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MANUFACTURERS' WARRANTIES OF CONSUMER GOODS

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Consumer-protective laws have a place in the Uniform Commercial Code ("UCC" or "Code"). A troublesome question is what that place ought to be. The market background for this paper is the matter of the warranties that manufacturers of consumer goods make to those who buy those goods from retail dealers. Is this a matter on which UCC Article 2 can be useful in facilitating the achievement of objectives that are common to consumers and manufacturers? Is this a matter on which assessment of the existing balance of the interests of consumers and manufacturers requires intervention by Article 2 to improve the position of consumers? These questions are high on the agenda of those currently engaged in revision of Article 2.

Consumers acquire many important things other than goods, notably services and residences, but the law traditionally has been compartmentalized into fields, one of which is transactions in goods.¹ Article 2 of the Uniform Commercial Code is the central body of sales law in the United States. That article is in the latter stages of revision,² which gives us an occasion to consider proposals for new or different consumer-protective provisions regarding the matter of manufacturers' warranties of consumer goods.

The common definition of a "consumer" as a person who buys goods for

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1. Segregation of the law on sales of goods is attributable to the 19th century development of codification of a few fields of law in Great Britain. Codification of the law of sales began with the British Sale of Goods Act, enacted in 1893. A few years later, the codification movement crossed the Atlantic Ocean. Under the auspices of the recently established National Conference of Commissioners on Uniform State Laws, the Uniform Sales Act was promulgated in 1906. Decades later, the Uniform Sales Act, together with several other commercial statutes, was replaced by the Uniform Commercial Code; sales was the subject of Article 2 of the Code.

2. The revision process is ongoing, with the Drafting Committee meeting and revising drafts with some frequency during the 1996-1997 year. Any draft becomes quickly obsolete. By the time this Symposium is published, the working draft may be quite different from what it is today. Unless indicated otherwise, I refer in this paper to the draft of Revised Article 2 dated July 1996. *See* Draft, Uniform Commercial Code Article 2—Sales (199_) (Nat'l Conference of Comm'rs on Unif. State Laws, July 12-19, 1996) [hereinafter July 1996 Annual Meeting Draft, Art. 2], *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997). This draft was read at the 1996 annual meeting of the Uniform State Laws Conference. Later drafts of Revised Article 2 are available online through the University of Pennsylvania Biddle Law Library at <<http://www.law.upenn.edu/library/ulc/ulc.htm>>.

personal, family or household use is generally acceptable,³ but I give more attention in this paper to sales of so-called “big ticket” goods, such as automobiles, mobile homes, and major appliances, than to sales of lower-priced goods. The marketplace for lower-priced goods is, commonly, a market of repetitive purchases. Consumers police that market, with considerable effect, by shifting their “custom” to different goods or other suppliers. Consumer disappointment with lower-priced goods usually involves amounts in controversy that are too small to be practicably resolved through the legal system. The principal exception, of course, is found in situations in which goods, sold at low prices, have caused substantial consequential harm, usually in the form of personal injuries.

Purchases of higher-priced goods differ from lower-priced goods in several important ways. The expected useful life of expensive goods is generally a significant period of time. Their acquisition involves relatively large commitments of personal, family or household purchasing power. Thus, the nature and consequences of these goods being seriously unsatisfactory can be severe and long lasting for the consumers involved. Consumer commitments to major purchases often entail long- or medium-term debt obligations that cannot be unwound easily if the goods are not satisfactory. As a result, there may be enough money and value at stake to make it practical to use the legal system for dispute resolution.

Furthermore, major purchases of goods are also likely to involve a set of connected contract relationships. In addition to the credit side of such transactions, commonly, more than one party is involved in providing the goods themselves. “Big ticket” goods are typically manufactured or assembled, branded and advertised by national or transnational enterprises, which put the goods into the “stream of commerce.” Eventually, consumers purchase these goods from independent retail dealers. Each part of the set of back-to-back transactions constitutes a sale, or something like a sale, but the set as a whole also creates a legal relationship between the manufacturers and the ultimate retail buyers/consumers.⁴ The lack of a direct contract between

3. Advocates of consumer protective legislation sometimes seek to include small business owners and farmers in the same class. There is considerable truth in the proposition that some small business entrepreneurs and some farmers engage in purchasing transactions with the same lack of legal sophistication thought to be endemic to ordinary consumers. For purposes of this paper, however, I do not consider whether the protected class should be enlarged.

4. Components suppliers, whose products are incorporated into the final consumer product by manufacturer/assemblers, may be in positions similar to those of manufacturers if their products do not lose their separate identities in the manufacturing of the final product. From the perspective of retail

consumers and manufacturers is the source of the difficult and important legal questions which are the focus of this paper. Answers to these questions are still being sought.⁵

I. MANUFACTURERS' WARRANTIES AND ARTICLE 2

Are manufacturers' warranties of the quality of their goods within the scope of Article 2 of the UCC; should they be; and if so, how should such warranties be treated in the statute? Sound resolution of these issues is vitally important to the success of the project to revise Article 2. The economic interests of consumers and manufacturers in this matter are great. It is important to all sides that any proposed changes in law be well grounded.

In the marketplace for consumer goods, particularly for "big ticket" items but also for many other goods, manufacturers commonly assume responsibility for warranting the goods to consumers and, conversely, the retail sellers totally disclaim responsibility for the quality of such goods. Manufacturers whose products are sold at retail by "authorized dealers" typically authorize those dealers to deliver, with the goods, documents that contain the manufacturers' undertaking. When a new motor vehicle is delivered, a buyer receives a booklet or packet of such documents, some of which are warranty undertakings by suppliers of tires and other components in the vehicle. For products not sold at retail by "authorized dealers" or franchisees, manufacturers commonly put documents that contain their warranty undertaking inside the package, the ubiquitous card-in-the-box warranty.

buyers of the final product as consumer goods, there are important differences between components suppliers and manufacturers. It is much less common for consumers to be influenced in purchasing decisions by the identity of the suppliers of components.

