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An Analysis of Warranty Claims Instituted By Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commerical Code Section 2-318 (Alternatives B & C)

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AN ANALYSIS OF WARRANTY CLAIMS INSTITUTED BY NON-PRIVITY PLAINTIFFS IN JURISDICTIONS THAT HAVE ADOPTED UNIFORM COMMERCIAL CODE SECTION 2-318 (ALTERNATIVES B & C)

by

WILLIAM L. STALLWORTH*

I. INTRODUCTION

In an earlier Article,[1] the author identified legal principles that explain and harmonize the cases decided under section 2-318, Alternative A.[2] There are no comprehensive commentaries on the other two versions of Uniform Commercial Code section 2-318 ("section 2-318"). Hence, the purpose of this Article is to discuss case law developments under Alternatives B[3] and C.[4] The Article will also propose a solution to various problems that arise under section 2-318 in the the law of defenses. In order to follow this discussion, one must understand the law of warranty claims and defenses under Article 2 of the Uniform Commercial Code (henceforth, the "Code" or the "UCC"). In an earlier Article[5] the author presented a capsule summary of the law in that area, and the reader may wish to refer to that Article.

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[1] *See* William L. Stallworth, *An Analysis Of Warranty Claims Instituted By Non-privity Plaintiffs In Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215 (1993).

[2] Alternative A provides that:

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

U.C.C. § 2-318 (1992).

A majority of the states have adopted Alternative A. *See* 2 WILLIAM D. HAWKLAND, U.C.C. SERIES § 2-318, at 666 n.1 (1992) [hereinafter HAWKLAND]. *See also* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERICAL CODE, § 11-3, at 460 n.5 (3d ed. 1988). *See infra* app. A for a list of the states that have adopted Alternative A.

[3] Alternative B provides that: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." U.C.C. § 2-318 (1992). *See infra* app. A for a list of the states that have adopted Alternative B.

[4] Alternative C provides that:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to the injury to the person of an individual to whom the warranty extends.

U.C.C. § 2-318 (1992). *See infra* app. A for a list of the states that have adopted Alternative C.

[5] *See supra* note 1.

A. *Summary and Overview*

This Article will reach the following conclusions. In warranty actions decided under Alternative B, the lack of privity defense *prevails* unless the section 2-318 plaintiff[6] is suing to recover for personal injury.[7] By comparison, under Alternative C, the lack of privity defense *fails* unless the plaintiff is someone whom the seller would *not* have expected to use, consume or be affected by the goods.[8] It is uncertain whether various Code defenses are available in section 2-318 litigation. For example, the courts seem to be reluctant to permit the Code's lack of notice defense to be used in personal injury cases.[9] Similarly, some cases suggest that the courts disfavor Code defenses based on warranty disclaimers or remedy limitations;[10] but other cases enforce such disclaimers, even in personal injury cases.[11] There is an analogous split of authority on the question whether the Code statute of limitations or the tort statute of limitations applies to a personal injury action tried on a breach of warranty theory.[12] This Article ultimately takes the position that defenses based on Code notice requirements, remedy limitations, warranty disclaimers and the statute of limitations should be effective against section 2-318 third party beneficiaries.

B. *Defenses to Breach of Warranty Claims*

1. The Defense of Lack of Privity

The defense of lack of privity is the primary obstacle to a warranty claim filed by a plaintiff who is not in privity of contract with the defendant. "Privity of contract" is the connection or relationship that exists between contracting parties.[13] For example, a buyer and seller are said to be "in privity of contract," or simply "in privity." Thus, lack of privity problems are disputes about whether various non-privity plaintiffs have standing to sue for breach of contract. There are two kinds of lack of privity—"vertical" lack of privity and "horizontal" lack of privity.[14]

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[6] This Article uses terms like "section 2-318 litigation" and "section 2-318 plaintiffs" as a convenient way to refer to the litigation and to the non-privity plaintiffs who file claims under § 2-318. Technically, § 2-318 confers *standing to sue* under other provisions of the Code (e.g., § 2-314) and does not provide an independent cause of action.

[7] *See* discussion *infra* parts III.A.1 - III.A.4.

[8] *See* discussion *infra* parts III.A.5 - III.A.7.

[9] *See infra* part III.B.1.

[10] *See infra* part II.B.2.

[11] *See infra* part III.B.2.

[12] *See infra* part III.B.3.

[13] *See* 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 778 (1951 & Supp. 1991); 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 998(A) (3d ed. 1964 & Supp. 1992).

[14] *See* WHITE & SUMMERS, *supra* note 2, at 460.

The problem of vertical lack of privity arises when a *purchaser* files a breach of warranty action against a vendor in the distribution chain who is not the immediate seller.[15] The problem of horizontal lack of privity occurs when a *non-purchaser* sues any vendor in the chain of distribution for breach of warranty.[16]

The lack of privity defense can produce harsh results, and for that reason the defense has been undermined by case law developments,[17] the doctrine of strict liability in tort,[18] and federal and state legislation.[19] Section 2-318 is an example of state legislation that has weakened the vitality of the privity defense.[20]

C. Common Law Third Party Beneficiary Theory

At common law a third party not in privity who wishes to sue on a contract has to prove that he or she is an "intended" beneficiary[21] of the contract rather than an "incidental" beneficiary[22] because incidental beneficiaries lack standing to enforce the contract.[23]

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[15] For example, when the woman who bought a defective lawnmower from a department store sues the company that manufactured the lawnmower for breach of implied warranty. Vertical non-privity plaintiffs are often referred to as "remote" purchasers because they did not buy directly from the defendant seller. Alternatively, the defendant sellers in vertical lack of privity cases are often referred to as "remote" sellers because they did not sell directly to the plaintiff purchasers.

[16] For example, when the man who is injured when he falls off a lawnmower sues the department store where his wife bought the lawnmower, or the company that manufactured the lawnmower, or both companies; or when the employee who is injured by some heavy machinery sues the company that sold the equipment to her employer, or the company that manufactured the equipment, or both companies.

[17] For example, the common law created exceptions to the privity requirement for certain kinds of products: "(1) first, drugs and articles of food and drink (products of intimate internal bodily use); then (2), by analogical extension, toiletry and cosmetic articles (products of intimate external bodily use) . . . ." McNally v. Nicholson Mfg. Co., 313 A.2d 913, 917 (Me. 1973). Thus, at common law the lack of privity defense was an unreliable defense in cases where personal injury was caused by food, beverages, drugs or cosmetics. *See* R.D. Hursh, Annotation, *Privity of Contract as Essential to Recovery in Action Based on Theory other than Negligence, Against Manufacturer or Seller of Product Alleged to Have Caused Injury*, 75 A.L.R.2d 39 (1961) (for a comprehensive state-by-state discussion of the common law exceptions to the privity requirement).

[18] For a comprehensive history of strict liability in tort, *see* William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[19] *See, e.g.*, Magnuson-Moss Warranty— Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1988). The Act permits consumers to recover for breach of warranty despite the absence of privity between the consumer and the vendor. *See id.* Section 2-318 is an example of state legislation that has weakened the lack of privity defense.

[20] By comparison to the common law, § 2-318 creates an across-the-board exception for all types of products; but only certain types of plaintiffs have standing to sue under § 2-318.

[21] *See, e.g.*, Lonsdale v. Chesterfield, 662 P.2d 385 (Wash. 1983) (holding that the non-privity plaintiff was an intended beneficiary and as such had standing to sue).

[22] *See, e.g.*, Cretex Companies, Inc. v. Construction Leaders, Inc., 342 N.W.2d 135 (Minn. 1984).

In order to obtain standing to sue as an "intended" beneficiary, the third party generally has to prove that the contracting parties intended to confer a benefit on the third party. Unfortunately, there are varying judicial interpretations of the "intent to benefit" requirement:

> The phrase "intent to benefit" is not necessarily used in the same sense by all of the courts that employ it. There are two key questions that often receive different answers. Of whose intent do we speak and what evidence is admissible on the issue of intent?
>
> Some cases stress the intent of the promisee whereas others have indicated that the intention of both parties is equally important.
>
> The Pennsylvania courts had announced a most restrictive rule. They stated that both parties must intend to benefit the third party and that such intention must be found in the contract.[24]

In addition, the common law rules can be difficult to apply. For example, in *Lonsdale v. Chesterfield*,[25] the Washington Supreme Court, quoting from one of its earlier decisions, stated the common law rule this way:

> If the terms of the contract *necessarily require the promissor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person* . . . The 'intent' which is a prerequisite of the beneficiary's right to sue is 'not a desire or purpose to confer a benefit upon him,' nor a desire to advance his interests, but an *intent that the promisor shall assume a direct obligation to him.*[26]

Adding to the confusion, the Restatement (Second) recognizes two types of third party beneficiaries —intended beneficiaries and incidental beneficiaries,[27] but the first

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[23] *See, e.g., id.* (holding that the non-privity plaintiff was an incidental beneficiary and as such lacked standing to sue).

[24] JOHN D. CALAMARI & JOSHEPH M. PERILLO, CONTRACTS § 17-3 at 694 (3d ed. 1987) (citations omitted).

[25] 662 P.2d at 385.

[26] *Id.* at 389-90.

[27] Thus, § 302 of the Restatement (Second) of Contracts provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either[:]
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

Restatement of Contracts recognizes three types—creditor beneficiaries, donee beneficiaries, and incidental beneficiaries.[28] In addition, the rules in the Restatement (Second) can be difficult to apply. For example, in order to qualify as an intended beneficiary under the Restatement (Second), a third party has to show that recognition of a right to performance in the beneficiary "is appropriate to effectuate the intention of the parties" and that "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[29] Thus, depending on the vagaries of judicial proclivities, different results could be reached at common law on a given set of facts.[30]

Even if the non-privity plaintiff can carry the burden of proof of common law third party beneficiary status, there are other potential obstacles to recovery. For example, the common law rule that a third party beneficiary stands in the shoes of the promisee and is subject to any defenses that the promisor has against the promisee. That means that remedy limitations and warranty disclaimers are usually effective against the common law third party beneficiary.[31] Unlike the situation at common law, it is uncertain whether a section 2-318 third party beneficiary is subject to whatever defenses the promisor has against the promisee.[32] Furthermore, regardless of which of the three alternate versions of section 2-318[33] applies, it will generally be easier for a non-privity plaintiff to obtain standing to sue under section 2-318 than under common law third party beneficiary doctrines.

D. Uniform Commercial Code Section 2-318 [34]

Section 2-318 gives certain non-privity plaintiffs standing to sue as third-party beneficiaries of the Code warranties that a buyer receives, "thereby freeing . . . such beneficiaries from any technical rules as to 'privity.'"[35] The drafters amended the early

[28] *See* RESTATEMENT, CONTRACTS, § 133 (1932). Many courts refused to adopt the Restatement's approach. *See* CALAMARI & PERILLO, *supra* note 24, § 17-3, at 693-94.

[29] RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b)(1979).

[30] *See* CALAMARI & PERILLO *supra* note 24, 17-3, at 696.

[31] *See, e.g.*, Chestnut Hill Dev. Corp. v. Otis Elevator Co., 653 F. Supp. 927 (D. Mass. 1987); R & L Grain Co. v. Chicago Eastern Corp., 531 F. Supp. 201 (N.D. Ill. 1981).

[32] *See* discussion *infra* part III.B.

[33] *See supra* notes 2-4 for the text of the three alternate versions of § 2-318.

[34] For a more comprehensive discussion of the history of § 2-318, see the author's earlier Article *supra* note 1.

