of those comments is that a further relaxation of the privity requirement in warranty actions would not violate the statutory scheme.[85] The U.C.C. codifies products liability law under the label "warranty," and it creates a consumer remedy at least with respect to the retailer. As a matter of policy, the further development of warranty law should not be stifled by any uncertainty in the Code on the issue of how far liability should extend up the distributive chain. Since implied warranty liability is not based upon the consensual elements of a transaction but rather arises by operation of law, reliance upon the absence of the face-to-face agreement which constitutes privity is misplaced.

Moreover, the privity-conscious approach may lead to an either/or dilemma. An injured purchaser who is not in privity has only a tort cause of action which must be brought within a short time after the injury occurs. But what about the purchaser in privity? Does the fact that he has a true commercial relationship with his immediate seller indelibly mark his relationship as "contractual" for purposes of the statute of limitations? If so, then Section 2-725 does not work well in all commercial settings, for the purchaser will be in the same situation these courts have attempted to avoid with the buyer of a defective product who suffers personal injury more than four years after tender of delivery. Immutable characterization of the relationship as contractual would bar recovery against the immediate seller.[86] What reason is there for denying a pur-

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sions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person [As amended in 1966].

See note 67, *supra* for an explanation of the three alternatives.

[85] It is clear that Alternatives B and C of U.C.C. § 2-318 abolish the requirement of vertical privity and create a consumer products liability claim against remote parties. *See* note 67 *supra.*

[86] *See* Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), a case which characterized the relationship as contractual and foreclosed recovery in tort. The case produced much criticism, (*see, e.g., Symposium, Mendel v. Pittsburgh Plate Glass Co.*, 45 ST. JOHN'S L. REV. 62 (1970)), and it was subsequently

chaser a remedy against the immediate seller while allowing him to recover under Section 402A against a remote manufacturer with whom he has had no dealings? This question may be particularly relevant where the plaintiff is unable to obtain jurisdiction over the manufacturer. Courts adopting a privity-conscious approach should therefore be compelled to offer the purchaser in privity a choice of litigation theories in order to prevent an unjust result. Once the choice of litigation theories is allowed, what reasons justify denying the same options to the plaintiff who sues a remote party? Absent this option of theories the conduct of trials involving the same substantive issues may be governed by entirely different sets of rules depending upon who is sued. A purchaser injured by a defective product who sued his immediate seller for breach of warranty would benefit from the less stringent standard of product acceptability and the longer statute of limitations, but he would have to prove the existence of the warranty and notice of its breach. A Section 402A action against the manufacturer must commence in shorter time and would require proof that the defective product was unreasonably dangerous, but the plaintiff would not have to abide by the notice and disclaimer provisions of the Code. Application of different rules in this case makes little sense, "[a]nd it would, of course, be most awkward and confusing when . . . the manufacturer and retailer are both sued in the same action."[87]

If privity-conscious courts continue to follow this approach, what are the rights of the Section 2-318 third-party beneficiary of the warranty? Clearly this party is not in privity with any seller, yet the drafters abolished the privity requirement for this class of plaintiffs. Does the third-party beneficiary plead breach of warranty or strict liability in tort? Should these plaintiffs have a choice of theories in actions against the immediate seller? When courts decide this question based on the absence of privity, they offer no guidance regarding the nature of the beneficiary's cause of action, when it will accrue, or which statute of limitation will apply. Actually, this prob-

overruled. Victorson v. Bock Laundry Mach. Co., 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

[87] Heavner v. Uniroyal, Inc., 305 A.2d 412, 426 (N.J. 1973). *See* note 66 *supra.*

lem should arise only in jurisdictions which have adopted Alternative A to Section 2-318, since it is that provision which restricts the class of beneficiaries.[88] Alternatives B and C plainly abolish any requirement of vertical privity.[89] There is some evidence, however, that privity-conscious courts may have difficulty resolving the either/or dilemma even under the expansive provisions of Alternatives B and C.[90]

C. *Characterization of the Litigation Theory*

Rather than focusing on the nature of the injury (personal or non-personal) or the relationship between the parties (in privity or not), some courts reach a more satisfactory solution by simply applying the statute of limitations for whichever theory is pleaded.[91] Assume that in 1976 a purchaser filed a complaint alleging that he purchased certain goods from S in 1973; that the goods were unmerchantable and as a result he was personally injured. The purchaser further alleges that the defect was not discovered until the injury occurred in 1973 and that S was promptly notified upon its discovery. The purchaser argues that he is entitled to consequential damages for personal injuries as authorized by Section 2-714(3)[92] and defined in Sec-

[88] *See* note 67 *supra*. Comment 2 to § 2-318 nevertheless characterizes the action as one for breach of warranty.