Not all "big ticket" goods are manufactured. In today's economy, the value of goods is largely determined by the knowledge and skill that have been applied to raw materials. Nonetheless, there are still instances of expensive consumer goods in which the value of the goods lies largely in the intrinsic quality of the commodity from which they have been made. Jewelry, with its components of gems and precious metals, is an example, although the value of jewelry is also dependent upon the artistry and skill of the jeweler. Other "big ticket" goods, such as fine art and fine antiques, have great value derived from the work of artists and craftsmen of the past as well as the scarcity of their surviving products.

5. Some manufacturers market goods directly to consumers, sometimes through mail order or Internet transactions. These "direct sales" are two-party transactions in which the manufacturer is the seller and the consumer is an immediate buyer. The warranties of manufacturer/sellers in these transactions are not different from warranties of retail sellers. Manufacturers' warranties in "direct sales" are not within the scope of this paper.

Manufacturers' warranties on consumer goods are often framed in terms of assurance that the goods are free from defect in materials and workmanship and, on "big ticket" items, such as motor vehicles and major appliances, manufacturers undertake, for a period of time, to repair goods in which such a defect appears. On lower-priced goods, such as photographic film, manufacturers undertake to replace defective goods.

In addition to using these familiar forms of manufacturers' warranties, many manufacturers also communicate with potential buyers through advertisements in public media or in promotional literature disseminated widely to potential buyers. Consumers may believe that factual representations made in advertisements or promotional literature constitute warranties with respect to the goods that are binding on the manufacturers who made them.

Before taking up the treatment of manufacturers' warranties in the emerging Revised Article 2, it is necessary to rehearse the place of those warranties under current Article 2 and other laws, including common law.

A. Current Article 2

Current Article 2 does not speak to manufacturers' express or implied warranties of quality made directly to the ultimate purchasers of consumer goods. Manufacturers' sales to their immediate buyers, who may be consumers, are within Article 2, of course, but the legal relationship between manufacturers and remote buyers has not been brought under Article 2.

1. Manufacturers' Descriptions of Their Goods

Express warranties under Article 2 are defined as statements "made by the seller to the buyer" and are "part of the basis of the bargain" in the contract of sale.⁶ This statutory language of section 2-313 cannot reasonably be stretched to cover manufacturers' warranties addressed to remote, consumer buyers. The Comment to the section supports the plain meaning of the text:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that

6. U.C.C. § 2-313(1) (1995).

warranties need not be confined either to sales contracts or to the direct parties to such a contract. . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.⁷

Notwithstanding the declared inapplicability of Article 2 to manufacturers' express warranties of description made to consumer buyers, counsel and courts have frequently asserted or assumed the applicability of section 2-313, as well as other provisions of Article 2, in suits by consumers against the manufacturers. In a high-profile recent case,⁸ a cigarette manufacturer, sued for breach of warranties made in the manufacturer's advertisements to the general public, defended on the ground that these affirmations were not "part of the basis of the bargain."⁹ The plaintiff prevailed in the trial court, but her victory was short-lived.¹⁰ On appeal, the Court of Appeals for the Third Circuit did not consider whether section 2-313 was applicable, did not consider whether a manufacturer was "the seller" referred to in the text, and did not mention the Comment quoted above.¹¹ Instead the court held that, to recover against the manufacturer, a consumer must prove that she had read, heard, saw or knew of the advertisement.¹² The court said: "Such proof will suffice 'to weave' the affirmation of fact or promise 'into the fabric of the agreement,' U.C.C. Comment 3, and thus make it part of the basis of the bargain."¹³ Because the jury had not been instructed that the consumer must prove this much knowledge, the court reversed the verdict and judgment.¹⁴

In so applying section 2-313 to representations about the goods that had been made in national advertisements, the Court of Appeals was not disregarding argument—from either side in the case—that Article 2 was not applicable. Both plaintiff and defendants had apparently based their legal positions, from the commencement of the trial court proceedings forward, on

7. *Id.* § 2-313 cmt. 2.

8. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

9. *Id.* at 563.

10. *Id.* at 554.

11. *Id.* at 563-70.

12. *Id.* at 567.

13. *Id.* at 567-68.

14. *Id.* at 569.

the unquestioned premise that section 2-313 was the governing law.¹⁵ There is only a hint of some disquiet on this matter in the Court of Appeals opinion.¹⁶

Manufacturers have been included among the defendants in actions by buyers to revoke acceptance of goods, a form of relief that has been sought with some frequency by buyers of “big ticket” items that have manifested severe quality problems. In some of these cases, the manufacturers have been aligned as defendants with the retail dealers in actions to recover the retail purchase price. Courts have been divided on the propriety of allowing claims of this kind to be made against manufacturers.¹⁷

If manufacturers’ express warranties are not within the scope of Article 2, they would be subject to other law. Section 1-103 states the controlling principle.¹⁸ The Supreme Court of Arizona held that a manufacturer’s express warranty on a mobile home was not governed by section 2-313, but could be

15. *See id.* at 563-64.

16. *Id.* at 564-67. At one point, the opinion broadened the legal base for analysis beyond section 2-313, indeed beyond Article 2, by referring to “traditional contract principles, which serve as the background rules to the U.C.C.” to buttress the reading of section 2-313. *Id.* at 568. The court cited section 1-103 for this proposition.