[35] U.C.C. § 2-318 cmt. 2 (1992).

version of section 2-318[36] in an effort to stop the states from adopting a variety of separate versions. The amendment provided three alternative versions of section 2-318:[37] Alternative A,[38] Alternative B,[39] and Alternative C.[40] With the exceptions of California, Louisiana and Texas, the states have all adopted some version of section 2-318.[41]

The majority of states have adopted Alternative A.[42] Alternative A is the most conservative[43] version of section 2-318 because it limits the class of potential plaintiffs in *four ways*.[44] First, the statute limits the class of potential plaintiffs to "natural persons." That means that Alternative A is no help to partnerships and corporations because they are not "natural persons."[45] Second, the statute limits the class of potential plaintiffs to the buyer's houseguests, household and family members. That means that Alternative A is generally no help to a buyer's employees.[46] Third, Alternative A is no help to

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[36] The 1952 version of § 2-318 provided that the benefit of a warranty automatically extended to the buyer's family, household and house guests:

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

U.C.C. § 2-318 (1952). *See* 2 HAWKLAND, *supra* note 2, at 661. This early version of § 2-318 was opposed as a statute that reduced the scope of warranty protection available to consumers by limiting the class of third-party beneficiaries to the purchaser's family members, household and houseguests. *See id.* at 661-62. As a result, some states refused to adopt § 2-318. The remaining states either proposed or adopted nonuniform versions of § 2-318. *See id.* at 662-63. The prospect of a proliferation of separate variations in state after state concerned the drafters because the purpose of the Code is "to make uniform the law among the various jurisdictions." U.C.C. § 1-102(2)(c) (1992).

[37] *See* 2 HAWKLAND, *supra* note 2, at 662-63; WHITE & SUMMERS, *supra* note 2, at 459-62.

[38] The early version of § 2-318 became Alternative "A". The text of Alternative A appears *supra* note 2.

[39] The text of Alternative B appears *supra* note 3.

[40] The text of Alternative C appears *supra* note 4.

[41] Texas has adopted a statute that leaves questions of horizontal and vertical privity for the courts. California omitted § 2-318 but has enacted a separate statute which is similar to Alternative C in effect. Louisiana has never enacted Article 2 of the Uniform Commercial Code. *See* WHITE & SUMMERS, *supra* note 2, at 461 n.11.

[42] *See* 2 HAWKLAND, *supra* note 2; *see also* WHITE & SUMMERS, *supra* note 2.

[43] Alternatives A, B, and C reflect conservative, moderate, and liberal solutions to the problem of the proper scope of warranty protection to afford non-privity plaintiffs under the Code.

[44] In principle, Alternative A limits the class of potential plaintiffs in a *fifth* way because it contains a *foreseeability* requirement. In practice, however, the foreseeability requirement rarely if ever operates as a limitation upon the right to sue for breach of warranty under Alternative A. *See* 3 ROBERT ANDERSON, UNIFORM COMMERCIAL CODE § 2-318:19 (3d ed. 1983).

[45] *See, e.g.*, Fischbach & Moore Int'l Corp. v. Crane Barge R-14, 476 F. Supp. 282 (D. Md. 1979), *aff'd*, 632 F.2d 1123 (4th Cir. 1980); United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 257 N.E.2d 380 (Ohio 1970)(a corporation is not a "natural person" within the meaning of § 2-318).

[46] *See, e.g.*, Cowens v. Siemens-Elema AB, 837 F.2d 817 (8th Cir. 1988); Brendle v. General Tire & Rubber Co., 505 F.2d 243 (4th Cir. 1974).

plaintiffs who have sustained only property damage or economic loss because the statute requires personal injury.[47] Fourth, Alternative A does not grant standing to sue "remote" sellers because the statute limits the class of potential defendants to "direct" sellers.[48] Alternative B, Alternative C, and various "nonstandard"[49] versions of section 2-318 go beyond Alternative A in weakening the lack of privity defense.

For example, Alternative B expands the class of potential plaintiffs to include non-purchasers such as the buyer's employees and invitees,[50] and even bystanders.[51] In addition, Alternative B expands the class of potential defendants to include "remote" sellers.[52] However, Alternative B does not help non-privity plaintiffs who have sustained only property damage or economic losses because the statute requires personal injury. Similarly, Alternative B is no help to corporation plaintiffs and other organizations because the statute is limited to "natural persons."

Alternative C weakens the lack of privity defense the most.[53] Like Alternative A, Alternative C grants standing to the buyer's family members, household, and houseguests; and like Alternative B, Alternative C expands the class of potential plaintiffs to include non-purchasers such as the buyer's employees and invitees, and even bystanders.[54] Also like Alternative B, Alternative C eliminates the vertical privity requirement. However, Alternative C is more generous than either of the other versions of section 2-318 because Alternative C does not require personal injury.[55] Thus, non-privity plaintiffs who have sustained only property damage or economic loss may have standing to sue under Alternative C.[56] And unlike the other two versions of section 2-318, Alternative C is not

[47] *See, e.g.*, Johnson v. General Motors Corp., 502 A.2d 1317 (Pa. Super. Ct. 1986), *overruled by* REM Coal Co. v. Clark Equip. Co., 563 A.2d 128 (Pa. Super. Ct. 1989); *see also* 2 HAWKLAND, *supra* note 2, at 665.

[48] The term "his buyer" in Alternative A refers to the seller's immediate buyer. *See* 2 HAWKLAND, *supra* note 2, at 665.

[49] *See infra* app. A for a discussion of the non-standard versions of § 2-318.

[50] *See supra* note 3 for the text of Alternative B.

[51] *See, e.g.*, Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970) (applying Vermont law); Nacci v. Volkswagen of America, Inc., 325 A.2d 617 (Del. Super. Ct. 1974).

[52] *See* 2 HAWKLAND, *supra* note 2, at 672-73. Alternative B implicitly abolishes the requirement of vertical privity because the statute does not limit the seller's warranty to "his buyer." Furthermore, the Code defines the term "seller" in a way that does not necessarily restrict the term to direct sellers. For example, the Code defines the term "seller" as a "person who sells or contracts to sell goods." U.C.C. § 2-103(1)(d) (1992).

[53] WHITE & SUMMERS, *supra* note 2, at 462; 2 HAWKLAND, *supra* note 2, at 674-75. *See supra* note 4, for the text of Alternative C.

[54] *See* Jane M. Draper, Annotation, *Third Party Beneficiaries of Warranties Under UCC Section 2-318*, 100 A.L.R. 3rd 743, 757-64 (1980).

[55] The statute simply refers to "injury." *See supra* note 4, for the text of Alternative C.

[56] *See, e.g.*, Milbank Mut. Ins. Co. v. Proksch, 244 N.W.2d 105 (Minn. 1976).

limited to "natural persons."[57] Hence, Alternative C permits corporations, partnerships, and other organizations to sue for breach of warranty.

II. RESEARCH HYPOTHESES

A. Hypotheses Concerning Alternative B

The analysis above suggests that *three factors* will determine whether a plaintiff who is not in privity with the defendant has standing to sue for breach of warranty[58] under Alternative B. *First*, the plaintiff must be a natural person. *Second*, the plaintiff must have sustained personal injury as a result of the breach of warranty. *Third*, the individual must be someone "who may reasonably be expected to use, consume or be affected by the goods." Therefore, in breach of warranty actions decided under Alternative B the lack of privity defense should *fail* when these three factors or variables are all present. For the sake of analysis, this proposition is formally stated as follows:

Hypothesis 1:

> Under Alternative B, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *fail* if the plaintiff is a natural person, is suing to recover for personal injury, *and* is someone whom the seller could reasonably have expected to use, consume or be affected by the goods.

Hypothesis 1 implies that the lack of privity defense should *prevail* when one or more of the three designated variables is absent. For example, when the non-privity plaintiff is *not* a natural person; *or* when the non-privity plaintiff is *not* attempting to recover for personal injury[59]; *or* when the non-privity plaintiff is *not* someone[60] whom the seller could reasonably have expected to use, consume or be affected by the goods. For clarity of analysis these logical corollaries are stated as hypotheses:

Hypothesis 2:

> Under Alternative B, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *prevail* if the plaintiff is *not* a natural person.

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[57] The statute refers to "any person." Under Code § 1-201(30) the word "person" includes an organization; and Code § 1-201(28) states that the word "organization" includes corporations, partnerships, and other types of organizations. *See supra* note 4, for the text of Alternative C.

[58] Privity is created when the defendant makes an express warranty directly to the plaintiff, and in that case there is no lack of privity problem. *See* WHITE & SUMMERS, *supra* note 2, at 467. Consequently, the references in this Article to "breach of warranty" claims generally refer to breach of implied warranty claims.

[59] For example, when the non-privity plaintiff is attempting to recover for economic losses or property damage.

[60] As used in the following hypotheses the term "someone" includes both people and organizations (e.g., corporations and partnerships).

Hypothesis 3:

> Under Alternative B, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *prevail* if the plaintiff has *not* sustained personal injury.

Hypothesis 4:

> Under Alternative B, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *prevail* if the plaintiff is *not* someone whom the seller could reasonably have expected to use, consume or be affected by the goods.

B. Hypotheses Concerning Alternative C

As stated above, Alternative C weakens the lack of privity defense the most.[61] Indeed, under Alternative C the only type of plaintiff who apparently lacks standing to sue is the plaintiff whom the seller could *not* reasonably have expected to use, consume or be affected by the goods. In other words, the lack of privity defense should prevail when the non-privity plaintiff is an *unforeseeable* plaintiff. For the sake of analysis, this proposition is stated as follows:

Hypothesis 5:

> Under Alternative C, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *prevail* if the plaintiff is not someone[62] whom the seller could reasonably have expected to use, consume or be affected by the goods.

In every other situation, the defense should fail. In particular, the lack of privity defense should *fail* even if the non-privity plaintiff is *not* a natural person; *and* even if the non-privity plaintiff is *not* attempting to recover for personal injury. For the sake of analysis, these corollary propositions are stated as follows:

Hypothesis 6:

> Under Alternative C, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *fail* if the plaintiff is *not* a natural person.

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[61] WHITE & SUMMERS, *supra* note 2, at 462; 2 HAWKLAND, *supra* note 2, at 674-75.

[62] The term "someone" includes people and organizations.

Hypothesis 7:

> Under Alternative C, the lack of privity defense to a non-privity plaintiff's breach of warranty claim will *fail* if the plaintiff has *not* sustained personal injury.

Part III.A *infra* presents some pertinent cases that illustrate these propositions.

C. *Additional Defenses to Warranty Claims*

Although the lack of privity defense is the most common defense that non-privity plaintiffs encounter, they may also encounter defenses based on lack of notice, warranty disclaimers, remedy limitations, and the statute of limitations. The drafters of Code Article 2 apparently intended that such defenses would be available in section 2-318 litigation.[63] Despite the drafters intent, however, some courts have ruled that the defenses cannot be raised in breach of warranty litigation under section 2-318. Part III.B *infra* will analyze and discuss some of the conflicting cases in this area.[64]

III. RESEARCH RESULTS

A. *The Lack of Privity Defense*

1. The Support for Hypothesis 1

The support for Hypothesis 1 is very strong. Recall that Hypothesis 1 says that the courts will *reject* a lack of privity defense to a non-privity plaintiff's breach of warranty claim if the plaintiff is a natural person, is suing to recover for personal injury, *and* is someone whom the seller could reasonably have expected to use, consume or be affected by the goods. The cases support the hypothesis,[65] and there appear to be no pertinent

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[63] For example, Official Comment 1 to § 2-318 states in pertinent part that "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." U.C.C. § 2-318 cmt. 1 (1992).

[64] Defenses based on the privity requirement, the notice requirement, warranty disclaimers, remedy limitations, and the Code statute of limitations are generally unavailable in tort actions. That is one reason why § 2-318 plaintiffs frequently add negligence claims and strict liability claims to their breach of warranty claims. The reader may wish to refer to the author's earlier Article, *supra* note 1, for a brief discussion of this subject.

[65] *See, e.g.*, Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970); Nacci v. Volkswagen of America, Inc., 325 A.2d 617 (Del. Super. Ct. 1974); Phipps v. General Motors Corp., 363 A.2d 955 (Md. 1976); Frericks v. General Motors Corp., 336 A.2d 118 (Md. 1975); England v. Sanford, 561 N.Y.S.2d 228 (N.Y. App. Div. 1990), *aff'd*, 573 N.Y.S.2d 228 (N.Y. 1991); Ambers v. C.T. Indust., 554 N.Y.S.2d 903 (N.Y. App. Div. 1990); Calabria v. St. Regis Corp., 508 N.Y.S.2d 186 (N.Y. App. Div. 1986); McKay v. Jefmar Wash & Dry, Inc., 443 N.Y.S.2d 435 (N.Y. App. Div. 1981).

cases where the lack of privity defense prevailed.[66] The following case illustrates the line of decisions which support Hypothesis 1.

