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Warranties and Remedies on Breach: Proposed Revision of Article 2 and Related Proposals Concerning Products Liability Law

Richard E. Speidel
Northwestern University School of Law

James J. White
University of Michigan Law School, jjwhite@umich.edu

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Warranties and Remedies on Breach:
Proposed Revision of Article 2 and Related Proposals
Concerning Products Liability Law

By

Richard E. Speidel
Northwestern University School of Law
Chicago, Illinois

and

James J. White
University of Michigan Law School
Ann Arbor, Michigan

**Warranties and Remedies on Breach: Proposed Revision of Article 2
and Related Proposals Concerning Products Liability Law**

Richard E. Speidel
Northwestern University School of Law

James J. White
University of Michigan Law School

The following materials contain (1) the warranty provisions, §§2-313 through 2-318, from the October, 1995 Draft of Revised Article 2, Sales, with selected Reporter's Notes; (2) Discussion questions on warranties; and (3) A comparison of Revised Article 2 and the ALI's Products Liability Restatement (Tent. Draft #2, March 13, 1995), with discussion problems.

1. Warranties: Revised Article 2, Sale (Oct. 1995)

**PART 3
GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

SECTION 2-313. EXPRESS WARRANTIES.

(a) An express warranty is an affirmation of fact or promise which relates to the goods, a description of the goods or an affirmation that the whole of the goods shall conform to any sample or model made by a seller, including a manufacturer, to a buyer, which becomes part of an agreement with the buyer under subsection (d). However, an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create an express warranty.

(b) To create an express warranty it is not necessary that the seller use formal words, such as "warrant" or "guarantee", or have a specific intention to make a warranty.

(c) An express warranty may be made by the seller (i) to an immediate buyer, see §2-318(a), (ii) to a remote buyer through an authorized dealer or other intermediary and (iii) to a remote buyer through any form of public advertising.

(d) Any description, sample, affirmation, promise or statement which relates to the goods made by the seller under subsection (a) to a buyer under subsection (c), presumptively become part of the agreement with the seller and creates an express warranty that the goods will conform to the affirmation, promise or statement. However, no obligation is created if the

seller establishes by a preponderance of the evidence that a reasonable person in the position of the buyer would conclude that either the seller merely affirmed the value of the goods or merely stated an opinion or commendation or that any affirmations of fact or promises did not become part of the agreement.

(e) Subject to Section 2-318, the buyer may enforce an express warranty created under subsection (d) directly against the seller, even though the express warranty is not part of the contract with the remote buyer's seller.

SOURCE: Sales, Section 2-313 (March, 1995)

Notes

1. The May, 1994 Draft of Section 2-313 was further revised after the March, 1995 meeting of the Drafting Committee to clarify and narrow its scope.

2. Subsection (a) ties the definition of what an express warranty is [an affirmation of fact or promise or description or sample] to whether it becomes part of the agreement with the buyer under subsection (d). Thus, an affirmation of fact [e.g., this horse has never had a broken bone], has the potential to become an express warranty if it becomes part of the agreement under subsection (d). The distinction between an express warranty and "puffing" is also drawn in subsection (a). But a statement of opinion by the seller [e.g., this horse is the fastest ever], can never be an express warranty. The line between affirmations of fact and "puffing" as well as whether an affirmation of fact becomes part of the agreement, however, is drawn through the proof process described in subsection (d).

3. Subsection (c) states that an express warranty may be made to an immediate buyer from the seller (the direct contractual relationship), to a remote buyer through an authorized dealer or intermediary (two contracts--the dealer does not make the warranty as a agent of the seller), and to a remote buyer from a seller other than a dealer through public advertising. This extension is consistent with the caselaw. See §2-318(a) for relevant definitions.

4. Subsection (d) states when a claimed express warranty becomes part of an agreement between the buyer and the seller and creates an obligation that the goods will conform to the express warranty.

First, note that an agreement creating an obligation can arise between a seller and buyer who do not have a direct contractual relationship. For example, if the seller affirms in a trade journal that described goods will do X, the buyer reads

the affirmation and buys the advertised goods from another seller, the affirmation can create an express warranty [an obligation] between the affirming seller and the buyer.

Second, the "basis of the bargain" language is replaced with the phrase "presumptively becomes part of an agreement" with the seller. If an express warranty becomes part of an agreement, it creates an obligation to the buyer that the goods will conform to the warranty. Under this test, there is no requirement that the buyer, as an initial matter, prove reliance on the express warranty. The presumption includes representations made before, at the time of and after contract formation. The latter, as contract modifications, must pass the "good faith agreement" test of §2-210(a). See, e.g., *Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984).