17. The statutory right to revoke acceptance is not explicitly linked to breach of a statutory warranty by “the seller” and the text of the statute does not specify “the seller” as the person against whom a buyer may move to revoke acceptance. *See* U.C.C. § 2-608 (1995). The statute permits revocation for any “non-conformity that substantially impairs [the] value [of the goods to the buyer].” *Id.* § 2-608(1). This language is broad enough, on literal reading, to support a contention that it can encompass a nonconformity as determined by manufacturers’ warranties to consumers. However, there are conceptual difficulties in relating to manufacturers a consumer buyer’s right to “revoke acceptance.” “Acceptance” of goods is a concept that is coherent within the context of the retail contract, but not against a remote seller. Manufacturers do not tender goods to consumers; consumers do not accept (or reject) goods tendered by manufacturers. *Vis-a-vis* manufacturers there is no acceptance to revoke. Buyers who successfully revoke acceptance are entitled also to monetary damages, including incidental and consequential damages, measured by the terms of the retail contracts of sale, terms that would be completely unknown to manufacturers. Nonetheless, some courts have applied section 2-608 in consumer suits against manufacturers. *See* JOHN O. HONNOLD & CURTIS R. REITZ, SALES TRANSACTIONS: DOMESTIC AND INTERNATIONAL LAW 285 & n.2 (1992).

18. Part of the other law that may apply to manufacturers’ warranties is the Magnuson-Moss Warranty Act. *See* 15 U.S.C. §§ 2301-2312 (1994). Indeed, it is fair to say that the principal purpose of that Act was to address problems perceived to arise from manufacturers’ warranties. The Act addresses warranties by “suppliers,” a term defined to mean “any person engaged in the business of making a consumer product directly or indirectly available to consumers.” *Id.* § 2301(4). Manufacturers are therefore suppliers. The Act’s provisions generally apply to warranties made by suppliers, both immediate sellers and remote suppliers. While the Magnuson-Moss Act is not restricted in scope to warranties that arise within the context of retail contracts of sale, the Act has very little application to manufacturers’ express warranties. The Act does not use the concept of “express warranty.” Only express warranties that come within the narrow definition of “written warranty,” are addressed. *Id.* § 2301(6). Thus, breach of a manufacturer’s express warranty of description is not a matter within the scope of the Magnuson-Moss Act. *Skelton v. General Motors Corp.*, 660 F.2d 311, 320-22 (7th Cir. 1981).

enforceable as a common-law warranty.¹⁹ In making common-law decisions, courts might borrow pertinent principles from the warranty provisions of Article 2 as persuasive authority by analogy on some legal issues. But, if section 2-313 were considered as one source of common law, courts should not refuse to enforce manufacturers' common-law warranties on the ground that they were not made by "the seller" or were not "part of the basis of [a] bargain" with "the buyer," elements of a claim under section 2-313.²⁰

2. *Manufacturers' Repair and Replace Promises*

a. *Promises as Article 2 Warranties*

Manufacturers' express undertakings to repair "big ticket" items or to replace other goods, like the descriptions of goods in advertisements and promotional materials, are commonly addressed to remote, consumer buyers, but are usually delivered to those buyers indirectly. Manufacturers put these repair commitments into documentary form and use one of two common methods of getting those documents into the hands of the ultimate retail buyers. Manufacturers may furnish a supply of these documents to retail sellers and authorize the dealers to give a copy to each buyer of the goods. Alternatively, manufacturers may put a copy of the document inside the package so that the document and the goods are delivered together. Whatever the delivery mechanism for these manufacturers' documents, they are outside the scope of current Article 2 for the reasons already discussed.

There is a further difficulty of characterizing such undertakings within the concepts of Article 2, even if the undertakings are made by a retail seller as part of a contract of sale. Typically, the firms who make these commitments, as well as the consumers who receive them, describe the undertakings as "warranties."²¹ If made by manufacturers, the undertakings are described as "manufacturers' warranties." But these undertakings are promises, not descriptions of the goods. These promises do not determine whether goods, as

19. *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383, 389 (Ariz. 1981). The court also suggested that the warranty language might have created a contract between the manufacturer and the buyer. *Id.* at 390.

20. To the best of my knowledge no manufacturer has advanced the argument that, because (i) Article 2 occupies the entire field of warranty law, and (ii) a manufacturer is not a "seller" within section 2-313, therefore manufacturers' warranties to consumers are not legally enforceable.

21. The Magnuson-Moss Warranty Act's key concept, called a "written warranty," is defined primarily as a promise to repair or replace goods. 15 U.S.C. § 2301(6)(B) (1994).

delivered, conform to contracts of sale. By its inherent nature, such a promise becomes operative only after goods have been delivered and at the time the buyer claims that the express condition on the repair promise has occurred and the promise is now ripe for performance. That condition is expressed, typically, as a determination that the goods are found to have a defect in materials or workmanship. Sometimes, the condition refers to a finding made subjectively by the manufacturer. In other instances, the condition is met on an objective determination of the existence of a defect.

Under current Article 2, promises of this nature that are made by retail sellers to their immediate buyers might be characterized as express warranties under section 2-313. The definition of express warranty in that section includes “promise . . . which relates to the goods.”²² Although the rationale for this section’s characterizing a promise as a warranty is not entirely clear, a retail seller’s repair or replacement promise can be described as a promise that is “related to” the goods. It is not implausible to construe section 2-313’s reference to “promise” as including promises to repair or replace goods.²³

With regard to enforcement of retail sellers’ promises, however, it might be better—from the perspective of buyers—to separate all of sellers’ promissory obligations from their obligations to deliver goods that conform to contract descriptions and to get those promissory obligations away from section 2-313. Because my concern here is with manufacturers’ undertakings, it is sufficient, by footnote, to mention some of the legal difficulties that result from linking together warranty and promise in enforcement of retailers’ promises.²⁴

22. U.C.C. § 2-313(1)(a) (1995).

23. In a recent, new automobile case, it was argued that a manufacturer’s one-year repair promise did not refer to the present or future quality of the car and, therefore, the repair promise does not “extend to future performance” of the car. *Nationwide Ins. Co. v. General Motors Corp.*, 625 A.2d 1172 (Pa. 1993). The argument was made in support of the manufacturer’s defense that the UCC’s statute of limitations, section 2-725, had lapsed four years after the date of delivery of the automobile, notwithstanding the one-year repair promise. *Id.* at 1174. The argument was persuasive to a single dissenting judge, but it was not accepted by the court. *Id.* at 1179-81 (Zappala, J., dissenting). The majority took note of the difficulty of characterizing repair promises in warranty terms, but, construing the language against the drafter, concluded that this repair promise was a warranty. *Id.* at 1176-78. The court held, further, that the second sentence of section 2-725(2) applied to such a warranty, even though the promise did not refer to the future performance of the goods. *Id.* at 1178.