In *Frericks v. General Motors Corporation*,[67] a passenger in an automobile which crashed sued the automobile manufacturer and the automobile dealer for negligence and breach of warranty to recover for personal injury.[68] The facts established that the plaintiff John Frericks was a passenger in an Opel Kadett which was being driven by Ronald Baines.[69] Unfortunately, Baines fell asleep at the wheel, and the car left the road and overturned.[70] The automobile was designed and manufactured by the defendant General Motors Corporation, and had been purchased by Ronald Baines' parents from defendant Anchor Pontiac-Buick.[71] The plaintiff passenger alleged that after leaving the highway, the locking mechanism of the seat in which he was riding failed, allowing the seat to drop backwards and placing his head in line with the collapsing roof supports.[72] The plaintiff's skull was crushed by the collapsing roof.[73] The complaint against General Motors and Anchor Pontiac alleged negligence and breach of implied warranty.[74] The Maryland Court of Appeals decided that the plaintiff had standing to sue both General Motors and Anchor for breach of warranty.[75]

2. The Support for Hypothesis 2

The support for Hypothesis 2 is also very strong. Recall that Hypothesis 2 says that under Alternative B, the courts will *sustain* a lack of privity defense to a non-privity plaintiff's breach of warranty claim if the plaintiff has *not suffered any personal injury.* The cases support the hypothesis;[76] and with one exception,[77] there appear to be no

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[66] *See, e.g.*, Harvey v. Sears, Roebuck & Co., 315 A.2d 599 (Del. Super. Ct. 1973), a case where the lack of privity defense prevailed, is distinguishable as a case involving a cause of action which accrued before § 2-318 was adopted in Delaware.

[67] 336 A.2d at 118.

[68] *Id.* at 120.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Wood Prods., Inc. v. CMI Corp., 651 F. Supp. 641 (D. Md. 1986); Horizons, Inc., v. Avco Corp., 551 F. Supp. 771 (W.D.S.D. 1982), *aff'd in part, rev'd in part*, 714 F.2d 862 (8th Cir. 1983); Fischbach & Moore Int'l Corp. v. Crane Barge R14, 476 F. Supp. 282 (D. Md 1979), *aff'd*, 632 F.2d 1123 (4th Cir. 1980); Wear v. Chenault Motor Co., Inc, 293 So.2d 298 (Ala. Civ. App. 1974); Arell's Fine Jewelers, Inc., v. Honeywell, Inc., 537 N.Y.S.2d 365 (N.Y. App. Div. 1989); Pronti v. DML of Elmira, Inc., 478 N.Y.S.2d 156 (N.Y. App. Div. 1984); Miller v. General Motors Corp., 471 N.Y.S.2d 280 (N.Y. App. Div. 1984), *aff'd* 489 N.Y.S.2d 904 (N.Y. 1985); Hole v. General Motors Corp., 442 N.Y.S.2d 638 (N.Y. App. Div. 1981); Western Equip. Co. v. Sheridan Iron Works, Inc., 605 P.2d 806 (Wyo. 1980).

[77] The exception is *Falker v. Chrysler Corp.*, 463 N.Y.S.2d 357 (N.Y. Civ. Ct. 1983), a case decided by the Small Claims Court.

pertinent cases where the seller's lack of privity defense failed. The following case illustrates the line of decisions that support Hypothesis 2.

Wear v. Chenault Motor Co., Inc.[78] was a case where a non-privity plaintiff sued to recover for economic losses.[79] In *Wear*, the plaintiff car owner filed a breach of warranty action against Ford Motor Company for damages arising from the partial destruction by fire of his car.[80] The plaintiff had purchased the car from a car dealer, and the plaintiff's wife was driving the car when the fire occurred.[81] She testified that she was driving about 60 miles per hour when she saw flames coming from under the dashboard near the ash tray.[82] Although she pulled the car to the side of the road and stopped, she was unable to extinguish the fire which eventually consumed the car's interior.[83] The complaint included claims for breach of implied warranty.[84] The court of civil appeals affirmed a directed verdict for the manufacturer on the grounds that the plaintiff lacked standing to sue for breach of warranty.[85]

However, *Falker v. Chrysler Corp.*[86] ruled that the purchaser of a defective outboard engine could sue the manufacturer for breach of implied warranty, despite the lack of personal injury.[87] The facts established that the plaintiff had purchased his outboard engine from one of the defendant manufacturer's dealers, and that the engine problems were attributable to design and assembly defects.[88] The plaintiff sued for breach of the implied warranties of merchantability and fitness, alleging that the defects prevented the engine from operating at full power and caused it to flood regularly.[89] In its opinion, the small claims court ruled that:

> This court would also reject any contention that the elimination of privity should apply only to cases involving personal injury. Any common sense reading of Section 2-318 and related sections supports applicability of prior privity elimination to property damage as well as economic or commercial losses, where the manufacturer or seller of goods could reasonably have expected the injured or damaged person to use, consume or be effected by the goods.

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[78] 293 So. 2d at 298.

[79] *Id.*

[80] *Id.* at 299.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 301.

[86] 463 N.Y.S.2d 357 (N.Y. Civ. Ct. 1983).

[87] *Id.*

[88] *Id.* at 359.

[89] *Id.* at 358.

> However, there is no need to reach any decision, with respect to the elimination of privity, as this court finds that the post purchase actions by defendant, gave rise to a contractual privity relationship with plaintiff, which overcame any original purchase gap in privity.[90]

3. The Support for Hypothesis 3.

The support for Hypothesis 3 is also strong. Recall that Hypothesis 3 says that under Alternative B, the courts will *sustain* a lack of privity defense to a non-privity plaintiff's breach of warranty claim if the plaintiff is *not a natural person.* The cases support this hypothesis,[91] and there appear to be no pertinent cases where the seller's lack of privity defense failed. For example, in *Fischbach & Moore International Corp. v. Crane Barge R14,*[92] the owners of a barge sued a transformer manufacturer when their transformers fell into a harbor.[93] The complaint included claims for breach of implied implied warranty, strict liability, and negligence.[94] The United States District Court held that:

> Under § 2-318 of the Commercial Law Article, "(a) seller's warranty whether express or implied extends to any natural person who is . . . (an) ultimate consumer or user of the goods or person affected thereby . . . and who is injured . . . by breach of the warranty." Relief under [section 2-318] is plainly not available to corporate entities such as those involved in this action which are incapable of incurring the loss for which this provision narrowly provides relief. Thus, [such] as third party beneficiaries, have no rights under the warranty to recover a strictly pecuniary loss.[95]

Similarly, in *Vermont Plastics, Inc. v. Brine, Inc.*[96] the Brine Company[97] sued Plastic Materials Company ("PMC") and New England Plastic Services Company ("New England"), alleging negligence, and breach of implied warranty.[98] Both defendants asked for summary judgment on the implied warranty claim.[99]

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[90] *Id.* at 360 (citations omitted). *Falker* is probably distinguishable as a case where the defendant's post-sale conduct created privity of contract.

[91] *See, e.g.*, Vermont Plastics, Inc. v. Brine, Inc., 1993 WL 221051 (D. Vt. June 4, 1993); Fischbach & Moore Int'l Corp. v. Crane Barge R14, 476 F. Supp. 282 (D. Md. 1979), *aff'd*, 632 F.2d 1123 (4th Cir. 1980); Arell's Fine Jewelers, Inc. v. Honeywell, Inc., 505 N.Y.S.2d 365 (N.Y. App. Div. 1991).

[92] 476 F. Supp. at 282.

[93] *Id.* at 284.

[94] *Id.* at 286.

[95] *Id.* at 288.

[96] 1993 WL 221051 (D. Vt. June 4, 1993).

[97] Vermont Plastics was the original plaintiff in this case, and Brine was originally the defendant.

[98] *Id.* at *1.

[99] *Id.*

The facts revealed that Vermont Plastics supplied plastic lacrosse stick heads to Brine under a contract which specified that only Dupont Zytel ST-801 SuperTough nylon resin was to be used in the manufacture of the lacrosse stick heads.[100] However, Vermont Plastics began having problems obtaining ST-801 in the colors needed for the lacrosse stick heads, and was eventually led to contact the defendant New England in an attempt to secure a source of nylon.[101] New England contacted PMC and PMC supplied the nylon through New England to Vermont Plastics.[102] The problem was that PMC did not use ST-801 nylon. Instead, it used a nylon called "6608."[103]

Because the 6608 nylon was used, Brine experienced an increased rate of breakage in the lacrosse stick heads.[104] Due to the increased breakage rate, Brine had to replace over 38,000 lacrosse sticks which had broken in play, and Brine "also suffered declining sales in its lacrosse stick business."[105] The situation deteriorated and Brine eventually sued New England and PMC for breach of implied warranty.[106]

The defendants asked for summary judgment on the grounds of lack of privity of contract with Brine.[107] Brine conceded that it was not in privity of contract with either defendant, but argued that under Vermont's version of the Uniform Commercial Code, privity was not required.[108] The court rejected Brine's position and ruled that "in order for a plaintiff to recover economic losses on a breach of implied warranty theory under Vermont law, privity of contract must exist between the plaintiff and the defendants where, as here, all parties are sophisticated business entities."[109] The court went on to say that:

> There are public policy reasons for differentiating between a case where an individual is personally injured and where a business suffers only economic losses. Where the individual suffers physical injury from a defective product, the ultimate wrongdoer is in the best position to spread the costs of liability. Where a business entity suffers only economic losses, on the other hand, the recourse should be against the other contracting party rather than another party further along the distribution chain. In these cases, the parties to the sales transaction are in the best position to determine the economic risk the transaction presents and then to allocate the risk accordingly.

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100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at *2.

106 *Id.*

107 *Id.* at *8.

108 *Id.* at *8; Vermont has adopted Alternative B § 2-318. *Id.*

109 *Id.* at *10.

> This is particularly true where both the buyer and the seller are sophisticated business entities that regularly deal with the product in question. In such a case, the buyer should attempt to proceed directly against the seller. Thus, if Brine is to recover under an implied warranty theory, it must recover from Vermont Plastics, if at all.[110]

Accordingly, the court granted the defendants' summary judgment motions.[111]

4. The Support for Hypothesis 4

Recall that Hypothesis 4 says that under Alternative B, the courts will sustain a lack of privity defense to a non-privity plaintiff's breach of warranty claim if the plaintiff is *not* someone whom the seller could reasonably have expected to use, consume or be affected by the goods. However, in Alternative B jurisdictions the foreseeability requirement rarely if ever precludes the right to sue for breach of warranty because the courts are willing to "stretch" to find that the plaintiff is foreseeable.[112] For example, in *Townsend v. Ed Fine Oldsmobile*,[113] a warranty claim was filed by Wendy Townsend ("Wendy") as the result of the injuries she sustained in an automobile accident.[114] The facts established that Wendy was a passenger in a Jeep owned and driven by Billy McCoy ("Billy").[115] Billy bought the Jeep from Ed Fine Oldsmobile as a used-car, with no seat-belts and a removable roof and doors.[116] On the day of the accident, the doors and roof had been removed.[117] Earlier that day, Wendy and Billy had been drinking, and they subsequently decided to take a ride in the country in the Jeep.[118] After a while, Wendy said she felt sick, so Billy slowed the Jeep down to let Wendy out.[119] But before the Jeep came to a complete stop, Wendy had fallen from the Jeep onto the road.[120] Wendy subsequently sued American Motor Corporation and Ed Fine Oldsmobile for breach of implied warranty, in an attempt to recover for her injuries.[121] The court ruled that section 2-318 gave Wendy standing to sue the defendants for breach of warranty.[122]

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[110] *Id.*

[111] *Id.* at *11.

[112] *See, e.g.*, Townsend v. Ed Fine Oldsmobile, 1987 WL 14870 (Del. Super Ct. July 23, 1987), *aff'd*, 536 A.2d 615 (Del. Dec. 28, 1987); Nacci v. Volkswagen of America, Inc., 325 A.2d 617 (Del. Super. Ct. 1974).