Third, any affirmations, promises or statements about the goods are presumptively part of the agreement. It is not necessary for the buyer to establish as an initial matter that the affirmations or statements were not "puffing." This follows former §2-313, comment 8 (1990 Official Text) and the caselaw. See, e.g., *Daughtrey v. Ashe*, 413 S.E.2d 336 (Va. 1992); *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Cal. App. 1985). See also, *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977), *aff'd without opinion*, 568 F.2d 770 (3d Cir. 1978).

Finally, the seller can rebut the presumption of inclusion by establishing through a preponderance of the evidence that the affirmation or statement was "puffing" or that an affirmation of fact or promise did not become part of the agreement. In both cases, the question is whether a reasonable person in the position of the buyer would conclude either that what was said was "puffing" or that an affirmation of fact did not become part of the agreement. For example, the seller might establish that an affirmation of fact [this horse has never had a broken bone] did not become part of the agreement because either the buyer was unaware of it, or did not believe it or relied upon the skill and judgment of a third person rather than the seller's affirmation. In these cases, the form of alleged express warranties (were they oral or in a record and if in a record, was it a record to which both parties assented), the content of the representation and the relative information and opportunities of both parties must also be taken into account.

This approach was approved in principle at the March, 1995 meeting of the Drafting Committee.

5. Revised §2-313(c) permits the creation of an obligation by a seller to a buyer with whom there is no direct contractual relationship. The extent to which that obligation can be

enforced is determined in §2-318. The buyer may also have a claim against its immediate seller for the breach of warranty relating to the same nonconformity. Presumably, the buyer will sue its immediate buyer and join the remote seller in the same litigation.

SECTION 2-314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE.

(a) Subject to Section 2-316, a warranty that goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale under this section.

(b) To be merchantable, goods, at a minimum, must:

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

(2) in the case of fungible goods, be of fair average quality within the description;

(3) be fit for the ordinary purposes for which such goods are used;

(4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;

(5) be adequately contained, packaged, and labeled as the agreement or circumstances may require;

(6) conform to the promise or affirmations of fact if any made on the container or label ; and

(7) in the case of goods sold for human consumption or for application to the human body, be reasonably fit for consumption or application.

(c) Subject to Section (former 2-316), other implied warranties may arise from course of dealing or usage of trade.

SOURCE: Sales, Section 2-314 (March, 1995)

Notes

1. Subsection (b)(7) is new. Recent cases have rejected the traditional foreign/natural object distinction in disputes over the quality of food, see, e.g., *Mix v. Ingersol Candy Co.*, 59

P.2d 144 (Cal. 1936), in favor of some variation of a reasonable expectations test. Under the traditional test, if the buyer was injured by a natural ingredient (i.e., a bone in fish chowder) the goods were found to be merchantable even though the buyer was unaware of the bone. Under the evolving test, the fish chowder might be unmerchantable if a reasonable buyer would not expect it, see *Jackson v. Nestle-Beich, Inc.*, 589 N.E.2d 547 (Ill. 1992) (turkey bone in processed turkey) or if the bone would not be expected by a reasonable consumer of the buyer's age and experience. See *Phillips v. Town of West Springfield*, 540 N.E.2d 1331 (Mass. 1992) (objective-subjective). See also, *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992) (if ingredient is natural to preparation of food it is reasonably expected and cannot be unfit.)

New subsection (b)(7) was deleted by the Drafting Committee at the October, 1995 meeting.

2. Revised §2-314 is not intended to displace or preempt the so-called "blood shield" statutes enacted by many states, which immunize suppliers of blood and other body parts from implied warranty liability under Article 2 or strict liability in tort. See, e.g., *Doe v. Travenol Laboratories, Inc.*, 698 F. Supp. 780 (D. Minn. 1988).

SECTION 2-315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE. Subject to Section 2-316, if a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for that purpose.

SOURCE: Sales, Section 2-315 (March, 1995)

SECTION 2-316. EXCLUSION OR MODIFICATION OF WARRANTIES.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty must be construed wherever reasonable as consistent with each other. Subject to Section 2-202 with regard to parol or extrinsic evidence, words negating or limiting a contract are inoperative to the extent that such a construction is unreasonable.

(b) Except in a consumer contract, to exclude or modify an implied warranty of merchantability or any part of it the language must in a record, mention merchantability, and be conspicuous.

(c) Except in a consumer contract, to exclude or modify any

implied warranty of fitness, the language of exclusion must be in a record and be conspicuous. Language excluding all implied warranties of fitness is sufficient if it states "There are no warranties extend beyond the description on the face hereof," or words of similar effect.