24. Characterizing a promise as a warranty, and therefore treating it as a matter governed by section 2-313, could be very unfortunate for some consumers if it became necessary to enforce the promise by a suit for breach. A promisor would have the defense that a contested promise, although undoubtedly made, was not “part of the basis of the bargain” and is therefore not enforceable. Ordinary contract law does not require aggrieved promisees to show that they had relied, to any degree, upon the

For reasons already noted, section 2-313 applies to warranties, whether of description or by promise, of "the seller" in contracts of sale with "the buyer" and become effective only if an affirmation of fact or promise "becomes part of the basis of the bargain."²⁵ Even if sellers' repair/replace promises are governed by section 2-313, manufacturers' promises do not fall within current section 2-313 and, therefore, are not statutorily bracketed with warranties of description.

If manufacturers' repair/replace promises are not within Article 2, they would be governed by other law.²⁶ Ordinary contract law would provide a complete and, perhaps, completely satisfactory legal platform. As with

promises at the time contracts are formed; nor does ordinary contract law permit a promisor to escape liability by showing that the promise in dispute was not a conscious factor in the promisee's decision to close a deal. The "weak reliance" element that section 2-313 puts as a condition to enforcement of express warranties is a legal oddity under normal contract law.

There are other unexpected and untoward results of characterization of a promise as a warranty. The prompt-notice-or-total-loss of remedy provision in section 2-607(3)(a) could bar enforcement of the promise. The prompt-notice requirement, with its draconian effects, has no proper role in the enforceability of post-delivery promises. The period of limitations for breach of warranty, under section 2-725(2), begins to run on tender of delivery of the goods, a date completely inappropriate to promises to repair or replace goods that are later determined to be defective. Such promises are not breached, absent repudiation, until performance is due and not made. Breach of a seller's repair or replacement promise should be governed by section 2-725(1), which provides a four-year period of limitations that starts on the date that a cause of action accrues. Characterizing a repair or replacement promise as a warranty leads to the apparent applicability of the delivery-date-as-breach rule of section 2-725(2). The inappropriate characterization is not relieved by the exception for warranties that extend to future performance of the goods; that exception is not germane. Promises to repair or replace refer to future performance of sellers, not to future performance of goods. *But cf. Nationwide Ins. Co.*, 625 A.2d 1172.

25. U.C.C. § 2-313(1)(a) (1995).

26. Among the other bodies of applicable law is, of course, the Magnuson-Moss Warranty Act. *See supra* note 18. One of the major purposes of that legislation was to address problems perceived to be arising from manufacturers' warranties, particularly manufacturers' undertakings to repair or replace defective products. A key concept of the Act is "written warranty," the primary definition of which is an undertaking by a supplier of a consumer product "to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking." 15 U.S.C. § 2301(6)(B) (1994). "Supplier" includes manufacturers as "person[s] engaged in the business of making a consumer product directly or indirectly available to consumers." *Id.* § 2301(4).

Although manufacturers' repair/replace promises are therefore within the scope of the Magnuson-Moss Act, the Act does little to change their contractual meaning or effect unless the manufacturers elect to place their obligations within the ambit of a "full warranty," in which event the Act provides strong remedies for a manufacturer's breach. *Id.* §§ 2303-2304. Manufacturers of "big ticket" consumer products have chosen not to seek the accolade of offering a "full warranty." As a result the Act has had minimal substantive effect on manufacturers' repair or replace promises in the consumer marketplace. *See generally* CURTIS R. REITZ, CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS (2d ed. 1987).

manufacturers' warranties of description, however, counsel and courts have turned to Article 2 as the governing law. The results have been truly startling.

An example is a recent Alabama case²⁷ involving a new Oldsmobile which was purchased in October 1991. General Motors, through its authorized dealer, gave the buyer its "New Car Warranty," which obligated General Motors to repair defects in materials or workmanship that arose during the first twelve months or first 12,000 miles in which the car was in use.²⁸ The Oldsmobile had numerous defects which General Motors, despite many attempts, was unable to repair. The buyer sued General Motors for breach of its "express warranty."²⁹ The buyer's complaint was filed four years and three months after the retail sale. Counsel for General Motors succeeded in persuading the Alabama trial and appellate courts that the statute of limitations in Article 2 governed the question of the timeliness of the suit.³⁰ Counsel for the buyer, apparently quite belatedly, advanced a new argument that a cause of action for breach of a promise to repair does not accrue until there has been a breach of the promise.³¹ The Alabama Supreme Court rejected buyer's argument out of hand:

This contention . . . directly contradicts the plain meaning of the language in section 7-2-725 [U.C.C. § 2-725], which states that a cause of action for breach of any contract for sale accrues when the breach occurs and that the breach occurs upon tender of delivery, regardless of the buyer's knowledge of the breach, unless the warranty explicitly extends to future performance. . . . [Buyer's] warranty does not extend

27. *Tittle v. Steel City Oldsmobile GMC Truck, Inc.*, 544 So. 2d 883 (Ala. 1989).

28. *Id.* at 884. General Motors's promise to repair defects in the Oldsmobile was framed as a promise to be performed by the manufacturer through the retail dealer. *Id.*

This has been standard practice in the automobile industry in recent decades. In earlier times, manufacturers had conditioned their repair promises on buyers' transporting the cars to the manufacturers' factories in Detroit, Michigan. The practice of waiving this condition and performing post-sale repairs through dealers became routine, but the express terms of the warranty documents were not changed. In 1960, the New Jersey Supreme Court made a withering attack on this, and other aspects of standard manufacturers' repair promises, in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

29. *Tittle*, 544 So. 2d at 885. The buyer named the dealer as an independent defendant for its breach of warranties. While the dealer was the manufacturer's agent to perform the manufacturer's promise, there is no reason to believe that the dealer had also promised to repair the Oldsmobile. Typically, new car dealers disclaim all obligation for the quality of the cars; provisions in retail sales contracts declare that the manufacturers' warranties, separately transmitted, are the only warranties extended to the buyers.