[113] 1987 WL 14870 (Del. Super. Ct. July 23, 1987), *aff'd*, 536 A.2d 615 (Del. 1987).

[114] *Id.* at *1.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at *2.

Nacci v. Volkswagen of America[123] also suggests that the courts are willing to "stretch" to the find that the claimant is a foreseeable plaintiff. That case was an action to recover for the injuries that a child riding a bicycle sustained when the child collided with a Volkswagen stationwagon.[124] It was undisputed that the Volkswagen was either stopped or going very slowly at the time of the collision.[125] The impact of the collision broke the Volkswagen's left front parking light which severed a tendon in the child's knee.[126] The child subsequently sued the automobile manufacturer and the dealer for breach of the implied warranty of merchantability.[127] The defendants moved for summary judgment on the grounds of lack of privity.[128]

As regards the privity question, the Delaware Superior Court had to decide "whether, under Section 2—318, plaintiff is of the class of persons 'who may reasonably be expected . . . to be affected by the goods . . . .'"[129] In this connection, the court said that:

> It is not uncommon for motor vehicles using the public highways to come into contact with other vehicles or pedestrians who use the public highways. In case of collision, users of public highways are affected by other motor vehicles which also use the public highways. Accordingly, the Court concludes that plaintiff is within the class of persons who may reasonably be expected to be affected by the motor vehicle. . . . Even pedestrians and occupants of other vehicles on the highway come within the protective ambit of that concept.[130]

To summarize, the courts apparently have no trouble applying Alternative B. In practice the three jurisdictional requirements boil down to a single requirement of personal injury. That is because the "natural person" requirement will normally be met whenever the plaintiff is suing to recover for personal injury, and because the "foreseeability" requirement rarely if ever precludes the right to sue under Alternative B. Thus, in warranty actions decided under Alternative B the lack of privity defense *prevails* unless the non-privity plaintiff is suing to recover for personal injury.

5. The Support for Hypothesis 5

Recall that Hypothesis 5 says that under Alternative C, the courts will *sustain* a lack of privity defense to a non-privity plaintiff's breach of warranty claim if the plaintiff is

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123 325 A.2d 617 (Del. Super. Ct. 1974).

124 *Id.* at 618.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 619.

130 *Id.* at 619-20.

not someone whom the seller would have expected to use, consume or be affected by the goods. There is evidence that the foreseeability requirement does occasionally preclude the right to sue. For example, *Cohen v. McDonnell Douglas Corp.*[131] was a claim for compensatory and punitive damages.[132] The facts established that the deceased, Nellie Cohen, had two sons— the plaintiff, Manuel Cohen, and his brother Ira Cohen.[133] In 1979, Ira Cohen was killed in an airplane crash.[134] The airplane that crashed was operated by the defendant American Airlines, and manufactured by the defendant McDonnell Douglas.[135] Manuel Cohen learned of the accident while listening to a radio broadcast, and surmised that his brother had been a passenger on the aircraft involved.[136] Seven hours after the airplane crash, the plaintiff telephoned his mother to inform her of Ira's death.[137] Shortly after being told of her son's death, Nellie Cohen suffered a series of painful heart attacks, and two days later she died.[138] A lawsuit was filed to recover for the pain and suffering that the mother allegedly endured after learning of the death of her son in the airplane crash.[139] The plaintiff Manuel Cohen was the executor of his mother's estate.[140] He asserted claims against McDonnell Douglas on theories of negligence, strict liability and breach of the implied warranty of merchantability.[141] The warranty claim was filed under section 2-318.[142] It was assumed for purposes of the defendant's summary judgment motion that Nellie Cohen's angina attacks and subsequent death were the direct result of learning of the death of her son.[143]

The Massachusetts Supreme Court ruled that the mother's injury and death were not compensable in an action for breach of the implied warranty of merchantability.[144] In this connection, the court stated that:

> The plaintiff argues that Nellie Cohen was "affected" by McDonnell Douglas' aircraft in a way that allows the imposition of liability under [section] 2-318. We disagree. . . .

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[131] 450 N.E.2d 581 (Mass. 1983).

[132] *Id.* at 582.

[133] *Id.* at 582-83.

[134] *Id.* at 583.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] The plaintiff asserted a negligence claim against American Airlines Corporation. *Id.*

[142] Massachusetts has adopted a non-standard version of Alternative C. *Id.* at 583, 584. *See infra* app. A for the text of the Massachusetts statute.

[143] *Id.* at 583.

[144] *Id.* at 589.

> [Section 2-318] indicates that recovery should be allowed only if it was reasonably foreseeable that the plaintiff was a person who would be "affected" by the goods in question.... It seems clear that McDonnell Douglas and American Airlines could reasonably foresee that their negligence or breach of warranty that resulted in an airplane crash which killed all of the passengers would cause severe emotional distress and physical injuries to relatives of individuals killed in the crash who learned of the deaths.... We think that the Legislature, in enacting [section] 2-318, did not intend that recovery be allowed in all cases where a plaintiff's injury was reasonably foreseeable.
>
> . . . [T]he decision whether to impose liability should not be made merely by reference to what is logically reasonably foreseeable but rather that other factors, "such as where, when, and how the injury to the third person entered into the consciousness of theclaimant, and what degree there was of familial or other relationship between the claimant and the third person," should be examined in deciding whether to impose liability [W]e conclude that these factors, nevertheless, must be employed for policy reasons to prevent an unreasonable expansion of liability for the multitude of injuries that could fall within the bare principle of reasonable foreseeability.* * *
>
> Nellie Cohen did not learn of her son's death until seven hours after the airplane crash. She did not observe the accident or her son. Rather, she was informed by means of a telephone conversation at her home in Massachusetts. Thus, at all pertinent times, Nellie Cohen was more than 1,000 miles from the scene of the crash. Although Nellie Cohen undoubtedly suffered severe mental anguish and physical harm as a result of the alleged negligence toward her son, the manner in which she learned of her son's death precludes the imposition of liability.[145]

Thus, the foreseeability requirement occasionally prevents a section 2-318 plaintiff from suing for breach of warranty.

6. The Support for Hypothesis 6

The support for Hypothesis 6 is also very strong. Recall that Hypothesis 6 says that under Alternative C, the courts will reject a lack of privity defense to a non-privity

[145] 450 N.E.2d at 587-89 (citations omitted).

plaintiff's breach of warranty claim *even if* the plaintiff is *not a natural person.* The cases support the hypothesis,[146] and there appear to be no pertinent cases where the lack of privity defense prevailed.

For example, in *Hydra-Mac, Inc. v. Onan Corp.*,[147] Onan Corporation appealed from a judgment awarding $2,751,000 in lost profits to International Harvester Company.[148] The facts established that in the early 1970's, Onan developed a new aluminum engine called the "NHCV," and that "an Onan brochure touted the engine as a more durable, cooler, quieter, and a more reliable engine".[149] Hydra-Mac purchased some NHCV's from Onan and installed them in the Hydra-Mac model 8C loader.[150] International Harvester purchased the 8C's from Hydra-Mac and resold them as the Model 4130 loader.[151] Problems with the NHCV engines began when Hydra-Mac's first two test engines failed.[152] Later on, Hydra-Mac's customers and dealers complained about severe problems such as warped cylinder blocks and carburetor problems.[153] As a result of these problems, Hydra-Mac and International Harvester eventually sued Onan for breach of warranty.[154]

The Pennington County District Court entered judgment in favor of Hydra-Mac and International Harvester, and Onan appealed.[155] The Minnesota Court of Appeals affirmed the trial court judgment, ruling in effect that International Harvester was entitled to sue Onan as a section 2-318[156] third party beneficiary of Onan's warranties to Hydra-Mac.[157]

7. The Support for Hypothesis 7

The support for Hypothesis 7 is also very strong. Recall that Hypothesis 7 says that under Alternative C the courts will reject a lack of privity defense to a non-privity plaintiff's breach of warranty claim even if the plaintiff has *not* sustained personal injury.

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[146] *See, e.g.*, Horizons, Inc. v. Avco Corp., 551 F. Supp. 771 (D.S.D. 1982), *aff'd in part, rev'd in part*, 714 F.2d 862 (8th Cir. 1983); Cameo Curtains, Inc. v. Philip Carey Corp., 416 N.E.2d 995 (Mass. App. Ct. 1981); Hydra-Mac, Inc. v. Onan Corp., 430 N.W.2d 846 (Minn. Ct. App. 1988), *aff'd in part, rev'd in part*, 450 N.W.2d 913 (Minn. 1990); Western Equip. Co., Inc. v. Sheridan Iron Works, Inc., 605 P.2d 806 (Wyo. 1980).

[147] 430 N.W.2d at 846.

[148] *Id.* at 848-49.

[149] *Id.* at 849.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 848.

[155] *Id.*

[156] The state of Minnesota has adopted a non-standard version of Alternative C. *See* MINN. STAT. ANN. § 336.2-318 (West Supp. 1993).

[157] *Hydra-Mac*, 430 N.W.2d at 848.

The cases support the hypothesis,[158] and there appear to be no pertinent cases where the lack of privity defense prevailed. *Milbank Mutual Insurance Co. v. Proksch*[159] and *Cundy v. International Trencher Service, Inc.*[160] illustrate the line of decisions that support Hypothesis 7. In *Milbank Mutual Insurance Co. v. Proksch*,[161] the plaintiff's home was damaged when the Christmas tree that his daughter purchased caught fire.[162] The plaintiff homeowner subsequently filed a breach of warranty action against the Christmas tree vendor.[163] The district court entered judgment in favor of the homeowner, and the vendor appealed.[164] The Minnesota Supreme Court affirmed the lower court and ruled that the homeowner had standing to sue under section 2-318.[165]

Cundy v. International Trencher Service, Inc.[166] was a case involving the purchase of a large trenching machine known as the Hoes Super Gigant.[167] The plaintiff purchaser (Duane Cundy) filed suit seeking damages for breach of express and implied warranties.[168] Both the distributor (International Trencher Service) and the dealer (Tri-State Sales) were named as defendants.[169] The trial court decided that the trencher was nonconforming because it lacked power and malfunctioned.[170] Accordingly, the trial court ruled that the dealer was liable for breach of implied warranty, and awarded Cundy $20,000 in general damages and $10,000 in consequential damages.[171] The trial court concluded that Cundy had no remedy against the distributor for economic losses because of the lack of privity of contract; yet, the court required the distributor to contribute $15,000.[172] On appeal to the South Dakota Supreme Court, the distributor argued that the trial court erred by requiring it to contribute to the judgment after ruling that Cundy had no remedy against the distributor because of the lack of privity.[173]

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158 *See, e.g.*, GKW Electronics, Inc. v. Zenith Elecs. Corp., 1992 WL 158882 (9th Cir. July 8, 1992); Board of Water Works v. Alvord, Burdick & Howson, 706 F.2d 820 (8th Cir. 1983); Dalton v. Stanley Solar & Stove, Inc., 629 A.2d 794 (N.H. 1993); Milbank Mut. Ins. Co. v. Proksch, 244 N.W.2d 105 (Minn. 1976);Cundy v. International Trencher Serv., Inc, 358 N.W.2d. 233 (S.D. 1984).

159 244 N.W.2d at 105.

160 358 N.W.2d. at 233.

161 244 N.W.2d at 105.

162 *Id.* at 107.

163 *Id.*

164 *Id.*

165 *Id.* at 108; Although the fire that triggered the lawsuit occurred at a time when Minnesota was governed by Alternative A, by the time the case came to trial Minnesota had adopted Alternative C. For various reasons the Court decided to apply Alternative C retroactively. Thus, *Milbank* can be treated as a case decided under Alternative C.

166 358 N.W.2d. at 233.

167 *Id.* at 235.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.* at 238.