(d) Except in a consumer contract, but notwithstanding subsections (b) and (c), the following rules apply:

(1) All implied warranties are excluded by expressions like "as is", "with all faults", or other language that in common understanding or under the circumstances calls the buyer's attention to the exclusion of warranties and clearly indicates that there is no implied warranty.

(2) If the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to nonconformities that an examination should in the circumstances have revealed.

(3) An implied warranty may be excluded or modified by course of dealing or course of performance or usage of trade.

(e) In a consumer contract, terms excluding or modifying the implied warranty of merchantability or the implied warranty of fitness for particular purpose must be in a record. The terms are inoperative unless the seller proves by clear and affirmative evidence that the buyer expressly agreed to them.

(f) Remedies for breach of warranty may be limited in accordance with this Article on liquidation or limitation of damages and on contractual modification of remedy.

SOURCE: Sales, Section 2-316 (March, 1995)

Notes

1. Subsection (a) preserves the policy that when an express warranty and a disclaimer of that warranty are inconsistent, the disclaimer is inoperative, subject to §2-202 (the "parol evidence rule". The enforceability of merger clauses in standard form contracts is governed by §2-206.

2. In commercial contracts, disclaimers of any implied warranty must be in a record, be conspicuous and comply with requirements on the content of the disclaimer. Compliance with these requirements provides a limited safe harbor, since other aspects of the doctrine of unconscionability may apply. See §2-105(a). Also, the disclaimer is ineffective where the

requirements of subsection (b) or (c) are not met even though the buyer knows of the disclaimer clause. Since this appears to elevate form over substance, the Drafting Committee has directed that the matter be reconsidered.

3. Subsection (e) states the exclusive requirements in a consumer contract for the seller to disclaim or limit any implied warranty. This applies to new, used, or distress goods or seconds, and preempts Subsection (d). Rather than providing that such disclaimers are inoperative, subsection (e) puts the burden on the seller to show by clear and affirmative evidence that the consumer expressly agreed to the term in the record. This is a more exacting requirement than those imposed by §2-106, on Standard Form Records.

4. Subsections (b) and (c) are subject to subsection (d). Thus, in commercial contracts, where used or distress goods are frequently involved, disclaimers of implied warranties are effective when the requirements of subsection (d)(1) are met. To the extent that subsection (d) applies, substance prevails over the form of disclaimer.

SECTION 2-317. CUMULATION AND CONFLICT OF WARRANTIES.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative. However, if that construction would be unreasonable, the intent of the parties determines which warranty prevails. In ascertaining that intent, the following rules apply:

(1) Exact or technical specifications prevail over an inconsistent sample or model or general language of description.

(2) A sample from an existing bulk prevail over inconsistent general language of description.

(3) Except in a consumer contract under Section 2-1305(e), an express warranty prevails over inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCE: Sales, Section 2-317 (March, 1995)

Notes

1. One change was made in §2-317. An implied warranty of merchantability in a consumer contract that is inconsistent with an express warranty is not displaced under §2-317(3). Rather, the requirements of §2-316(b) must be satisfied.

SECTION 2-318. EXTENSION OF EXPRESS OR IMPLIED WARRANTIES.

(a) In this section, "seller" includes a manufacturer, "immediate buyer" means a buyer in privity of contract with a seller, "remote buyer" means a buyer other than from the seller, "goods" includes a component incorporated in substantially the same condition into other goods, and "beneficiary" means a person to whom a warranty extends under subsection (b).

(b) The seller's express or implied warranty, made to an immediate buyer, extends to any person who may reasonably be expected to buy, use or be affected by the goods and who is damaged by breach of the warranty. The rights and remedies of a beneficiary against a seller for breach of a warranty extended under this subsection are determined by the enforceable terms of the contract between the seller and the immediate buyer and this Act.

(c) If a merchant seller sells new goods to an immediate buyer which are unmerchantable at the time of delivery and the remote buyer is a reasonably expected consumer buyer who is damaged by breach of the implied warranty of merchantability, §2-314, or the seller makes an express warranty to a remote buyer under §2-313(c) and (d), the following rules apply:

(1) The remote buyer may sue the seller without regard to the terms of the contract between the seller and the immediate buyer; and

(2) The remote buyer's rights and remedies against the seller are determined under this Act, as modified by subsection (d).