30. *Id.* at 885.

31. *Id.*

to future performance of his car. [The warranty did not guarantee that the car will perform free of defects for the term of the agreement. In fact, the language of the guarantee anticipates that defects will occur.] The trial court, therefore, correctly determined that [buyer's] cause of action, by statute and by the express terms of his warranty, accrued at the time [the dealer] delivered the vehicle to him.³²

b. Promises to Repair or Replace as Article 2 Remedies

Another part of Article 2, sometimes mentioned in connection with the view that repair/replace promises are governed by Article 2, is a provision in the section on remedies provided by contract, section 2-719. Subsection (1)(a) mentions "repair or replacement of non-conforming goods or parts" as an example of a remedy that may be agreed upon by the parties to contracts of sale, in addition to or in substitution for remedies provided by Article 2.³³ One might be led to infer that the subsection contains all law germane to undertakings to repair or replace goods. Such an inference would plainly be wrong.

Section 2-719 refers to a seller's repair or replacement of goods only as a remedy for a seller's breach of the contract of sale. The section does not contemplate, even as to a retail seller, that repair or replacement could be an independent obligation that arises even though there has been no anterior breach of the retail sales contract. Nor does the section contemplate the buyer's remedies if a term were construed as a promise to repair or replace goods if certain conditions were to occur and that promise was breached. The section insistently considers repair or replacement only as a remedy for a seller's breach and provides that, if the *remedy* fails, a buyer may resort to statutory remedies for breach of the contract of sale.³⁴

However section 2-719 is construed with respect to retail sellers' contracts, the section cannot reasonably be read to apply to manufacturers' repair/replace promises. These are promises, not remedies for manufacturers' breach of contracts of sale. Manufacturers are not parties to contracts of sale

32. *Id.* at 891. The court denied General Motors a complete victory in this case, however, on the ground that a representative of the manufacturer may have lulled the buyer into delaying filing his complaint. *Id.* at 891-93.

33. U.C.C. § 2-719(1)(a) (1995).

34. *Id.* § 2-719(2). The meaning of this provision is itself the source of major controversy centering on the effect of failure to repair or replace goods on contract clauses that exclude sellers' liability for consequential damages.

with the beneficiaries of these promises. The manufacturers' promises are, and should be, enforceable even though neither the manufacturer nor anyone else has committed a breach of a contract of sale.

The legal myopia of counsel, courts, and commentators who are unable to look outside Article 2 to deal with breach of manufacturers' repair/replace promises, may not be doctrinally explicable, but it has occurred and, in the minds of some, will continue. One of the arguments advanced for adding to Article 2 a set of provisions on enforceability and enforcement of manufacturers' repair/replace promises is the view that lawyers and judges are now so conditioned to the erroneous idea that current Article 2, not common law, is the source of state law on these matters that the only solution is to amend Article 2 so that it will not continue to be used inappropriately.³⁵

3. *Manufacturers' Implied Warranties*

More problematic than Article 2's coverage of manufacturers' express warranties is whether, under Article 2, manufacturers make an implied warranty of merchantability directly to consumer buyers. Under section 2-314, a warranty that goods must be merchantable "is implied in a contract for their sale."³⁶ Manufacturers that sell goods through a distribution chain are not party to retail contracts of sale. The goods reach the consumer marketplace through a series of contracts, which may involve several intermediary firms that buy and sell the goods as they move down the chain. When goods are marketed in this fashion, a statutory basis for an implication of a manufacturer's warranty of merchantability to the ultimate consumer buyers is wholly lacking in Article 2.

It is also impossible to find any statutory basis to implicate manufacturers in the statutory implied warranty of fitness for particular purpose. A seller's obligation of this kind arises if "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable

35. Many states have enacted so-called "lemon laws" that apply to failures of automobile manufacturers to repair defective vehicles. The "lemon laws," which are not part of the UCC and which are not uniform among states enacting them, tend to require manufacturers to replace a car or refund the retail price if the car exhibited the same defect after a statutorily fixed number of attempts to repair the defect or the car was not available for use for a statutorily specified period of time. See REITZ, *supra* note 26, at 14. "Lemon laws" do not amend UCC Article 2 and do not, generally, apply to repair promises of manufacturers of goods other than automobiles.

36. U.C.C. § 2-314(1) (1995).

goods.”³⁷ Direct negotiation between a seller and a buyer may give rise to this warranty, but it has no application to persons in the distribution chain who have never had any direct communication.

Although manufacturers are not contracting parties in the ultimate retail sales at the end of a chain of distribution, they are contracting parties as sellers in the first sales at the top of the chain. If an implied warranty of merchantability were made in a top-of-the-chain sale,³⁸ a buyer in a subsequent sale might attempt to enforce the upper-tier warranty. In common-law doctrinal terms, allowing such a claim to be made would be met with the defense that the ordinary common-law doctrine of privity of contract permits only one who is a party to a contract to enforce it.³⁹ However, the common-law requirement is not inexorable in its application. Exceptions have been carved out so that persons other than those who formed contracts may be recognized as parties permitted to enforce contracts that they did not make. The two principal exceptions permit third party beneficiaries and contract assignees to enforce contracts.⁴⁰ But neither of these traditional common-law exceptions to contract privity would allow retail buyers to enforce upstream sales contracts, such as a contract between a manufacturer and a distributor, because ordinary downstream buyers are not likely to be common-law assignees or common-law third-party beneficiaries of upstream contracts.