The South Dakota Supreme Court ruled that it was technically an error for the trial court to require the distributor to contribute after ruling that lack of privity precluded Cundy from recovering his economic losses from the distributor.[174] However, the court nevertheless affirmed the award against the distributor, stating that:

> [U]pon [South Dakota's] adoption of Alternative C of U.C.C. 2-318, the limitation of warranty coverage to injuries "to the person" of a beneficiary, was omitted . . . allow[ing] recovery of consequential damages from the remote manufacturer . . . based on implied warranties.
>
> The point is: The parts warranty between distributor and dealer should have extended to Cundy as a foreseeable user. Therefore, it is not so clear that Cundy could not have recovered consequential damages directly from distributor.[175]

8. Summary and Conclusions: The Lack of Privity Defense.

The courts have no trouble applying Alternatives B and C, and the following rules emerge from the cases decided under those statutes. In warranty actions decided under Alternative B, the lack of privity defense *prevails* unless the plaintiff is suing to recover for personal injury. In warranty actions decided under Alternative C, the lack of privity defense *fails* except in the extraordinary case where the plaintiff is someone whom the seller would *not* reasonably have expected to use, consume or be affected by the goods. The *Cohen* case notwithstanding, the foreseeability requirement rarely precludes the right to sue for breach of warranty.[176] However, *Cohen* demonstrates that in an appropriate case the courts may deny standing to sue on the grounds that the Section 2-318 claimant was unforeseeable.

B. Code Defenses Based On Notice Requirements, Warranty Disclaimers, Remedy Limitations, and the Statute of Limitations.

As mentioned earlier, the Code provides a variety of potential defenses based on warranty disclaimers,[177] remedy limitations,[178] notice requirements,[179] and the statute of limitations.[180] There is no question that such defenses are available in breach of warranty

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[174] *Id.*

[175] *Id.* at 240. In effect, the state supreme court decided that the trial court's result was right even if the trial court's reasoning was wrong.

[176] *See, e.g.*, Nacci v. Volkswagen of America, Inc., 325 A.2d 617 (Del. Super. Ct. 1974). Townsend v. Ed Fine Oldsmobile, 1987 WL 14870 (Del. Super. Ct. July 23, 1987), *aff'd*, 536 A.2d 615 (Del. 1987).

[177] *See* U.C.C. § 2-316 (1992). In this Article the term "warranty disclaimer" refers both to language that limits or modifies warranty liability and also to language that disclaims warranties.

[178] *See* U.C.C. § 2-719 (1992).

[179] *See* U.C.C. § 2-607(3)(a) (1992).

[180] *See* U.C.C. § 2-725 (1992).

litigation instituted by "direct" puchasers because many of the pertinent Code provisions are expressly applicable to "buyers."[181] However, there is a question whether such defenses apply to claims filed under section 2-318 because section 2-318 plaintiffs are non-purchasers and "remote" purchasers.

1. The Lack of Notice Defense.

Some courts refuse to permit a defense based on the Code's section 2-607(3)(a) notice requirement to be used against an injured consumer[182] or an injured employee.[183] Indeed, some courts reject the lack of notice defense even when the plaintiff is a purchaser;[184] and even when the plaintiff purchased the product directly from the defendant.[185] But when the plaintiff is suing to recover for economic loss, the courts seem to be more willing to enforce the Code's notice requirement.[186]

Frericks v. General Motors Corporation[187] illustrates the line of personal injury cases where the courts reject the lack of notice defense. In *Frericks*, the passengers in an automobile which crashed sued the automobile retailer and the manufacturer for breach of warranty to recover for personal injury.[188] It was undisputed that the plaintiffs had not notified the manufacturer or the retailer of any breach of warranty until the lawsuit was filed.[189] As a result, both defendants moved for summary judgment on the

[181] For example, Code section § 2-316(3)(a) makes it possible for seller to disclaim all implies warranties "by [using] expressions like 'as is'... or other language which in common understanding call the *buyer's* attention to the exclusion of warranties." U.C.C. §2-316(3)(a) (1992) (emphasis added).

Similarly, § 2-607(3)(a) states that "Where a tender has been accepted the *buyer* must within a reasonable time after he discovers of should have discovered any breach notify the seller of breach or be barred from any remedy." U.C.C. §2-607(3)(a) (1992) (emphasis added).

By the same token, § 2-719(1)(a) permits the seller to "limit or alter the measure of damages recoverable under this Article, as by limiting the *buyer's* remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts." U.C.C. §2-719(1)(a) (1992) (emphasis added).

[182] *See, e.g.*, Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574 (N.D. Ga. 1988); Tomczuk v. Town of Cheshire, 217 A.2d 71 (Conn. Super. Ct. 1965); Chaffin v. Atlanta Coca-Cola Bottling Co., 194 S.E.2d 513 (Ga. Ct. App. 1972); Goldstein v. G.D. Searle & Co., 378 N.E.2d 1083 (Ill. App. Ct. 1978); Frericks v. General Motors Corp., 363 A.2d 460 (Md. 1976); *see also* WHITE & SUMMERS, *supra* note 2, at 480-85.

[183] *See, e.g.*, Firestone Tire and Rubber Co. v. Cannon, 452 A.2d 192 (Md. Ct. Spec. App. 1982), *aff'd*, 456 A.2d 930 (1983). *See also* Mattos, Inc. v. Hash, 368 A.2d 993 (Md. 1977).

[184] *See, e.g., Goldstein*, 378 N.E.2d 1083.

[185] *See, e.g., Chaffin*, 194 S.E.2d 513.

[186] *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Western Equip. Co. v. Sheridan Iron Works, Inc., 605 P.2d 806 (Wyo. 1980); *but see* Cameo Curtains, Inc. v. Philip Carey Corp., 416 N.E.2d 995 (Mass. App. Ct. 1981) (rejecting manufacturer's lack of notice defense against corporate remote purchaser).

[187] 363 A.2d 460 (Md. 1976).

[188] *Id.* at 461; Lack of privity was not an issue because Maryland has adopted a non-standard version of Alternative B.

[189] *Id.*

ground that the plaintiffs were barred from any remedy due to failure to comply with the section 2-607(3)(a) notice requirement.[190]

The trial court granted both motions for summary judgment, ruling that section 2-318 third party beneficiaries stand in the shoes of the buyer, and are therefore obligated to comply with the Code's notice requirement.[191] The Maryland Court of Appeals reversed, and ruled that a section 2-318 third-party beneficiary is not required to comply with the notice requirement,[192] and thus the plaintiffs' warranty claims were not barred.[193] The court offered a variety of reasons for its ruling. First, the court pointed out that section 2-607(3)(a) applies to "buyers," and that neither plaintiff was a buyer.[194] Second, the court stated that the purpose of the notice requirement is to inform the seller of a defect in the product, thus enabling the seller to correct the defect, and to minimize any damages.[195] Thus, "(i)n a case involving a personal injury to a non-buyer, the [notice] requirement... would seem to serve no purpose, as it would be impossible to correct the defect or minimize damages after the injury has already occurred."[196]

The court chose to disregard Official Comment 5 to Code section 2-607,[197] on the grounds that "the official comments are a valuable aid to construction, [but] they have not been enacted by the Legislature, and '(t)he plain language of the statute cannot be varied by reference to the comments.'"[198] Expanding on that explanation, the *Frericks* court went on to say that:

> We are not free, in view of the unambiguous language of [section] 2-607 requiring only the buyer to notify the seller of breach, . . . to extend that requirement to encompass the plaintiffs here. As the defendants correctly note, it is a cardinal rule of statutory construction that a statute should be construed so as to give effect to the real intent of the Legislature. But in ascertaining that intent, a court must first look to the language of the statute. 'If there is no ambiguity or obscurity in the language of a statute, there is

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[190] *Id.* at 462.

[191] *Id.* at 461.

[192] *Id.* at 463.

[193] *Accord* Mattos, Inc. v. Hash, 368 A.2d 993 (Md. 1977).

[194] *Frericks*, 363 A.2d at 463.

[195] *Id.* at 465.

[196] *Id.*

[197] Official Comment 5 states that:

> Under this Article various beneficiaries aregiven rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred.

U.C.C. § 2-607 cmt. 5 (1992).

[198] *Frericks*, at 464 (citations omitted).

> usually no need to look elsewhere to ascertain the intent of the legislature.' Here there is no ambiguity in the language of the statute. Section 2-607 requires only the 'buyer' to notify the seller of a breach.[199]

The defendants tried to persuade the court that the other purpose of the notice requirement is to protect sellers from stale claims, and that such protection is required whether or not the plaintiff is a buyer or a third party beneficiary.[200] However, the court rejected that argument on the grounds that protecting against stale claims is the function of the Code's statute of limitations.[201] The defendants also argued that it would be unfair to allow a third party beneficiary to enjoy the benefits of a buyer without assuming the burdens imposed on the buyer;[202] but the court rejected that argument too:

> Simply because the legislature created certain rights in a third party beneficiary as to express or implied warranties, in adopting [section] 2-318, does not mean that by implication such a beneficiary must give notice of an alleged breach to the manufacturer. If it were the legislative intent to require such notice, the code would have said so. Nowhere is there any indication that the manufacturer and the third party beneficiary are to be construed as seller and buyer, respectively. Just the contrary appears evident. It may have had its own reason for not setting forth a requirement of giving notice by a third party beneficiary to the manufacturer. Even though it might seem more just or equitable that such a beneficiary be required to give notice in the same manner as a buyer, this court cannot legislate [that].[203]

Other courts have reached the opposite result, and have ruled that section 2-607(3)(a) does indeed require a plaintiff who is not in privity with the defendant to give timely notice of a breach of warranty.[204] For example, *Morrow v. New Moon Homes, Inc.*[205] was instituted by a married couple who purchased a defective mobile home from a retailer known as Golden Heart Mobile Homes.[206] Failing to obtain satisfactory repairs, the Morrows finally sought to return the vehicle for a refund.[207] When the retailer went out

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[199] *Id.* at 465 (citations omitted).

[200] *Id.* at 465.

[201] *Id.*

[202] *Id.*

[203] *Id.* at 465-66 (quoting Tomczuk v. Town of Cheshire, 217 A.2d 71, 73 (Conn. Super. Ct. 1965)).

[204] *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Western Equip. Co. v. Sheridan Iron Works, Inc., 605 P.2d 806 (Wyo. 1980). *See also* WHITE & SUMMERS, *supra* note 2, at 484 (asserts the position that notice is required).

[205] 548 P.2d at 279.

[206] *Id.* at 281.

[207] *Id.* at 282.

of business, the Morrows sued the manufacturer (New Moon Homes) for breach of implied warranty, in an attempt to recover for their economic losses.[208]

The superior court dismissed the breach of warranty claim on the grounds that the Morrows were not in privity of contract with the manufacturer.[209] However, the Alaska Supreme Court reversed, and ruled that a remote seller can be held liable for direct economic losses attributable to a breach of implied warranty, despite a lack of privity of contract.[210] Explaining its decision to abrogate the vertical privity bar, the court stated that "by expanding warranty rights to redress this form of harm, we preserve . . . the well developed notion that the law of contract should control actions for purely economic losses and that the law of tort should control actions for personal injuries."[211]

Thus, the Alaska Supreme Court justified the decision to abrogate the vertical privity bar on the grounds that commercial disputes should be resolved under the Code. The Alaska Supreme Court understood that recognizing the pre-eminence of the Code in commercial transactions meant recognizing the related Code defenses to liability. Thus, the court stated that:

> Our decision today preserves the statutory rights of the manufacturer to define his potential liability to the ultimate consumer, by means of express disclaimers and limitations, while protecting the legitimate expectation of the consumer that goods distributed on a wide scale by the use of conduit retailers are fit for their intended use. The manufacturer's rights are not, of course, unfettered. Disclaimers and limitations must comport with the relevant statutory prerequisites and cannot be so oppressive as to be unconscionable within the meaning of [U.C.C. sections 2-302 and 2-719(3)] On the other hand, under the Code the consumer has a number of responsibilities if he is to enjoy the right of action we recognize today, not the least of which is that he must give notice of the breach of warranty to the manufacturer pursuant to [U.C.C. section 2-607(3)(a)]. The warranty action brought under the Code must be brought within the statute of limitations period prescribed in [U.C.C. section 2-725].[212]

To summarize, in the line of decisions represented by the *New Moon* case the courts seem to be ruling that a third-party beneficiary takes the burdens of the contract along with the benefits. By contrast, the line of decisions represented by the *Frericks* case take a different tack that prevent sellers from raising the notice defense against a third party

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208 *Id.*

209 *Id.* at 282-83.

210 *Id.* at 291.