(d) A remote buyer under subsection (c) has the rights and remedies available against the seller provided by this Act, except as follows:

(1) The time for giving any required notice begins to run no earlier than when the remote buyer receives the goods;

(2) A remote buyer other than a consumer buyer cannot recover consequential damages unless the conditions of subsection (3) are satisfied;

(3) Upon receipt of a timely notice of rejection or revocation of acceptance, the seller may within a reasonable time offer to refund the price paid by the remote buyer or offer to supply goods that conform to the warranty. If such an offer is made and satisfied, the seller's liability is limited to incidental damages under §2-705. If the seller fails to comply

with this subsection, the remote buyer may claim damages for breach of warranty, including incidental and consequential damages under §§2-705 and 2-706.

(4) A cause of action for breach of warranty accrues no earlier than when the remote buyer receives the goods.

(e) A seller may not exclude or limit the operation of this section.

SOURCE: Sales, Section 2-318 (March, 1995).

Notes

1. Section 2-318 has been the subject of considerable discussion, both within and without the Drafting Committee, and is still a "work in progress." After the 1994 NCCUSL Annual Meeting, the May, 1994 Draft was further revised for clarity and was discussed at the March, 1995 meeting of the Drafting Committee. In response to suggestions made at that meeting, the section was further revised for clarity and consistency and subsection (c) was limited to sellers of unmerchantable new goods.

2. Overview. Section 2-318 deals with warranty claims by a buyer [called a "remote" buyer to distinguish a buyer with privity, called an "immediate" buyer] against a seller with whom there is no privity of contract. See subsection (a). The remote buyer may be a commercial or a consumer buyer and may have claims for economic loss and for damage to person or property.

The remote buyer may sue the seller in two types of cases. In the first, a seller's warranty made to an immediate buyer is extended to a foreseeable buyer or user [a "beneficiary"] who is damaged by the breach. Subsection (b). In these cases, the beneficiary's rights against the seller are limited by the terms of the contract between the seller and the immediate buyer and the terms of this Act. It is, in short, a derivative warranty and the beneficiary stands in the shoes of the immediate buyer.

In the second, the seller is potentially liable to a remote, foreseeable consumer buyer for unmerchantable new goods sold to an immediate buyer and for express warranties made to remote buyers through a dealer or directly through advertising and the like under §2-313(c). Subsection (c). This is not a derivative warranty. Rather, the remote buyer has a direct action against the seller, the scope of which is under Article 2 as modified by subsection (d).

3. Under subsection (b), all warranties made by a seller,

including a manufacturer, for goods, including components, sold to an immediate buyer are extended to reasonably expected buyers or persons who use, consume or are affected by the goods and are damaged by breach of warranty. This extension is broader than Alternative C in §2-318 the 1990 Official Text in that it includes damages (not just injury) to buyers (vertical privity) and "any" person, not just "natural" persons. Furthermore, it applies across the board. There are no alternatives.

Although protected buyers and users are called beneficiaries under subsection (b), the extension is based upon policy rather than intention of the parties. A seller should be responsible to foreseeable buyers and users for at least the quality of the goods warranted to the immediate buyer. But, since the warranty is derivative, the beneficiary is bound by the terms and conditions of the contract between the seller and immediate buyer. Thus, disclaimers and agreed limited remedies in that contract bind the beneficiaries as well. See subsection (a), last sentence. Put differently, policy may dictate an extension under subsection (a), but it does not require seller liability beyond that for which it bargained with the immediate buyer.

This extension is in the borderland between warranty, a contract theory, and tort. The extension in subsection (b) is justified on grounds similar to those for imposing strict tort liability. But the limitations on the extension are determined by contract, the bargain between the seller and the immediate buyer. Thus, even if the breach causes damage to the person or property of a foreseeable buyer or user, subsection (a) controls the outer limits of liability.

4. The derivative theory of subsection (b) does not apply to the cases described in subsection (c). Thus, remote, consumer buyers and remote buyers to whom an express warranty has been made under §2-313 may sue the seller free of the lack of privity defense and the terms in the contract between the seller and the immediate buyer. This codifies the result reached in most cases.

There is no intention to preclude the courts from applying the principle of subsection (c) to unmerchantable goods which are sold by M to R and resold to a commercial buyer. See §2A-316. See also, *Hininger v. Case Corp.*, 23 F.3d 124 (5th Cir. 1994), where the court, applying Texas law, held that the privity defense was available to the manufacturer of a component which was resold as part of a combine to a commercial buyer but not to the manufacturer of the combine which is resold to a commercial buyer.