[89] *See* notes 67 and 85 *supra*.

[90] For example, the Rhode Island Supreme Court was confronted with a case in which the children of the purchaser of an automobile brought suit against the manufacturer for personal injuries allegedly caused by a breach of warranty. The children contended that by virtue of § 2-318 they were subrogated to the rights of their father to bring the action and that the four-year limitation period in § 2-725 was controlling. The majority of the court circumvented this argument by stating that regardless of whether the children had acquired the status of their father, there was no buyer-seller relationship between the father and the manufacturer and thus no contract of sale. The majority indicated that this rationale would be controlling regardless of whether § 2-318 were applied as originally enacted (Alternative A), or as amended (a modified version of Alternative C which expressly incorporates a manufacturer's warranty). Hence, any personal injury action maintained by a third-party beneficiary pursuant to § 2-318 would be governed by the Rhode Island two-year personal injury statute of limitations. The cause of action accrued prior to the amendment of § 2-318. Kelly v. Ford Motor Co., 290 A.2d 607 (R.I. 1972).

[91] *See, e.g.*, Reid v. Volkswagen of America, Inc., 512 F.2d 1294 (6th Cir. 1975) (construing Michigan law); Berry v. G.D. Searle & Co., 309 N.E.2d 550 (Ill. 1974); Redfield v. Meade, Johnson & Co., 512 P.2d 776 (Ore. 1973); Kassab v. Central Soya, 246 A.2d 848 (Pa. 1968); Gardiner v. Philadelphia Gas Works, 197 A.2d 612 (Pa. 1964).

[92] U.C.C. § 2-714(3) states: "In a proper case any incidental and consequential

tion 2-715(2)(a) and (b).[93] The complaint states a cause of action for breach of warranty, and the action is within the four year statute of limitations designated in Section 2-725. Courts which focus upon the nature of the injury[94] would hold that this constitutes an action for personal injuries and that the shorter personal injury statute of limitations bars the action. However, privity-conscious courts would allow the action because the purchaser is in privity with the seller. The third category of jurisdictions would permit the action simply because it alleges a breach of warranty and has been brought within the four-year period of limitation. This approach is compelling and is supported in some jurisdictions by the enactment of Section 10-103, which repeals all legislation inconsistent with the Code. Some courts have construed this provision to repeal shorter statutes of limitation if they would control actions for personal injuries resulting from breach of warranty.[95] This conclusion has been reached despite statutes which state that "[e]very suit brought to recover damages for injury wrongfully done to the person . . . must be brought within two years . . . ."[96] The result is correct in light of Sections 2-725 and 10-103.

Kentucky is among those jurisdictions which have failed to enact the Code's general repealer. Without an amendment to the U.C.C. or the general statute of limitations, there is an apparent conflict between Section 2-725 and the general statute of limitations for personal injuries. This conflict may be resolved by traditional principles of statutory construction. A specific statute which deals with a specific subject should control over a general law under which that subject might fit.[97]

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damages under [U.C.C. § 2-715] may also be recovered."

[93] U.C.C. § 2-715 states in relevant part:

. . . .

(2) 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.

[94] *See* text accompanying notes 63-72 *supra.*

[95] *See, e.g.,* Sinka v. Northern Commercial Co., 491 P.2d 116 (Alas. 1971).

[96] Gardiner v. Philadelphia Gas Works, 197 A.2d 612, 613 n.3 (Pa. 1964). *But see* Tyler v. R.R. St. & Co., Inc., 322 F. Supp. 541 (E.D. Va. 1971).