211 *Id.*

212 *Id.* at 292 (citations omitted).

who is not in privity of contract. As the following cases demonstrate, there is an analogous split of authority on the question whether a defense based on warranty disclaimers or remedy limitations is effective against a plaintiff who is not in privity of contract with the defendant.

2. Warranty Disclaimers And Remedy Limitations.

Some courts refuse to enforce these type of exculpatory provisions against a non-privity plaintiff;[213] even when the litigants are both commercial entities.[214] But other courts have enforced such provisions even in personal injury cases.[215]

Lecates v. Hertrich Pontiac Buick Co.,[216] illustrates the line of decisions where warranty disclaimers and remedy limitations were enforced against a section 2-318 third party beneficiary. In *Lecates* the plaintiffs were used car buyers who sued an automobile manufacturer.[217] The plaintiffs were injured when the brakes of their Chevrolet Citation locked causing the car to spin out of control.[218] Their personal injury claim against the manufacturer alleged breach of the implied warranties of merchantability and fitness.[219] The manufacturer sought summary judgment on the grounds that there were no implied warranties upon which the plaintiffs could sue because all such warranties had been modified or disclaimed in the sales contract between the manufacturer and its customer.[220] The plaintiffs argued that they were not bound by the defendant's warranty disclaimer because they had never received a copy of it.[221] However, the court rejected that argument stating that:

> [H]ad plaintiffs, as secondary purchasers, been given a copy of the factory warranty, they still would not be the beneficiaries of implied warranties, as [the defendant] had effectively limited their duration. It is even more difficult to understand how plaintiffs are in any better position by not having received the factory warranty [and the warranty disclaimer]. As secondary

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[213] *See, e.g.*, Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co., 846 F.2d 1247 (10th Cir. 1988); Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49 (Mo. Ct. App. 1981); Spagnol Enters., Inc. v. Digital Equip. Corp., 568 A.2d 948 (Pa. Super. Ct. 1989).

[214] *See, e.g., Patty Precision Products*, 846 F.2d at 1247; SCM Corp. v. Deltak Corp., 702 F. Supp. 1428 (D. Minn. 1988); Horizons, Inc. v. Avco Corp., 551 F.Supp. 771 (D.S.D. 1982), *aff'd in part, rev'd in part*, 714 F.2d 862 (8th Cir. 1983); Hydra-Mac, Inc. v. Onan Corp., 430 N.W.2d 846 (Minn. Ct. App. 1988), *aff'd in part, rev'd in part*, 450 N.W.2d 913 (Minn. 1990); *Groppel*, 616 S.W.2d at 49; Falker v. Chrysler Corp., 463 N.Y.S.2d 357 (N.Y. Civ. Ct. 1983).

[215] *See e.g.*, Lecates v. Hertrich Pontiac Buick Co., 515 A.2d 163 (Del. Super Ct. 1986). *See also* Townsend v. Ed Fine Oldsmobile, 1987 WL 14870 (Del. Super. Ct. July 23, 1987), *aff'd*, 536 A.2d 615 (Del. 1987)

[216] 515 A.2d at 163.

[217] *Id.* at 165.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.* at 166.

> purchasers, they have no greater rights than the party to whom the automobile was originally sold. To say otherwise would mean that a disclaimer or warranty modification loses its effectiveness upon resale of goods, with later purchasers receiving warranty rights denied to their sellers.
>
> A secondary purchaser who claims the protection of a warranty is subject to the same disclaimers, modifications or remedy limitation clauses that were the basis of the underlying sales agreement between the original purchaser and seller. Although warranties that a seller extends to its immediate purchaser also reach any person "who may reasonably be expected to use" the goods, [section] 2-318, modifications or exclusions of warranty rights are equally operative against subsequent purchasers who claim to be benificiaries of such warranties. [222]

Accordingly, the court ruled that the manufacturer's implied warranties had been disclaimed and, as a result, the plaintiffs' breach of implied warranty action against the manufacturer was barred.[223]

Similarly, *Townsend v. Ed Fine Oldsmobile*[224] was a warranty claim filed by Jeep passenger Wendy Townsend as a result of the injuries she sustained after getting so drunk that she fell out of the Jeep.[225] When Wendy sued the Jeep dealer for breach of implied warranty,the dealer filed a motion for summary judgment on the grounds that the warranty disclaimers in the sales contract barred Wendy's claim.[226] In that connection, the defendant argued that since the warranty disclaimers in the sales contract complied with the pertinent requirements of Code section 2-316, all warranties were excluded and therefore could not provide a foundation for Wendy's breach of warranty claim.[227]

Wendy argued that even if the disclaimer complied with the pertinent Code requirements, Code section 2-318 prevented the defendant from excluding express or implied warranties as to a section 2-318 third-party beneficiary like herself.[228] However, the court rejected that argument and ruled that:

> One of the principal objectives and effects of [Section 2-318] was to abrogate the common law requirement of privity of contract with the seller for recovery by an injured party and thus update Delaware law.

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[222] *Id.* at 166 (emphasis added).

[223] *Id.* at 178.

[224] 1987 WL 14870 (Del. Super. Ct. July 23, 1987), *aff'd*, 536 A.2d 615 (Del. 1987).

[225] *See infra* Part III.A.4.

[226] *Townsend*, 1987 WL 14870 at *1.

[227] *Id.* at *2.

[228] *Id.*

> I do not doubt that Wendy Townsend is within the class of persons who may reasonably be expected to be affected by the Jeep. Such analysis does not come into play, however, unless a warranty is in existence absent any disclaimers or defenses. . . .
>
> . . . When such warranty exists, then any person who meets the requirements set forth therein may recover from the seller whether or not that person shares privity with the seller. However, that plaintiff has no more rights than the original buyer:
>
> "Because the liability asserted by the nonprivity plaintiff is derivative, being derived from the buyer to whom the warranty sued upon was expressly or impliedly made, it follows that the plaintiff claiming the right to sue under UCC [section] 2-318 is in no better position than the original buyer.
>
> From this it follows that if in fact there were no warranties in the original transaction, a plaintiff cannot assert warranty liability merely because he is a person entitled to sue under [section] 2-318 when there is in fact [no] warranty on which to bring suit. Consequently, when warranties are validly excluded with respect to the buyer, a plaintiff within the scope of UCC [section] 2-318 is subject to such exclusion."
>
> In the present case, there are no warranties. Any implied warranties have been excluded pursuant to [section] 2-316 (2) . . . .[229]

By contrast, *Horizons, Inc. v. Avco Corporation*[230] illustrates the line of cases where the courts refused to enforce a seller's warranty disclaimers and remedy limitations against a plaintiff who was not in privity of contract. In the *Horizons* case the plaintiff Horizons Corporation ordered a rebuilt engine from Casper Air Service, and paid the purchase price of $12,767.00.[231] The engine was installed in Horizons' Cessna 310 aircraft, and Horizons subsequently discovered several problems with the engine.[232] As a result of the problems, Horizons eventually sued the engine manufacturer, Avco Corporation, for breach of implied warranty, in an attempt to recover for economic loss.[233]

The manufacturer's first defense to the breach of warranty claim was that there was no privity of contract between Horizons and Avco.[234] However, the United States District

[229] Townsend v. Ed Fine Oldsmobile, 1987 WL 14870, *2-4 (Del. Super. Ct. July 23, 1987), *aff'd* 536 A.2d 615 (Del. 1987) (emphasis added) (citations omitted).

[230] 230 551 F. Supp. 771 (D.S.D. 1982), *aff'd in part, rev'd in part*, 714 F.2d 862 (8th Cir. 1983).

[231] *Id.* at 773.

[232] *Id.* at 774.

[233] *Id.* at 771.

[234] *Id.* at 777.

Court rejected that defense on the grounds that the state of South Dakota had adopted a non-standard form of Alternative C which made lack of privity no defense to an implied warranty action instituted by a remote purchaser to recover for economic losses.[235]

The manufacturer's second defense to the implied warranty claim was based upon the warranty disclaimer in the sales contract between the manufacturer and its distributor.[236] However, the court rejected that defense too, stating that:

> [Avco's Limited Standard Warranty] does not operate to limit Horizons' remedies, disclaim warranties or exclude consequential damages. Initially this Court must note the competing positions taken by Avco in this case: while it vehemently denies privity of contract with Horizons, it requests the court to hold that Horizons is bound by the limited warranty.... Avco cannot have it both ways.... Horizons was never informed of, nor did it discuss in any way the limited warranty. The terms of the limited warranty were not disclosed to Horizons prior to the purchase agreement and were not bargained for....[237]

To summarize, in *New Moon*, *Lecates*, and *Townsend* the courts essentially ruled that a third-party beneficiary takes the burdens of the contract along with the benefits. That seems like a sound application of third party beneficiary theory. It also seems consistent with the Official Comment to section 2-318, which says that a third party beneficiary is entitled to enforce any warranties provided in the original contract but that any warranty disclaimers or remedy limitations in the contract are equally effective against the third party beneficiary.[238] Nevertheless, there is a contrary line of authority represented by cases like *Frericks* and *Horizons* which reject defenses based on warranty disclaimers and remedy limitations. As the following cases demonstrate, there is also a split of authority on the question whether the Code statute of limitations applies to a personal injury claim tried on a breach of warranty theory.

3. The Statute of Limitations Defense.

The weight of authority is that the the Code statute of limitations applies to a warranty claim instituted by a plaintiff who is not in privity of contract with the defendant, regardless of whether the claimant seeks to recover for personal injury or economic

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[235] *Id.* at 777-78.

[236] *Id.* at 778.

[237] *Id.*

[238] The Official Comment states in pertinent part that: "To the extent that the of sale contract contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section."
U.C.C. § 2-318 cmt. 1. (1992).

loss or property damage.[239] However, this is still a litigated point of law,[240] and in a sizeable minority of cases the courts have applied a tort statute of limitations to personal injury claims.[241]

Spieker v. Westgo, Inc.[242] is a case applying the Code's statute of limitations. In that case, Douglas Spieker appealed from a judgment dismissing his personal injury claim against the G & G Manufacturing Company.[243] The facts established that Spieker was seriously injured while helping his father-in-law, Clarence Breker, harvest corn on Breker's farm.[244] The accident happened while Spieker was using an auger to unload the corn from a truck into a bin.[245] The auger was driven by a power take-off driveline [PTO] connected to a tractor.[246] Spieker testified that he started the tractor, engaged the PTO, and got off the tractor to open the tailgate of his truck.[247] According to Spieker, he heard a loud bang and was then struck in the right arm and left leg by the auger.[248] Spieker subsequently sued the auger manufacturer (Westgo, Incorporated), the PTO manufacturer (G & G Company), and the company that sold the auger to his father-in-law (Nelson Implement

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[239] *See, e.g.*, Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981); Errichiello v. Eli Lilly & Co., 618 F. Supp. 484 (D. Mass 1985); Sellon v. General Motors Corp., 571 F. Supp. 1094 (D. Del. 1983); Mills v. Int'l. Harvester Co., 554 F. Supp. 611 (D. Md. 1982); Cropper v. Rego Distribution Ctr., 542 F. Supp. 1142 (D. Del. 1982); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088 (N.D.N.Y. 1977); Townsend v. Ed Fine Oldsmobile, 1987 WL 14870 (Del. Super. Ct. 1987), *aff'd*, 536 A.2d 615 (Del. 1987); Amoroso v. Joy Mfg. Co., 531 A.2d 619 (Del. Super. Ct. 1987); Lecates v. Hertrich Pontiac Buick Co., 515 A.2d 163 (Del. Super. Ct. 1986); Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646 (Del. Super. Ct. 1985); Harvey v. Sears, Roebuck & Co., 315 A.2d 599 (Del. Super Ct. 1973); Collins Co., v. Carboline Co., 532 N.E.2d 834 (Ill. 1988); Bay State-Spray & Provincetown S.S. v. Caterpillar Tractor Co., 533 N.E.2d 1350 (Mass. 1989); Hydra-Mac, Inc. v. Onan Corp., 430 N.W.2d 846 (Minn. Ct. App. 1988), *aff'd in part, rev'd in part*, 450 N.W.2d 913 (Minn. 1990); Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985); Heller v. U.S. Suzuki Motor Corp., 488 N.Y.S.2d 132 (N.Y. 1985); Antone. v General Motors Corp., 484 N.Y.S.2d 514 (N.Y. 1984); Arell's Fine Jewelers, Inc. v Honeywell, Inc., 566 N.Y.S.2d 505 (N.Y. App. Div. 1991); Ambers v. C.T. Indust., Inc., 554 N.Y.S.2d 903 (N.Y. App. Div. 1990); Kurtz v. Sanford Fire Apparatus Corp., 537 N.Y.S.2d 407 (N.Y. App. Div. 1989); Rissew v. Yamaha Motor Co., 515 N.Y.S.2d 352 (N.Y. App. Div. 1987); Calabria v. St. Regis Corp., 508 N.Y.S.2d 186 (N.Y. App. Div. 1986); McGregor v. J. & L. Adikes, Inc., 491 N.Y.S.2d 426 (N.Y. App. Div. 1985); McCarthy v. Bristol Labs., 401 N.Y.S.2d 509 (N.Y. App. Div. 1978); Ribley v. Harsco Corp., 394 N.Y.S.2d 741 (N.Y. App. Div. 1977); Couser v. Rockwell Int'l., Inc., 536 N.Y.S.2d 965 (N.Y. Sup. Ct. 1989); Garcia v. Rivera, 541 N.Y.S.2d 880 (N.Y. Sup. Ct. 1989), *rev'd*, 553 N.Y.S.2d 378 (N.Y. App. Div. 1990); Steckmar Nat'l. Realty and Inv. Corp., v. J.I. Case Co., 415 N.Y.S.2d 946 (N.Y. Sup. Ct. 1979); Spieker v. Westgo, Inc., 479 N.W.2d 837 (N.D. 1992); Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986).