5. Remote buyers protected under subsection (c) who sue the seller for a breach of a warranty are not subject to the "no

privity" defense or the limitations of subsection (b). They may sue the seller as if there were privity of contract under Article 2, subject to subsection (d). Subsection (d) provides adjustments that reflect the reality that the remote buyer has not contracted with the seller.

A key issue in subsection (d) is the treatment of consequential damages. Should the seller be liable to a remote buyer with whom it has not contracted for consequential damages proved under §2-706? For remote consumer buyers the answer is yes. For remote commercial buyers, the answer is no unless the seller has failed to offer either a refund or to supply conforming goods within a reasonable time. If the offer is made and the buyer does not accept it, consequential damages are foreclosed. The seller, of course, may still exclude liability for consequential damages to a remote buyer by an agreement with that buyer, i.e., through a dealer.

2. Warranty Questions Under Revised Article 2.

Problem 1

I. Manufacturer makes and sells earth moving equipment. In the typical distribution, manufacturer sells equipment to a wholesaler who either sells directly to large purchasers or sells through retailers to smaller purchasers. In its contract with its distributor, the manufacturer disclaims all implied warranties. The contract also has an integration clause that provides that there are no express warranties made beyond the four corners of the agreement. The express warranties in the agreement are no more than a description of the goods and a statement that the goods are "free of defects in material and workmanship." The contract provides that the express warranties apply only to defects which are discovered and reported within one year of the sale.

Manufacturer also advertises its equipment in trade journals. Those advertisements make favorable comparisons of this earth moving equipment to comparable Caterpillar equipment. The advertisements contain specific statements about reliability (i.e., no more than 2% down time) and load carrying capacity (e.g., bucket can lift three cubic yards per scoop and 4,000 pounds).

Assume a mining company buys ten of these earth devices for \$1 million each from a wholesaler. During the first year it has trouble making them work. The equipment proves to be unprofitable to run because it cannot lift as much as the advertisement suggested, because the equipment does not have a large enough footprint and accordingly is repeatedly bogged down

in the wet conditions in which it is made to work, and because the engines require excessive periodic repair and have been out of service for substantial periods of time. Ultimately buyer gives up on the equipment 18 months after its purchase and sues the manufacturer.

Buyer's theory against Manufacturer includes the following:

1. Manufacturer broke the implied warranty of merchantability under 2-314.
2. Manufacturer broke the implied warranty of fitness for a particular purpose under 2-315.
3. Manufacturer made an express warranty of performance by the advertisement.
4. Manufacturer is liable on its express warranty concerning material and workmanship.

Manufacturer responds as follows:

1. The advertisement cannot be an express warranty because it is merely puffing under 2-313(a).
2. The advertisement cannot be an express warranty to the remote buyer because it never became "part of an agreement with the buyer under subsection (b)," 2-313(a) and to that extent is invalid.
3. Buyer did not see the advertisement until his lawyer in this lawsuit found it and showed it to him. Even assuming it is not puffing, there is no warranty liability based upon the statement in the advertisement. (Compare 2-313(e) with 2-313(a) and (b) and Comments 4 and 5 to 2-313.)
4. There is no liability under the implied warranty of merchantability because the warranty was effectively disclaimed.
5. Even though the merchant that made the sale directly to the mining company may have known of Buyer's purpose, Manufacturer never did and therefore 2-315 cannot be asserted against it.
6. Whether or not the implied warranty was effectively disclaimed, technical specifications prevail over general language or description under 2-317. That rule applies not only to the contract but also to the advertisement.
7. In any event the mining company cannot recover

consequential damages because of 2-318(d)(2). Having failed to give timely notice of rejection or revocation of acceptance, it is entirely cut off from consequential damages.

8. Buyer cannot qualify under 2-318(a)(3) since the goods are fit for ordinary purposes and any damages are lost profits or uniquely associated with the buyer's business. All are of Buyer's consequential damages under 2-706 and none can be recovered.

Problem 2

Joe Camel, a 23 year old resident of San Francisco, became uniquely attached to Red Dog, Miller's new dark beer. Over a three year period, he drank progressively more beer until ultimately he was consuming a case and a half a day. As a result of that consumption, he fell deathly ill of cirrhosis, and sued Miller both for breach of express warranty under 2-313 and breach of implied warranty of merchantability under 2-314. He specifically cited 2-314(b)(7).

Miller moved for summary judgment on the following grounds:

1. The advertisements which showed a powerful red dog were at most "an affirmation merely of the value of the goods" and could certainly not be construed to be a specific warranty that excessive use of alcohol would not cause cirrhosis.