Current Article 2 has a statutory third-party beneficiary section, one version of which is sometimes read to allow downstream buyers to enforce warranties, including implied warranties, that were made in upstream contracts. Alternative C of section 2-318, the broadest of the three versions, permits anyone “who may reasonably be expected to use, consume or be affected by the goods” to enforce “a seller’s warranty.”⁴¹ Reading “seller” to mean the manufacturer, one can characterize a retail buyer as within the subset of persons who may be expected “to use, consume or be affected by the goods.” The section does not mention retail buyers, but it does not

37. *Id.* § 2-315.

38. Reliable account of normal business practice in contracts at this level of trade cannot be made without valid empirical inquiry, but it seems quite reasonable to expect that the parties to distribution and wholesale contracts would define their rights and obligations with respect to the goods through express warranties and other related contract terms, and, accordingly, would include disclaimers of the implied warranty of merchantability in those contracts.

39. 8 SAMUEL WILLISTON & WILLIAM H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 998 (3d ed. 1964).

40. *Id.* § 998A.

41. U.C.C. § 2-318 alt.C (1995).

exclude them either. In those few states that have enacted Alternative C of section 2-318,⁴² there is a plausible basis for retail buyers (and, indeed, the entire class of nonbuyers who use, consume, or are affected by goods) to try to enforce whatever warranties were made in an upstream contract of sale.

The other versions of section 2-318 are much narrower in their scope. Alternative A, the section as originally promulgated, allows only individuals who are closely related to buyers to enforce “a seller’s warranty.”⁴³ It is not possible to read that version as including the retail buyer as within the class of protected persons for purposes of enforcement of an upstream warranty. The section contemplates extension of retail sellers’ warranties beyond retail buyers. It does not allow a retail buyer to enforce the warranty in an upstream contract of sale. Alternative A, like Alternative B, is further limited in that only one kind of injury for breach of warranty is covered: personal injuries. Claims that the goods do not conform to description or that there has been breach of a promise to repair or replace goods are not within the scope of either Alternative A or B.

Section 2-318, in all of its versions, is identified primarily with the field that we now generally describe as products liability. This field is concerned with products that have “defects” that cause death or personal injuries or that cause damage to other property. The victims of such harm are not necessarily buyers of the defective goods. The parties deemed most responsible for causing these harms are the manufacturers of the goods. The idea of “warranty” under sales law before the UCC was instrumental in early common-law development of product liability law. Article 2 was influenced by this development, most notably in section 2-318. Revision of Article 2 has become seriously entangled with the development of products liability law outside of Article 2. It is necessary to look more closely at this subject in order to understand the debate regarding the role that revised Article 2 should play on these matters.

a. Products Liability and Sales Law

In the half century or so before the UCC was drafted, courts found a way, through sales law, to compensate persons if deaths or personal injuries were caused by contaminated products. Inventing warranty concepts that defined

42. Alternative C has been adopted in Hawaii, Iowa, Minnesota, North Dakota and Utah. U.C.C. § 2-318, 1A U.L.A. 559 (1995).

43. U.C.C. § 2-318 alt.A (1995).

an obligation running directly from manufacturers to ultimate consumer buyers, courts permitted those buyers to recover against the manufacturers without any concern for the terms of the manufacturers' actual upstream contracts and without regard to common-law notions of privity of contract. This line of cases developed in connection only with certain products, consumables that people ate, drank, or applied to their bodies, such as soap, hair dyes, and cosmetics. The obligation to put unharmed goods into the stream of commerce and the privity exception were thought to be restricted to these goods, until 1960, when the New Jersey Supreme Court extended the idea to injuries caused by automobiles.⁴⁴

William Prosser, a prominent torts scholar, collected many of these decisions in an extraordinarily influential law review article, published in 1960.⁴⁵ Prosser declared that the facade of sales law in these cases was pernicious to the further development of the law:

No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.⁴⁶

Within a remarkably short time, courts began to characterize the liability in such cases as a tort. A pivotal decision was *Greenman v. Yuba Power Products, Inc.*, a 1963 California Supreme Court case that used this new tort to affirm a trial court decision for a personal injury claimant, even though the case had been tried below entirely as a warranty claim.⁴⁷ Judgment for plaintiff on a warranty basis was unsustainable because the claimant had not given timely notice of breach, thought to be a remedy-forfeiting prerequisite for recovery under pre-Code sales law.⁴⁸ The California court found that a

44. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

45. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

46. *Id.* at 1134 (footnotes omitted).

47. 377 P.2d 897, 901 (Cal. 1963).

48. *Id.* at 899-900. Prosser cited this and eight other aspects of sales law as major difficulties and disadvantages to the accomplishment of the judicial objective of fashioning a legal basis for relief. Prosser, *supra* note 45, at 1127-33. He concluded: "What all of this adds up to is that 'warranty,' as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of

judgment, defective as a warranty claim, could be sustained under a tort theory.⁴⁹ With the impetus of section 402A of the *Restatement (Second) of Torts*, promulgated in 1964, most states recognized the new tort which has evolved into the modern law of products liability.

The tort that emerged was directed primarily at the conduct of manufacturers, those who put goods into the stream of commerce. Persons entitled to relief in tort were all those who suffered injuries, without regard to whether or not they had bought the goods. The standard of tort liability was defined by the dangerousness of the goods, without concern for how the goods had been described in contracts of sale. If the contract contained a disclaimer of liability, the disclaimer was denied legal effect. The tort thus moved away from its warranty precursor.

Products liability thus took on the mantle of tort law, but its roots in warranty law were not torn up. The new tort was an additional claim for relief. It did not displace the right of buyers to recover for their personal injuries caused by goods that did not conform to contract. The formative period of the UCC overlapped the period of development of the new tort. In a few respects, provisions were added to the Code to enable recovery by individuals who had incurred personal injuries caused by nonconforming goods, but for the most part the drafters of current Article 2 took the position that further development of products liability law was a matter for the courts and case law.