[97] Reid v. Volkswagen of America, Inc., 512 F.2d 1294 (6th Cir. 1975) (Michigan

U.C.C. § 2-725 is a specific enactment which relates to actions for breach of warranty, and recovery of damages for personal injury is a statutory remedy for breach of warranty. Thus, Section 2-725 should be deemed to govern this cause of action. Article One supports this result by expressing a policy of liberal construction of Code provisions and an intent to occupy the field of commercial transactions.[98]

1. *Legislative Pre-emption*

If a jurisdiction allows recovery under either the warranty provisions of the U.C.C. or Section 402A, another issue may arise: Does the fact that the legislature adopted the U.C.C. pre-empt and therefore bar application of Section 402A? Absent a contrary expression of legislative intent, statutory and common law causes of action are not considered exclusive. Likewise, U.C.C. § 1-103 provides that general principles of law and equity shall supplement the provisions of the Code unless displaced by particular sections.[99] In some instances, a determination that a supplemental body of law is not displaced may be made with relative ease. For example, a buyer fraudulently induced to enter a contract may seek return of the purchase price, notwithstanding an otherwise effective disclaimer of warranties which the misrepresentation would have created.[100] Even if a seller's statements do not create an express warranty under Section 2-313, "the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation."[101]

In other contexts, it may be more difficult to determine when a Code provision is intended to be the exclusive state-

law); Val Decker Packing Co. v. Corn Prod. Sales Co., 411 F.2d 850 (6th Cir. 1969)(Ohio law); Gardiner v. Philadelphia Gas Works, 197 A.2d 612 (Pa. 1964).

[98] Val Decker Packing Co. v. Corn Prod. Sales Co., 411 F.2d 850 (6th Cir. 1969); Gardiner v. Philadelphia Gas Works, 197 A.2d 612 (Pa. 1964).

[99] U.C.C. § 1-103 specifically lists "the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause" as illustrative of supplemental bodies of law.

[100] *See* City Dodge, Inc., v. Gardner, 203 S.E.2d 729 (Ga. App. 1974), *aff'd* 208 S.E.2d 794 (Ga. 1974) (Article Two does not displace tort action for fraud and deceit in connection with oral representations which induced purchase of automobile).

[101] U.C.C. § 2-313, comment 8.

ment of law, and the conflicts between Restatement Section 402A and Article Two bring the problem into sharp focus. Official comments to Section 2-318 reflect the intent of the drafters to provide designated third-party beneficiaries the protection of the buyer's warranty and "to accomplish this purpose without any derogation of any right or remedy resting on negligence."[102] Although these comments were not made with respect to the development of strict liability in tort, other comments to Section 2-318 clearly contemplate that courts are free to extend warranty liability up the distributive chain.[103]

It is disturbing that few courts which have adopted Restatement § 402A have even considered the possibility that this conflict exists. Among those which have recognized a potential conflict, the tendency has been to view the judiciary's prerogatives as absolute. In the words of the New Jersey Supreme Court: "We may parenthetically also observe that, to our knowledge, no one has ever contended anywhere that adoption of the Code did away with strict liability in tort."[104] This statement was used to justify that court's denying applicability of the Code's warranty provisions in suits to recover consequential damages for harm to person or property. This result was reached even though the legislature amended the general statute of limitations for property damage and contract claims so that it did "not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes."[105] The fact that the personal injury statute of limitations was not similarly amended was viewed as clear legislative intent that Section 2-725 was not designed to apply to personal injury actions, and this is a defensible conclusion. On the other hand, it was a distaste for disclaimers and for two sets of rules regarding litigation for tortious injury that led the court to characterize all actions for consequential personal injury and property damage as strict tort actions. "No advantage can be gained by pleading them in terms of breach of warranty. . . . We . . . hold that [Section 2-725] does not apply to [such] actions . . . against the ultimate seller or supplier and that

[102] U.C.C. § 2-318, comment 2.

[103] *See* notes 83 and 84 *supra.*

[104] Heavner v. Uniroyal, Inc., 305 A.2d 412, 427 (N.J. 1973).

[105] N.J. STAT. ANN. § 2A:14-1 (1976).

such actions are governed, like those against a manufacturer, by our general statutes of limitation."[106] While the failure to amend one statute was significant, it is uncertain whether the amendment to the statute of limitations for property damage and contract claims was viewed as having any significance. Moreover, if one assumes that the court was correct in its application of the statutes of limitations, the import of the decision was that the *substantive* principles of strict tort liability would govern the trial of a claim for personal injury or property damage, no matter how pleaded. A refusal to apply the more lenient standard for unmerchantability to the injured consumer and third-party beneficiary in an action against the ultimate seller effectively repeals several provisions of Article Two.[107] Nowhere has it ever been contended that a common law theory repealed a statute. Conversely, there are courts which recognize parallel causes of action under Article Two and Restatement § 402A. They have tended to expand warranty liability in order that it be coextensive with tort liability. As one author has observed, "[i]t is a topsy-turvy world when a rule of law based upon a statute must be changed in order to conform with a rule of common law."[108]

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[106] 305 A.2d at 427.