2. Red Dog is "reasonably fit for consumption."

Moreover, Miller warns its customers. The last paragraph of Comment 2 to 3-314 notes "a preferred test, however is whether a reasonable person in the position of the buyer should have been aware of and been able to take precautions against the risk. If an adequate warning is not given, goods whose natural ingredients cause damage may be unmerchantable." Miller notes that both its ads and its labels warn against excessive consumption and states that any drinker should have been aware of and been able to take reasonable precautions against the risk.

How do respond on behalf of Joe to those arguments?

3. **The Products Liability Restatement and Revised Article 2, Sales**

History

The content of Article 2, Sales, has not changed since the 1958 Official Text. Section 2-715(2)(b) in the 1990 Official Text, which was in the 1952 Official Draft of the UCC, provides

that "consequential damages resulting from the seller's breach include... (b) injury to person or property proximately resulting from any breach of warranty." This provision codified the "usual rule" as to breach of warranty, which imposed liability upon sellers where unmerchantable goods, frequently food, caused personal injuries to consumer buyers. See §2-715, comment 5. See also, William Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117 (1943).

Section 402A of the Restatement, Second of Torts was promulgated in 1964, thereby stimulating the strict products liability revolution. Although there were overlaps between Article 2 and §402A where personal injuries and property damage were involved, neither was intended to preempt the other. Thus, a plaintiff injured by an allegedly unsafe product could sue in either warranty or tort. The route was smoother in tort, however, since sales intricacies such as disclaimers, privity, notice, and the sales statute of limitations were not available as a defense.

More recently, acceptance by many courts of the so-called "economic loss" doctrine has limited the scope of tort liability where defective products are involved. The emphasis is upon the type of loss caused by the alleged defect. If the loss is commercial rather than to person or property, tort law is not available and the plaintiff must recover for breach of warranty, if at all. See East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) and its progeny. In short, beyond the borders of tort, product risk allocation is left to the domain of contract, including Article 2 of the UCC. See M. Geistfeld, The Political Economy of Neo-Contractual Proposals for Product Liability Reform, 72 Tex. L. Rev. 803 (1994); William Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort, 44 U. Miami L. Rev. 731 (1990).

Article 2 is currently under revision and the American Law Institute is considering a new Restatement of Products Liability. (RPL) See American Law Institute, Restatement of the Law Third, Torts: Products Liability (Tent. Draft #2, March 13, 1995). See Symposium, 61 Tenn. L. Rev. 1043 (1994). See also, Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 Mo. L. Rev. 2 (1995); Marshall S. Shapo, In Search of the Law of Products Liability: The ALI Restatement Project, 48 Vand. L. Rev. 1 (1995). The purpose of this Outline is to compare the current status of these important documents.

Comparisons

For better or worse, the "tail that wags the dog" in this comparison is the type of injury resulting from the allegedly

defective product. So we will start with the tail and work up.

A. Type of Injury.

Article 2.

Section 2-715(2)(b) of the 1990 Official Text defines consequential damages "resulting from the seller's breach" to include "injury to person or property proximately resulting from any breach of warranty."

To date, no change has been made in this provision. See §2-706(a)(2) (Oct. 1995).

Should Article 2 be limited to claims for commercial or economic loss? Compare the Article 5 of the Convention on the International Sale of Goods which states that CISG "does not apply to the liability of the seller for death or personal injury caused by the goods to any person." If so limited, what would fill the gap between warranty and tort liability? See Jay Feinman, *Economic Negligence* (1995).

RPL.

Section 1 states when a defendant is liable "for harm" caused by a defective product. "Harm" means "harm to persons or property." §1(a). See Comment d.

Section 6 states that "harm to persons and property" includes "economic loss only when caused by harm to: (a) the plaintiff's person; (b) the person of another when harm to the other interferes with a legally protected interest of the plaintiff; (c) the plaintiff's property other than the defective product itself."

In cases of harm to property other than the defective product, the extent to which the parties can contract for liability or remedy more limited than normally provided by tort is left to developing case law. §6, Comment f.

Section 10 deals with the required causal connection between product defect and harm.

Section 11 deals with increased harm due to a product defect.

B. Potential Defendants

Article 2.

The defendant under Article 2 is a seller, defined as a "person who sells or contracts to sell goods." §2-103(1)(d).

The word "seller" is used consistently and exclusively in the key sections on liability for breach of warranty. See §§2-313, 2-314, 2-315, 2-714 and 2-715.

Only a seller who is a "merchant with respect to goods of that kind" makes an implied warranty of merchantability. §2-314(1), see §2-314(a) (Oct. 1995). "Merchant" is defined in §2-104(1), see §2-102(a)(3) (Oct. 1995).