The Code does not address manufacturers' liability to consumers even in connection with express warranties or promises that manufacturers extended directly to consumers. The implied warranty provisions, notably the implied warranty of merchantability, were not drafted to impose any liability on manufacturers who put harmful goods into the stream of commerce. None of the express or implied warranty provisions of Article 2 was drawn to recognize liability of upstream sellers running directly to consumer buyers.

However, the Code did address one aspect of products liability in terms of the contracts at the end of the distribution chain. If goods sold at retail cause personal injuries, the victims may be someone other than the persons who contracted to buy the goods. The Code expressly permits individuals other than retail buyers to recover from "a seller" for personal injuries.⁵⁰ Section 2-

undesirable complications, and is leading us down a very thorny path." *Id.* at 1133.

49. *Greenman*, 377 P.2d at 901.

50. U.C.C. § 2-318 (1995).

318 extended the warranties made by "a seller" to persons, other than buyers, who have suffered personal injuries caused by the seller's breach of warranty.⁵¹ A Comment to this section reflects the drafters' awareness that the section expanded the class of potential plaintiffs (often called horizontal privity), did not extend manufacturers' liability (often called vertical privity), and that case law on this issue was developing in both tort and warranty theories.⁵²

While current Article 2 was narrowly drawn to include only very limited textual provisions on products liability, the drafters were aware of the state of developing common law, including the emergence in the 1960s of strict liability in tort. Their decision not to codify more of the warranty branch of products liability law may have been made, in part, so as not to freeze a body of law in flux. At the same time, they did not choose to cut off the warranty branch. The drafters' choice allowed both the tort and the warranty branches to develop without legislative interference.

The consequence is that both branches of this body of law continued to exist. Prosser's proposal that "liability to the consumer must be in tort and not in contract" was not fully implemented.⁵³ The tort side grew prolifically. If personal injury and property damages claims were compensated by recovery under tort theories, there would be no occasion to prosecute those claims to judgment and appeal under the aegis of warranty law. But, although overshadowed, contract law continued to offer an alternative cause of action to personal injury claimants.⁵⁴

51. Section 2-318, in its original form, widened the class of such warranty claimants to include, in addition to buyers, members of their families or households and houseguests. In 1966, the section was redrawn with two alternatives that extended the right to sue the seller to anyone reasonably expected to use, consume or be affected by the goods. *See id.*

52. *Id.* cmt. 3.

53. Prosser, *supra* note 45, at 1134.

54. This has been demonstrated most clearly in decisions that allowed buyers to proceed under a warranty claim even though their tort claims had failed. The most recent example is *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1996). *See also* *Clary v. Fifth Ave. Chrysler Ctr., Inc.*, 454 P.2d 244 (Alaska 1969); *Malawy v. Richards Mfg. Co.*, 501 N.E.2d 376 (Ill. App. Ct. 1986). The preclusive res judicata effect on warranty claims of judgments based in tort depends, of course, on a state court's determination of the elements of that state's product liability tort. In states where the elements of the tort have been derived entirely from the warranty of merchantability, a negative outcome in either claim would bar recovery in the alternative.

In another set of cases, personal injury claimants barred from proceeding against manufacturers in tort by the statute of limitations, have been able to prosecute their claims within the different, and sometimes, longer period of limitations that applies to claims that sound in warranty. *See, e.g.*, *Fernandez v. Char-Li-Jon, Inc.*, 888 P.2d 471 (N.M. Ct. App. 1994). *But see, e.g.*, *Taylor v. Ford Motor Co.* 408 S.E.2d 270 (W. Va. 1991). Tort claims may be timely even after the warranty period of

The overlap of tort and implied warranty theories has been a source of much discussion and debate in connection with the debate over the revision of Article 2. We will return to this subject later.

b. Economic Loss

Courts have rarely permitted consumers to recover damages from manufacturers for economic losses claimed to be the result of breach of an implied warranty of quality. A few state courts held that consumers could recover for such losses in the new strict tort,⁵⁵ but this tort heresy was quickly and firmly rejected by most courts.⁵⁶ Decisions that allow recovery for economic losses in consumers' claims that manufacturers breached an implied warranty of merchantability are exceedingly rare.⁵⁷

It may be thought that manufacturers' liability to consumers for implied warranties of quality, if not recognized by Article 2, may be established by federal law in the Magnuson-Moss Warranty Act.⁵⁸ The federal statute clearly speaks to certain forms of manufacturers' express warranties to consumers,⁵⁹

limitations has expired. *See, e.g.,* *Rosenau v. City of New Brunswick*, 238 A.2d 169 (N.J. 1968). Decisions on these issues vary widely across the country. The judgments turn upon the state courts' views of the similarity or dissimilarity of tort and contract law. For a collection of the cases, see Andrea G. Nadel, Annotation, *What Statute of Limitations Applies to Actions for Personal Injuries Based on Breach of Implied Warranty Under UCC Provisions Governing Sales (UCC § 2-725(1))*, 20 A.L.R.4th 915 (1983).

55. *See, e.g.,* *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965).

56. For a full account of this debate, see *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868-71 (1986).

57. The most prominent example is the decision of the Alaska Supreme Court in *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976). Although the plaintiffs' complaint had been drawn in terms of breach of implied warranty, they couched their appellate argument on the basis that a manufacturer of a mobile home should be liable for economic loss, despite lack of contract privity, under the precepts of strict tort liability. *Id.* at 283. The Alaska Supreme Court declined to permit recovery for plaintiffs' economic loss in tort, but the court held further that plaintiffs could proceed against the manufacturer on the claim of breach of implied warranty of merchantability. *Id.* at 289-92. The court reserved judgment on the scope of a manufacturer's liability for losses beyond the retail value of the goods. *Id.*

In a more recent case, the Illinois Supreme Court held that the state's law of privity barred an implied warranty of merchantability claim against an automobile manufacturer, but held further that federal law, specifically, the Magnuson-Moss Warranty Act, opened the manufacturer to the implied warranty claim because the manufacturer had given consumers a "written warranty," a limited form of express warranty that triggers application of the federal act. *Szajna v. General Motors Corp.*, 503 N.E.2d 760, 767, 770-71 (Ill. 1986).