[240] *See* WHITE & SUMMERS, *supra* note 2, at 474-80.

[241] *See e.g.*, Simmons v. American Mut. Liab. Ins. Co., 433 F. Supp. 747 (S.D. Ala. 1976), *aff'd mem.*, 560 F.2d 1022 (5th Cir. 1977); Drayton Pub. Sch. Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410 (D.N.D. 1989); Cameo Curtains, Inc. v. Philip Carey Corp., 416 N.E.2d 995 (Mass. App. Ct. 1981); Salvador v. Atlantic Steel Boiler Co., 389 A.2d 1148 (Pa. Super. Ct. 1978), *aff'd*, 424 A.2d 497 (Pa. 1981).

[242] 479 N.W.2d 837 (N.D. 1992).

[243] *Id.*

[244] *Id.*

[245] *Id.* at 839.

[246] *Id.*

[247] *Id.*

[248] *Id.*

Company).[249] Spieker settled his claims against Westgo and Nelson Implement prior to trial, but the claim against G & G proceeded on theories of strict liability, breach of implied warranty, and negligence.[250] The trial court determined that the Code's four-year statute of limitations barred Spieker's breach of warranty claim,[251] and Spieker appealed.[252] On appeal Spieker argued that the Code's statute of limitations only applied to parties in privity, and therefore did not apply to a section 2-318 claim.[253] Unfortunately for Spieker, the North Dakota Supreme Court rejected that argument. The court explained that the Code contemplates that its statute of limitations will apply to breach of warranty claims, even those that involve personal injury claims.[254] To the court, that meant that the Code statute of limitations applies to personal injury claims filed under section 2-318 because they are just breach of warranty claims for personal injury.[255]

Similarly, in *Spring Motors Distributors, Inc. v. Ford Motor Co.*[256] the New Jersey Supreme Court ruled that the Code's four-year statute of limitations governs a remote purchaser's breach of warranty claim.[257] In that case, Spring Motors sued Ford Motor Company, a Ford dealer known as Turnpike Ford Truck Sales (Turnpike), and Clark Equipment Company (Clark), a company that manufactured and sold truck transmissions to Ford.[258] Spring Motors was in vertical privity with both Ford and Turnpike but was not in privity of contract with Clark because Spring Motors had not purchased anything from that company.[259] The transaction that triggered the lawsuit occurred when Spring Motors entered a contract to purchase 14 trucks from Turnpike.[260] The complaint alleged that the trucks had defective transmissions and that Spring Motors had sustained economic losses in the form of the costs of repair, towing, and replacement parts, lost profits, and the diminished value of the trucks.[261] The plaintiff sought to recover for those losses on theories of breach of express warranty, breach of implied warranty, strict liability and negligence.[262]

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249 *Id.* at 839-40.
250 *Id.* at 840.
251 *Id.* at 847.
252 *Id.*
253 *Id.*
254 *Id.* at 847-48.
255 *Id.* at 847-48.
256 489 A.2d 660 (N.J. 1985).
257 *Id.* at 663.
258 *Id.* at 662-63.
259 *Id.* at 663.
260 *Id.*
261 *Id.* at 664.
262 *Id.*

The trial court dismissed the tort claims on the grounds that the Code provided the plaintiff's exclusive remedies for economic losses.[263] The trial court subsequently ruled that the four-year Code statute of limitations barred any action against Ford and Turnpike.[264] Accordingly, the trial court dismissed the complaint.[265]

On appeal, the New Jersey Supreme Court affirmed those rulings,[266] explaining that that the Code provides a "more appropriate framework" for resolving disputes between commercial entities than the principles of strict liability.[267] In this connection, the court added that "tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident."[268] The court also pointed out that the Code is a "carefully-conceived [and] . . . comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods,"[269] and that the stated purpose of the Code, as reflected in section 1-102, is to "clarify and make uniform throughout the United States the law governing commercial transactions."[270] The court went on to say that:

> Allowing Spring Motors to recover from Ford under tort principles would dislocate major provisions of the Code. For example, application of tort principles would obviate the statutory requirement that a buyer give notice of a breach of warranty [under Code Section 2-607(3)(a)], and would deprive the seller of the ability to exclude or limit its liability [under Section 2-316]. In sum, the U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce, and courts should pause before extending judicial doctrines that might dislocate the legislative structure.[271]

Thus, the *Spring Motors* Court ruled that the Code statute of limitations applies to a warranty claim instituted by a plaintiff who is not in privity of contract with the defendant.[272]

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[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *See generally id.*

[267] *Id.* at 674.

[268] *Id.* at 672.

[269] *Id.* at 665.

[270] U.C.C. § 1-102(2)(a)&(c) (1992).

[271] *Spring Motors*, 489 A.2d at 671.

[272] Unfortunately, the Court did not say whether other Code defenses apply to a warranty claim instituted by a plaintiff who is not in privity of contract with the defendant:

> [W]e need not determine the outer limits of a suit by an ultimate purchaser against a remote supplier for economic loss. Therefore, we reserve determination on the effectiveness of a remote manufacturer's disclaimer or [remedy] limitation on express and implied warranties to an ultimate purchaser that did not have the opportunity to negotiate over the terms of the agreement. . . . We also leave unreviewed the Code requirement that a purchaser notify the seller about the defective condition of the product.

Id. at 677.

By contrast, *Salvador v. Atlantic Steel Boiler Co.*,[273] serves to illustrate the line of cases holding that the tort statute of limitations governs a peronal injury claim tried on a breach of warranty theory.[274] In *Salvador*, a boiler exploded causing the purchaser's employee (Mr. Salvador) to lose his hearing.[275] Salvador subsequently filed a breach of warranty action against the company that manufactured the boiler and the company that sold it to his employer.[276] The defendants argued that Salvador could not sue for breach of warranty because he was not in privity of contract with the defendants.[277]

The Pennsylvania Supreme Court rejected the lack of privity defense and so the case hinged upon a disputed question of Pennsylvania law: which statute of limitations applies to a section 2-318 claim, the two-year tort statute of limitations for personal injury actions or the four-year Code statute of limitations?[278] If the four-year Code statute of limitations was applied, the plaintiff's claim would be time-barred.[279]

The plaintiff argued that it would be illogical to strictly construe the Code statute of limitations because that would virtually eviscerate section 2-318.[280] In that connection, the plaintiff contended that "in many cases, the statute of limitations will have run before the injury to a third party has occurred."[281] Thus, the plantiff urged the court to interpret the Code statute of limitations in a way that would preserve the vitality of section 2-318. In particular, the plaintiff wanted the court to rule that section 2-725 begins to run on the date of injury.[282] The defendants favored a strict interpretation of section 2-275, because then the plaintiff's warranty action would be time-barred.

The court rejected both positions and ruled that the state's two-year tort statute of limitations applied to section 2-318 breach of warranty claims.[283] The court offered a variety of justifications for that decision.[284] For example, at one point in the opinion the court seemed to be saying that a personal injury claim filed under section 2-318 is basically just a tort claim, and it is therefore appropriate to apply the tort statute of limitations:

Nevertheless, the logic of the Court's position that the Code provides the appropriate analytical framework for commercial transactions suggests that the defenses should be effective against such a plaintiff.

[273] A.2d 1148 (Pa. Super. Ct. 1978), *aff'd*, 424 A.2d 497 (Pa. 1981).

[274] *Id.* at 1156.

[275] *Id.* at 1150.

[276] *Id.*

[277] *Id.*

[278] *Id.* at 1150.

[279] *Id.*

[280] *Id.* at 1151.

[281] *Id.* at 1151.

[282] *Id.*

[283] *Id.*

[284] *See id.*

> [V]irtually all jurists and scholarly commentators recognize that this [section 2-318 claim] . . . is purely a fiction created to reach a desirable social policy, the theory of recovery sounds in tort. . . . If the theory sounds in tort rather than contract, [then] it follows that the appropriate statute of limitations should be that which would be applied if the plaintiff's complaint were captioned "Trespass." In Pennsylvania that statute is two years and runs from the date of the injury.[285]

The court also stated that "it takes a very strained reading of section 2-725 to conclude that it was ever meant to apply to persons other than the contracting parties in breach of warranty actions."[286] Having determined that the two-year tort statute of limitations applied, the court dismissed the section 2-318 breach of warranty claim on the grounds that it was time-barred.[287]

To summarize, we need only reiterate the remarks that Professors White and Summers make: "[W]e can do little more than warn lawyers not to make hasty judgments about the applicable statute of limitations or about when it will commence to run. Section 2-725 offers a sane and workable statutory scheme, but it is one the courts will infrequently follow when the plaintiff's blood has been spilled."[288]

IV. CONCLUSIONS

The courts have no difficulty applying Alternatives B and C. In warranty actions decided under Alternative B, the lack of privity defense *prevails* unless the non-privity plaintiff is suing to recover for personal injury. By comparison, under Alternative C, the lack of privity defense *fails* except in the unusual case where the non-privity plaintiff is someone whom the seller could *not* reasonably have expected to use, consume or be affected by the goods. Regardless of which statute is applied, however, the vitality of the Code defenses based on notice requirements, remedy limitations, warranty disclaimers, and the statute of limitations is uncertain. So what should the law be in the area of defenses? For the following reasons the better view is that the defenses should be effective in section 2-318 litigation.

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[285] *Id.* at 1154 (citations omitted).

[286] *Id.* (citations omitted).

[287] *Id.* at 1156.

[288] WHITE & SUMMERS, *supra* note 2, at 479.

The Official Comments indicate that the drafters intended for the defenses to be available in warranty actions instituted under section 2-318.[289] Although the Official Comments do not have the force of the statutory language, they are regarded as a permissible and persuasive aid in determiniing the drafters' intent.[290] As a result, the courts should avoid the type of approach taken in cases like *Frericks* where the Official Comments are deliberately disregarded. Instead, the courts should adopt the approach taken in cases like *New Moon*, *Lecates*, *Townsend*, *Spieker v. Westgo*, and *Spring Motors* where defenses based on warranty disclaimers, remedy limitation, the notice requirement, and the Code statute of limitations were enforced. Although "[o]ne can easily understand the emotional pressure to reach a no disclaimer result,"[291] or a result that invalidates a remedy limitations or the notice requirement, the Official Comments provide firm support for courts who wish to enforce such exculpatory provisions.