No changes are made in Revised Article 2.

RPL.

Section 1(a) limits liability to a "commercial seller or distributor" of defective products. One must be "engaged in the business of selling or otherwise distributing products" and sell or distribute a defective product.

RPL applies to sales transactions and "other forms of product distribution that are the functional equivalent of product sales." §1, Comment b. This idea is elaborated in §5.

The "commercial seller or distributor" limitation is RPL's version of Article 2's "merchant" seller. §1, Comment c.

C. Scope and Subject Matter.Article 2.

Article 2 applies to "transactions in goods." §2-102. See §2-103(a) (Oct. 1995), which amplifies this phrase. Although the prototype transaction is a contract for the sale of goods, Article 2 applies to mixed transactions where the sale of goods predominates and has been extended by analogy to disputes over the quality of goods sold in transactions where services predominate.

"Goods" are defined as "all things (including specially manufactured goods) which are movable at the time of

identification to the contract for sale." §2-105(1), see §2-102(a)(25) (Oct. 1995).

RPL.

RPL states the liability of a commercial seller or distributor for an alleged defective "product." §1(a).

Section 4 provides a broad definition of "product," but specifically excludes services, §4(c), and human blood and human tissue, §4(d).

Section 4(a) states: "A 'product' is something distributed commercially for use or consumption. Most but not necessarily all products are tangible personal property; most have been subjected to processing and fabricating prior to entering the stream of commerce; and most pass through a commercial chain of distribution before ultimate use and consumption."

D. Standards of Liability.

Article 2.

A seller must make and breach a warranty, express or implied. See §§2-313, 2-314 and 2-315. Warranties are treated as terms of the contract for sale. A breach occurs when the goods fail at the time of tender to conform to the warranty.

The standard of liability depends upon the type of warranty involved. For example, to breach an express warranty under §2-313, the goods must fail to conform to an affirmation or promise made to the buyer about the goods that is part of the agreement. Under §2-315, the goods must fail to conform to the seller's implied warranty that the goods are fit for the buyer's particular purpose.

Section 2-314(1) implies a "warranty that the goods shall be merchantable...in a contract for their sale if the seller is a merchant with respect to goods of that kind." The "serving for value of food or drink to be consumed either on the premises or elsewhere" is treated as a sale. This "bottom line" implied warranty is derived from both representations made by the seller about the goods [such as the description, price and ordinary uses] and a policy judgment about what responsibility a merchant seller should have.

Under §2-314(2), "goods to be merchantable must be at least such" as, among other things, "(a) pass without objection in the trade under the contract description; and...(c) are fit for the ordinary purposes for which such goods are used; and...(e) are adequately contained, packaged, and labeled as the agreement may require...."

RPL.

A commercial seller or distributor must sell or distribute a "defective product." §1(a). Section (1)(b) states that a "product is defective if, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."

A "manufacturing defect" occurs when the "product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." §2(a).

A "design defect" occurs when the "foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." §2(b).

When an otherwise sound product is defective because of "inadequate instructions or warnings" is stated in §2(c).

Section 3 deals with circumstantial evidence supporting the inference of a product defect.

Special rules are provided in Section 8 for harm caused by prescription drugs and medical devices and in Section 9 for harm caused by defective used products.

E. Defenses

Here is a brief comparison the defenses under Article 2 and RPL when a plaintiff seeks to recover for damage to person or property allegedly caused by a breach of warranty or defective product.

Lack of privity.

Under Article 2, lack of privity is probably not a defense in most states where personal injury and property damage claims are involved. The answer depends upon which Alternative to §2-318 has been adopted and the relevant caselaw. With the availability of strict products liability, the plaintiff has little incentive to sue under Article 2.

The October, 1995 Draft of §2-318 proposes a further reduction of the privity defense for breach of warranty claims. Under this revision, individuals claiming damage to person or property caused by a breach of warranty would have a clearer shot at the remote seller who made the warranty. Individuals include buyers and foreseeable persons who use or are affected by the goods. §2-318(b) (Oct. 1995).

Under RPL, lack of privity is not a defense.

Failure to give timely notice.

Under Article 2, a buyer who fails to notify the seller of a breach "within a reasonable time after he discovers or should have discovered any breach" is "barred from any remedy." §2-607(3)(a). This notice condition applies regardless of the nature of the loss.

Under the October, 1995 revision of Article 2, the failure to give notice must prejudice the seller before the remedy is barred. See §2-608(c)(1) (Oct. 1995). The notice requirement applies even though the buyer is suing a remote seller. §2-318(d)(1) (when time to give notice begins to run).