[107] *But see* Collins v. Uniroyal, Inc., 315 A.2d 16 (N.J. 1974), in which a purchaser of a defective tire was permitted to recover consequential damages for personal injury on a theory of express warranty. The court held that in light of the manufacturer's advertising regarding the safety of its tires and the natural reliance upon such representations, the attempt to limit the remedy to repair or replacement of a defective tire was patently unconscionable. The plaintiff had also asserted an unsuccessful claim in strict tort. This case is distinguishable from *Heavner* because the express warranty could be treated as a true warranty in the "commercial sales sense." Also, the breach of an express warranty requires proof that the product failed to meet the explicit representations of the seller rather than proof of a defect or unfitness. The court further clarified its view in Realmuto v. Struab Motors, Inc., 322 A.2d 440, 444 (N.J. 1974):

> [W]hen the gravamen of a consumer suit against a manufacturer or retailer for consequential personal injuries and property damage is a *defect* in the article, the action will be considered as one founded on strict liability in tort, whether the cause of action is pleaded in express or implied warranty, in strict liability, or in any combination of these theories.
>
> This is not to say that an injured consumer, who cannot prove or does not desire to rely entirely on a defect, may not sue, solely or alternatively under the Uniform Commercial Code for a causally related breach of a pertinent express warranty.

[108] Titus, *supra* note 38, at 717.

D. *Running of the Statute of Limitations Against Remote Parties*

In a warranty action to recover for personal injuries or economic loss, it may be necessary to name a remote vendor as a defendant because of the intervening insolvency of the immediate seller. Jurisdictions which characterize the action as a warranty claim face yet another problem: When does the statute of limitations begin to run against a remote party? When he tenders delivery to his immediate purchaser or when the plaintiff purchases the goods? There are two approaches to consider in answering this question.

In the first approach, the policy considerations favoring the elimination of the privity requirement must be analyzed. Rather than being viewed as an insurer of its goods, the remote seller is simply identified as a convenient risk bearer in an integrated marketing chain. This policy seeks to impose responsibility upon the party placing defective goods in the stream of commerce with the intent of having the goods come into the hands of a consumer. Relaxing orthodox contract principles merely permits that responsibility to be fixed by the purchaser who has suffered the loss.

Given this policy, one might argue that the statute of limitations in warranty actions should not begin to run until tender of delivery of the goods to the ultimate purchaser.[109] For example, suppose that a parts manufacturer ships defective parts F.O.B. manufacturer's plant to D, a distributor, in January, 1970. D supplies some of the parts to a wholesaler in January, 1971, who is unable to sell the parts to R, a retailer, until January, 1972. In February, 1974, a consumer purchases one of the defective parts and suffers personal injury as a result of the defect. Later in the year a warranty action is brought against

[109] Case law on this point is scarce. At least one court has identified tender of delivery to the ultimate consumer as the latest time that a cause of action could have accrued without deciding when it actually did accrue. Rufo v. Bastian-Blessing Co., 207 A.2d 823 (Pa. 1965). *But see,* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7 (S.D. Tex. 1976). This Texas opinion concluded that § 2-725 was applicable to a personal injury action arising out of breach of warranty but that the cause of action accrued in accordance with the personal injury statute of limitations. The court held the action could be brought within four years of the date of injury under Article Two. The result is clearly wrong.

the manufacturer, who pleads that Section 2-725 bars the action. The plaintiff will argue that to bar the action would require the illogical conclusion that his cause of action both accrued and expired prior to his taking delivery of the goods,[110] and that this construction does not promote the policy of affording the ultimate consumer a remedy against the remote seller of defective goods. This argument overlooks two crucial points. First, the provision of a remedy and the guarantee of recovery are not synonymous. Abolition of privity only insures the injured purchaser a theory by which legal recourse may be sought. A second flaw in the argument deals with the objection to barring an action prior to the time when the purchaser could have discovered the defect. This objection ignores the Code scheme, which specifies that a cause of action accrues when the breach occurs despite the fact that the purchaser did not have knowledge of the breach.[111] Absent a warranty of the future performance of the goods, the cause of action always accrues when tender of delivery is made. Hence, the plaintiff in this example is in no worse position than a purchaser of goods containing a latent defect which is not discoverable until more than four years after the purchase.