Cases like *New Moon*, *Lecates*, *Townsend*, and *Spring Motors* implicitly or explicitly reflect the notion that a section 2-318 third party beneficiary is subject to the whole contract and may not selectively enforce its provisions. That idea certainly comports well with common law third party beneficiary doctrine. Hence, the enforcement of the various Code defenses in section 2-318 litigation is firmly supported by traditional principles of contract law. By comparison, cases such as *Frericks*, *Horizons*, and *Salvador* seem questionable, at least from the perspective of third-party beneficiary doctrine, insofar as they reject the defenses. In so doing, those courts are effectively ruling that a third party beneficiary takes the benefits of the contract without the burdens —an idea that could place the third party beneficiary in a better position than the buyer from whom she derives her rights.[292]

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[289] Thus, the Official Comment to § 2-318 states in pertinent part that: "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." U.C.C. § 2-318 cmt. 1 (1992). Similarly, the Official Comment to § 2-607 states that:

> Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred . . . even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

U.C.C. § 2-607 cmt. 5 (1992).

[290] Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257, 261-63, (Mo. Ct. App. 1976). *See also* WHITE & SUMMERS, *supra* note 2, at 9; Sean M. Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 963 (1990); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rule*, 100 HARV. L. REV. 465, 498-99, 536-41 (1987).

[291] Lecates v. Hertrich Pontiac Buick Co., 515 A.2d 163, 174 (Del. Super. Ct. 1986).

[292] For example, the woman who is injured by a defective lawnmower could conceivably sue the department store where her husband bought the machine even though his lawsuit might be barred by the notice requirement or the statute of limitations.

Of course, one could argue that section 2-318 plaintiffs are "statutory" third party beneficiaries rather than common law third party beneficiaries, and therefore that decisions like *Frericks* do no violence to common law third party beneficiary doctrine. That is an appealing argument as regards Alternatives B and C[293] because the class of third party beneficiaries is much broader than the class of common law third party beneficiaries. One problem with that argument, however, is that the Official Comments to section 2-318 reflect common law third party beneficiary principles, and if the drafters had intended something different they could have said so.

The *Salvador* court explained its decision to reject the Code statute of limitations on the grounds that "it takes a very strainied reading of section 2-725 to conclude that it was ever meant to apply to persons other than the contracting parties in breach of warranty actions."[294] However, when the drafters intended to relax one of the Code's requirements, as regards consumers or section 2-318 plaintiffs, they said so.[295] And there is nothing in the Official Comments to sections 2-318 and 2-725 which indicates that the Code statute of limitations does not apply to warranty claims instituted under section 2-318.

One could argue that it is illogical to permit defenses based upon the Code statute of limitations to be raised in personal injury litigation under sections 2-318 because the limitations period could bar a plaintiff's cause of action before the injury occurred, and no rational statute of limitations should run before the cause of action accrues. This argument is based on the premise that the Code statute of limitations is designed to penalize plaintiffs for sleeping on their rights and letting their claims grow stale. However, that may be an unwarranted assumption. The Official Comments to the Code statute of limitations indicate that the statute is designed to provide a uniform record retention period for businesses beyond which they can start to discard some of their records.[296] That explains why the Code statute of limitations is tied to the date of delivery rather than to the more variable date of injury.

Of course, one could make the policy argument that the courts should apply the tort statute of limitations in order to provide a uniform limitations period for the three causes

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[293] The argument is less plausible as to Alternative A, because the third party beneficiaries who have standing to sue under Alternative A are probably the same people who have standing to sue at common law.

[294] Salvador v. Atlantic Steel Boiler Co., 389 A.2d 1154, 1156 (Pa. Super. Ct. 1978), *aff'd*, 424 A.2d 497 (Pa. 1981).

[295] *See, e.g.*, U.C.C. § 2-607 cmt. 4 & 5 (1992).

[296] Thus, the Official Comment provides in part that the purpose of the statute is:

> To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictionsal variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several differnet periods of limitations depending upon the state in which the transaciton occurred. This Article . . . selects a four year period as the most appropriate to modern business practice. This is within the normal commerical record keeping period.

U.C.C. § 2-725 cmt. 1 (1992).

of action typically raised in products liability cases.[297] However, the courts routinely apply different statutes of limitations in multi-count litigation, and they have been doing so for a long time. Hence, in products liability litigation it should not be a major problem for the courts to apply the Code statute of limitations to the warranty claims and the tort statute of limitations to the tort claims. And under that approach if the Code statute of limitations has run and the tort statute of limitations has not, then the plaintiff can still sue on a tort theory.

A final reason why Code defenses should be effective in section 2-318 litigation is that an approach which eliminates such defenses threatens the integrity of the Code, by dislocating the critical provisions which permit sellers to limit their liability. In that connection, the *Spring Motors* case[298] serves as a reminder that the Code is a "carefully-conceived [and] . . . comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods."[299] Accordingly, the courts should eschew approaches "that might dislocate major provisions of the Code [like] the seller's "ability to exclude or limit its liability."[300] Thus, in *Morrow v. New Moon Homes, Inc.*,[301] the Alaska Supreme Court advocated an approach which:

> [P]reserves the statutory rights of the manufacturer to define his potential liability to the ultimate consumer, by means of express disclaimers and limitations . . . . [U]nder the Code the consumer has a number of responsibilities if he is to enjoy the right of action we recognize today, not the least of which is that he must give notice of the breach of warranty to the manufacturer pursuant to [U.C.C. section 2-607(3) (a)]. The warranty action brought under the Code must be brought within the statute of limitations period prescribed in [U.C.C. section 2-725].[302]

In conclusion, the approach taken in the cases which enforce the Code defenses is the preferred approach because it maintains the integrity of the Code, is supported by the Official Comments, is consistent with the principles of traditional contract law, and does not produce paradoxical results. However, if the enforcement of Code defenses threatens to produce unfair results in section 2-318 litigation, then the courts can intervene on the

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[297] That is, breach of warranty, negligence, and strict products liability. *See, e.g.*, Spieker v. Westgo, Inc., 479 N.W.2d 837 (N.D. 1992).

[298] Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985).

[299] *Id.* at 665. That same theme is echoed in other cases. *See, e.g*, Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976).

[300] *Spring Motors*, 489 A.2d at 671.

[301] 548 P.2d at 279.

[302] *Id.* at 292 (citations omitted).

authority of Code section 1-103[303] to prevent that from happening.[304] And if judicial intervention is unsatisfactory, then the state legislatures can intervene and eliminate any defenses that they regard as objectionable.[305]

APPENDIX A

Alternative A has been adopted in the following jurisdictions: Alaska, Arizona, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin.[306] Technically, the Florida statute is a non-standard version of Alternative A because it includes employees.[307] The courts in a few states have loosened some of Alternative A's restrictions. For example, the Illinois Court of Appeals and the Pennsylvania Supreme Court have expanded the class of third party beneficiaries and the class of potential defendants.[308]

Alternative B has been adopted in the following jurisdictions: Alabama, Kansas, New York, South Carolina, Vermont, and the Virgin Islands.[309] The following states have adopted non-standard versions of Alternative B, or separate statutes which are similar in effect to Alternative B: Delaware (similar in effect to Alternative B except that the personal injury requirement has been abolished);[310] Maryland (similar in effect to Alternative B);[311] New York (contains an insignificant variation from the standard version of Alternative B);[312] and South Carolina (modified form of Alternative B).[313]

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[303] Section 1-103 provides in pertinent part that: "[T]he principles of law and equity, including . . . the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement [the Code's] provisions." U.C.C. § 1-103 (1992).

[304] The courts occasionally use estoppel and other doctrines to eliminate certain defenses. *See, e.g.*, Hydra-Mac, Inc. v. Onan Corp., 430 N.W.2d 846 (Minn. Ct. App. 1988), *aff'd in part, rev'd in part*, 450 N.W.2d 913 (Minn. 1990) (estopping defendant remote seller from raising a defense based on the Code statute of limitations).

[305] For example, Alabama's version of Code § 2-725 provides that the statute of limitations on a personal injury action under § 2-318 starts to run on the date of injury, not the time of delivery. *See* ALA. CODE § 7-2-725(1993). In addition, Massachusetts has adopted a non-standard version of Alternative C which provides in pertinent part that "Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs." MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1993).

[306] *See* 2 HAWKLAND, *supra* note 2, at 666 n.1; *see also* WHITE & SUMMERS, *supra* note 2, at 460 n.5.

[307] *See* 2 HAWKLAND, *supra*, note 2, at 649; FLA. STAT. ANN. §672.318 (West 1993).

[308] *See, e.g.*, Whitaker v. Lian Feng Mach. Co., 509 N.E.2d 591 (Ill. App. Ct. 1987), and Salvador v. Atlantic Steel Boiler Co. 319 A.2d 903 (Pa. 1974).

[309] *See* 2 HAWKLAND, *supra* note 2, at 673 n.1.

[310] *Id.* at 649; DEL. CODE ANN. tit. 6, §2-318 (1993).

[311] 2 HAWKLAND, *supra* note 2, at 650; MD. COM. LAW I CODE ANN. §2-318 (1992).

[312] 2 HAWKLAND *supra* note 2 at 653-54, N.Y. COM. LAW §2-318 (McKinney 1993).

[313] 2 HAWKLAND, *supra* note 2, at 655-56; S.C. CODE ANN. §36-2-318 (Law Co-op. 1976).

Alternative C has been adopted in the following states: Hawaii, Iowa, Minnesota, North Dakota, South Dakota, Utah, and Wyoming.[314] The following states have adopted non-standard versions of Alternative C, or separate statutes which are similar in effect to Alternative C: Arkansas (similar in effect to Alternative C);[315] California (California never adopted §2-318 but has a separate statute which is similar in effect to Alternative C. California's statute also provides for treble damages and attorneys fees);[316] Colorado (similar in effect to Alternative C);[317] Maine (similar in effect to Alternative C);[318] Massachusetts (similar in effect to Alternative C but contains potentially significant variations);[319] Minnesota (similar in effect to Alternative C);[320] Mississippi (Mississippi has a separate statute, which abolishes the requirement of privity "[i]n all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty");[321] New Hampshire (similar in effect to Alternative C);[322] Rhode Island (similar in effect to Alternative C;[323] and Virginia (see the following comments). Arkansas, Maine, Massachusetts, New Hampshire, and Virginia have similar statutes.[324] The Arkansas statutes reads as follows:

> The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods.[325]

The Massachusetts statutes provides that:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor, or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defen-

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[314] *See* 2 HAWKLAND, *supra* note 2, at 675 n.1.

[315] *Id.* at 645-46; ARK. CODE ANN. §85-2-318.1 (Michie 1991).

[316] 2 HAWKLAND, *supra* note 2, at 646-47.

[317] 2 HAWKLAND, *supra* note 2, at 647-48; COL. REV. STAT. ANN. §4-2-318 (West 1987).

[318] 2 HAWKLAND, *supra* note 2, at 649-50; ME. REV. STAT. ANN. tit. 11, §2-318 (West 1993).

[319] 2 HAWKLAND, *supra* note 2, at 650-51; MASS. GEN. LAWS ANN. ch. 106, §2-318 (West 1990).

[320] 2 HAWKLAND, *supra* note 2, at 652; MINN. STAT. ANN. §336.2-318 (West Supp. 1993).

[321] 2 HAWKLAND, *supra* note 2, at 652-53; MISS. CODE ANN. § 11-7-20 (West 1987).

[322] *Id.* at 553; N.H. REV. STAT. ANN. §382-A:2-318 (1992).

[323] 2 HAWKLAND, *supra* note 2, at 654-55; R.I. GEN. LAWS §6A-2-318 (1992).

[324] *See* 2 HAWKLAND, *supra*, note 2, at 642-57.

[325] ARK. CODE ANN. § 4-86-101 (Michie 1987).

> dant if the plaintiff was a person whom the manufacturer, seller, lessor, or supplier might reasonably have expected to use, consume, or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.[326]

Although similar in effect to Alternative C, the Massachusetts statute resolves several problems that are left to the courts under the standard version of Alternative C. For example, it states that lack of privity is not a defense in a breach of warranty action against a manufacturer, seller, supplier or lessor. It establishes a rebuttable presumption that weakens the vitality of the notice defenses. Finally, it resolves the question of what the applicable statute of limitations should be.

[326] MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1993).