Under RPL there is no notice requirement.

Disclaimers of warranty and agreed limitations on remedy.

Under Article 2, implied warranties may be excluded or limited under controlled conditions regardless of the type of loss. §2-316(2), see 2-316(b) (Oct. 1995). In general, agreements excluding or limiting consequential damages are enforceable unless unconscionable. §2-719(3), see §2-709(c) (Oct. 1995). However, a limitation on consequential damages for personal injury is "prima facie unconscionable." §2-718(3), see §2-709(d)(2) (Oct. 1995) ("presumed" to be unconscionable).

Under RPL, disclaimers, limitations, waivers and other

contract-based defenses to products liability claims for harm to persons "do not bar or reduce otherwise valid products liability claims." §13. Whether such contract based defenses are valid where the only harm is to other property is left to developing caselaw. §6, Comment f.

Other affirmative defenses.

Article 2 does not explicitly deal with such affirmative defenses as failure to follow directions for use, misuse or contributory fault. Courts must draw relevant principles from other sources, See, e.g., *Chatfield v. Sherwin-Williams Co.*, 266 N.W.2d 171 (Minn. 1978), or fit them under the "proximate cause" requirement in §2-715(2)(b).

Under RPL, defenses such as misuse, alteration or modification of a product are treated under the causal connection requirement in §10. Defenses relating to the apportionment of liability among the plaintiff, sellers and distributors and other tortfeasors are treated in §12.

Statute of Limitations.

Under Article 2, a cause of action for breach of warranty accrues when "tender of delivery is made" unless the warranty "explicitly extends to future performance of the goods." In that latter case, the cause of action accrues "when the breach is or should have been discovered." §2-725(2). An action for breach must be commenced "within four years after the cause of action has accrued" unless the parties have agreed to reduce it to "not less than one year." §2-725(1). Statute of limitations issues are still under discussion by the Article 2 Drafting Committee.

Under RPL, the appropriate statute of limitations is left to state law. Typically, a "discovery" rather than a "tolling" statute governs tort claims.

Policy Questions and Problems

1. Warranty liability is a theory of strict but limited liability. Warranties, when made, provide information in the form of representations, express or implied, to the buyer about the goods. They can be analogized to a form of insurance in a setting where there is imperfect information.

Except for certain food products, RPL has rejected a representational or consumer expectation test for determining design defects. Rather, the defective design question turns on "whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety." §2, Comment (f) at 29. See also, Comment (g), dealing with food products.

Consider this question. Suppose that a product is not defective under RPL, i.e., neither a manufacturing or design defect nor a failure to warn, but the product is unmerchantable under UCC §2-314 because, price, description and ordinary use considered, it is not fit for ordinary purposes. Suppose, also, that the product has "proximately caused" damage to person and property of a buyer. Can the buyer invoke warranty theory under Article 2?

Under Article 2, the answer is clearly yes, provided that the plaintiff jumps through the Article 2 hoops of privity, notice, disclaimers, limited remedies and the statute of limitations. Under RPL, however, the suggested answer is no. See §2, Comment (m) and the Reporter's Notes at 122-123, which state:

Comment M takes the position that as long as the plaintiff establishes defect under § 2(a), § 2(b), or §2 (c), courts are free to utilize the concepts of negligence, strict liability, or implied warranty of merchantability as theories of liability. Conversely, failure to meet the requisites of § 2(a), or § 2(b), or § 2(c) will defeat a cause of action under either negligence, strict liability, or implied warranty of merchantability

Is this position sound? Should a court applying Article 2 be bound by limitations in the Product Liability Restatement?

(2) M, a manufacturer, sells a component to B, a manufacturer, to be included in a product which will be resold to dealers, D, and then resold to business and consumer buyers. (BB and CB). The component was unmerchantable because it contained a manufacturing defect at the time it was delivered to BB, a sole proprietorship. As the result of a malfunction, B suffered personal injuries and the product sold suffered damage. No other property was damaged. B's business, however, suffered consequential economic losses during the time that the product was out of operation. Assess B's options under Article 2 and/or the Restatement.

(3) F raises beef cattle which are sold to B for slaughter. B resells sides of beef to W, a wholesaler, who further processes

the product and sells it to restaurants in the form of ground beef. (R) R cooks sells the beef as hamburgers in its restaurant chain to customers. (C) The hamburgers contain e-coli bacteria and many customers become ill, some seriously. Evidence will establish that there were e-coli bacteria in the intestines of the cattle that F sold to B. What recourse is available to C?