The second approach to the question of when the statute of limitations begins to run against a remote party is based upon close scrutiny of the provisions of the Code and produces a more sound analysis and consistent result. Since a buyer's cause of action for breach of warranty normally accrues upon tender of delivery, it is necessary to determine when and how tender of delivery is accomplished. Tender requires that the seller complete his obligations for delivery of the goods.[112] Generally, the crucial factors are whether the contract authorizes or requires the seller to ship the goods and whether the seller is in possession of the goods. A shipment contract, like the one in this hypothetical, relieves the seller of further expense and

[110] "[I]t is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one." Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 211, 305 N.Y.S.2d 490, 495 (1969)(dissenting opinion), *overruled in* Victorson v. Bock Laundry Mach. Co., 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975). Also *see* Heavner v. Uniroyal, Inc., 305 A.2d 412, 427 n.15 (N.J. 1973).

[111] U.C.C. § 2-725(2).

[112] U.C.C. § 2-503.

risk of loss once he has delivered the goods to the point of shipment.[113] The seller tenders delivery when he puts the goods in the possession of the carrier, makes a proper transportation contract, obtains and tenders any necessary documents, and notifies the buyer that the goods have been shipped.[114]

Application of these principles to the present example shows that the manufacturer tendered delivery of the goods when they were placed in the hands of the carrier. It is clear that the manufacturer had no further delivery obligations. At this point, the statute of limitations should begin to run against all parties insofar as the manufacturer's potential warranty liability is concerned.

Since the manufacturer in the example tendered delivery of the goods in January 1970, and they were not purchased until February 1974, the warranty action would be barred. Jurisdictions that apply the statute of limitations of whichever litigation theory is pleaded would nevertheless permit the plaintiff to proceed in tort against the manufacturer. As long as the action is commenced within the limitations period for a personal injury claim, the bar to pursuit of one theory will not preclude pursuit of a parallel action.[115] The Code remedy is distinguishable from, yet supplemental to the tort remedy.[116]

IV. CONCLUSION

Most courts, in their eagerness to provide a remedy for consumers who suffer personal injury or property damage, have

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[113] U.C.C. § 2-319. Under a destination contract, the seller bears the expense of transportation and the risk of loss until the goods arrive at the named destination.

[114] U.C.C. §§ 2-503(2) and 2-504.

[115] [A] plaintiff who is injured more than four years after the sale of the defective product, although barred from recovery for breach of warranty in an action pursuant to the Code, will nevertheless have two years to bring an action based on strict liability in tort, provided he can show that the defective product was unreasonably dangerous as required under § 402A.

Redfield v. Mead, Johnson & Co., 512 P.2d 776, 779 (Ore. 1973). *Accord,* Peeke v. Penn Cent. Transp. Co., Inc., 403 F. Supp. 70 (E.D. Pa. 1975); Hoffman v. A.B. Chance Co., 339 F. Supp. 1385 (M.D. Pa. 1972). In addition, *see* cases cited in note 116 *infra.*

[116] *See, e.g.,* Moody v. Sears, Roebuck & Co., 324 F. Supp. 844 (S.D. Ga. 1971); Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alas. 1976); Berry v. G.D. Searle & Co., 309 N.E.2d 550 (Ill. 1974); Redfield v. Meade, Johnson & Co., 512 P.2d 776 (Ore. 1973); Gardiner v. Philadelphia Gas Works, 197 A.2d 612 (Pa. 1964); and Layman v. Keller Ladders, Inc., 455 S.W.2d 594 (Tenn. 1970).

failed to reflect before reacting. The adoption of Section 402A in cases argued under a warranty theory[117] has made it "unnecessary" to decide the effect Article Two warranty provisions may have in other contexts[118]and has stifled articulate debate on the proper relationship of the two theories.[119] Courts have turned to Section 402A because of its simplicity and their concern with the notice requirements and the disclaimer and limitation of remedy provisions of the Code. Although the seller's Article Two rights may appear to be a barrier to recovery by the unwary consumer, the Official Comments indicate that a retail consumer is to be judged by more lenient standards than a merchant buyer. Notice provisions are relaxed for consumers because "the rule . . . requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."[120] Moreover, a disclaimer of warranty or limitation of remedy in a consumer transaction can be attacked as unconscionable. These principles ameliorate the apparent harshness of the Code scheme, yet the Code remains an untapped source of products liability law in many jurisdictions.

McMichael v. American Red Cross[121] is the latest in a series of Kentucky cases which blur the very real distinctions

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[117] "We are fully mindful that plaintiff did not directly plead the theory of strict tort liability, request the court to instruct on it, nor urge this theory until this appeal." McCormack v. Hankscraft Co., 154 N.W.2d 488, 501 (Minn. 1967). *See also* Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966); Santor v. A & M Karagheusian, Inc., 207 A.2d 305 (N.J. 1965); Heaton v. Ford Motor Co., 435 P.2d 806 (Ore. 1967).

[118] Suvada v. White Motor Co., 210 N.E.2d at 188.

[119] It has been suggested that without a careful examination of legislative and judicial precedents regarding the RESTATEMENT within a particular jurisdiction, "sources of state law on products liability will remain obscure, and, consequently, choices of law in many states between strict tort liability and warranty rules in products liability cases will continue to be made illegitimately." Titus, *supra* note 38, at 782. This writer focuses upon the development of products liability law in the special food warranty cases and identifies Kentucky as one of two jurisdictions in which courts have held that legislative enactment of the Sales Act was intended to absorb the common law special food warranty. *See* Great Atl. & Pac. Tea Co. v. Eiseman, 81 S.W.2d 900 (Ky. 1935); Rinaldi v. Mohican Co., 121 N.E. 471 (N.Y. 1918). "The reasonable conclusion is that this prior case law established the statutory scheme as the exclusive remedy for products liability and foreclosed the court from adopting a scheme outside the Code." Titus, *supra* note 38, at 778.

[120] U.C.C. § 2-607, comment 4. *See also* comment 5.

[121] 532 S.W.2d 7 (Ky. 1975).

between the two theories. In *McMichael,* the plaintiff argued under alternative theories of strict tort and implied warranty, yet the Court never addressed the Article Two scope provisions and proceeded to apply the product quality standards of Section 402A without examining pertinent Code standards. The application of tort theory to causes of action litigated in warranty leaves unanswered the question of how far up the distributive chain warranty liability may be imposed, and it raises the possibility that the common law tort theory may pre-empt comprehensive legislation.

The judicial adoption of Restatement § 402A after legislative enactment of the U.C.C. should result in the recognition of two distinct theories of recovery. Section 402A cannot be held to pre-empt a statutory remedy. Moreover, since the Kentucky Court does not require privity in a products liability action, purchasers of defective products should be allowed to proceed in warranty against immediate and remote sellers, regardless of whether the defective condition is characterized as unreasonably dangerous and regardless of the nature of the injury sought to be remedied. A parallel cause of action in tort should also be available if the facts are favorable.

If it is determined that the two theories cannot co-exist compatibly, there are two alternatives. First, the Court could reinstate privity requirements in warranty actions. If we continue to apply Section 402A as well, this change would put Kentucky squarely in line with privity-conscious jurisdictions.[122] All products liability claims against remote sellers would be litigated in tort, while claims against immediate sellers would be grounded in warranty with a possible alternative remedy in tort.

Second, at least one jurist concluded that courts should no longer indulge in the assumption that they are free to provide a tort remedy when statutory relief exists under the U.C.C. Chief Justice O'Connell of the Oregon Supreme Court wrote that a bifurcated approach "injects into our law of products liability complexities which are likely to haunt us in future cases."[123] After reviewing the comprehensive Code provisions,

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[122] *See* text accompanying notes 73-90 *supra.*

[123] Markle v. Mulholland's, Inc., 509 P.2d 529, 537 (Ore. 1963) (special concurrence of Chief Justice O'Connell). It should be noted that these considerations per-

he reluctantly concluded that legislative pre-emption had occurred and that "the Code is controlling in this area of the law."[124] Although this approach is inconsistent with recent products liability cases, there is much to be said for the proposition that once the legislature has enacted a statute with notice and disclaimer provisions, "the fact that these requirements are ill-fitting does not give [a court] license to purge them from the statute."[125]

Regardless of one's personal predilections regarding the proper resolution of this products liability dilemma, it is clear that an articulated premise upon which Kentucky Courts can proceed is essential for the development of a cogent body of jurisprudence.

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suaded the New Jersey Supreme Court that the Code was inapplicable in cases involving defective products which caused physical harm. *See* text accompanying note 104 *supra*.

[124] 509 P.2d at 536.

[125] *Id.*