58. 15 U.S.C. §§ 2301-2312 (1994).

59. *Id.* §§ 2303-2307.

and it also speaks in various ways to manufacturers' implied warranties.⁶⁰ For example, the federal statute gives some plaintiffs the right to sue for breach of implied warranty in federal courts.⁶¹ In the end, however, it seems indisputable that manufacturers' implied warranties referred to under federal law are only those implied warranties that may be found under state law.⁶²

The lack of statutory basis, in the UCC or in federal law, for manufacturers' implied warranty of quality with regard to economic losses does not necessarily preclude the possibility that such warranties could be recognized as a matter of common law. One possibility might be to fashion an implied warranty of this kind as a corollary to manufacturers' express warranties of description. If manufacturers give descriptions of their products to potential consumers and thereby seek to induce them to purchase the manufacturers' products, it may be reasonable to hold that the manufacturers should be responsible for more than the accuracy of their expressed warranty representations. The warranty of such a manufacturer might be enlarged to include, by implication, an obligation that the goods described are fit for the ordinary purposes for which goods of that description are used.

B. *The Draft Revision of Article 2*⁶³

Manufacturers' warranties and obligations have been a major subject in the process of preparing a revision of UCC Article 2. At the outset, let me

60. *Id.* § 2308.

61. *Id.* § 2310(d)(1)(B). A jurisdictional prerequisite is that the plaintiff's claim must be for \$50,000 or more, a threshold that makes a consumer's right to proceed in federal court almost ephemeral. *Id.* § 2310(d)(3)(B); see also REITZ, *supra* note 26, § 10.03(a).

62. The federal statute, when referring to an implied warranty, clearly means "an implied warranty arising under State law . . . in connection with the sale by a supplier of a consumer product." 15 U.S.C. § 2301(7) (1994). "Supplier" is broadly defined to include manufacturers. *Id.* § 2301(4). There is some difficulty with "in connection with the sale by a supplier" if "the sale" means the retail sale, since a manufacturer is not the "supplier" making that sale. When manufacturers sell goods to distributors or dealers, more likely than not the contracts include express warranties but exclude any implied warranty. Notwithstanding that the federal act's reference to implied warranties is to warranties that exist under state law, manufacturers have been including in their warranty documents a provision that refers to manufacturers' implied warranties. The Act proscribes disclaimer or modification of implied warranties by any supplier who makes a "written warranty" or enters into a "service contract," *id.* § 2308(a), but permits such suppliers to limit the "duration" of implied warranties, *id.* § 2308(b). To the best of my knowledge, every major American manufacturer that now extends a "written warranty" to consumers has added a term to its document that limits duration of "any" implied warranty. The clauses tend to avoid language that might be said to imply that a warranty of this type actually exists.

63. The draft referred to in this paper is the July 1996 draft. See *supra* note 2.

first describe how these warranties appear in the July 1996 draft. The draft attempts to codify some of the law of manufacturers' warranties. This represents an unstated, but nonetheless extremely important conclusion that it is better to draft a code for some of these issues than to leave the entire matter to common law and other laws, like "lemon laws" and the Magnuson-Moss Warranty Act.⁶⁴

1. Manufacturers' Express Warranties of Quality and Promises to Repair or Replace Defective Goods

The draft would add to section 2-313 a subsection intended to cover certain manufacturers' warranties of quality extended to consumers. The draft appears to be intended also to cover manufacturers' promises to repair or replace goods. The draft reads:

(d) If the seller makes an affirmation of fact or promise relating to or a description of goods to a remote buyer or lessee through an authorized dealer or other intermediary of the seller or through any medium of communication to the public, including advertising, the following rules apply:

(1) An obligation is created if the remote buyer or lessee establishes that it knew of and was reasonable in believing that the goods

64. See *supra* notes 26-35 and accompanying text. The Drafting Committee's decision to incorporate manufacturers' warranties in Article 2 is not responsive to a clear recommendation of the Study Group, appointed by the Permanent Editorial Board for the Uniform Commercial Code ("PEB"). The Study Group examined Article 2 prior to the decision to undertake a revision and submitted its report in 1990. The Study Group's report was reprinted, together with an appraisal by an American Bar Association Task Force. Task Force of the A.B.A. Subcomm. on Gen. Provisions, Sales, Bulk Transfers, and Documents of Title, Comm. on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991). In one brief passage, the PEB Study Group, referring to manufacturers' express warranties through advertising or otherwise, concluded that a consumer's suit against the remote seller should be allowed but that the remote seller should be permitted to show that a representation did not become part of the buyer's bargain. *Id.* at 1113 (citing U.C.C. § 2-313). The Study Group did not explain what "bargain" it had in mind. See *id.*

The ABA Task Force was more vigorous in its conclusion that the law of manufacturers' warranties should be codified in Article 2. The Task Force observed that such warranties are "pervasive," *id.* at 1103, that they have been enforced, and concluded: "Surely a rewritten statute should be drafted broadly enough to encompass such commonly used warranties. Further, the drafting should be broad enough to encompass representations in advertising which are broadly addressed to the public." *Id.* at 1104. The Task Force took note of the suggestion (by me) that manufacturers' warranties could be dealt with under common law and vigorously disagreed with that suggestion. However, no reasons for the Task Force's disagreement were stated.

purchased from another seller or lessor in the distributive chain would conform to the affirmation of fact, promise or description made by the seller;

(2) The obligation may be enforced by the remote buyer or lessee as an express warranty directly against the seller under this [article], subject to subsection (d) of Section 2-318.⁶⁵

This draft deals in a single subsection with manufacturers' warranties made in advertisements and warranties transmitted, in any manner, through an authorized dealer. The draft brackets together affirmations of fact and promises in the same way that these are jointly treated in current Article 2.

With respect to manufacturers' affirmations that describe the goods, these would be enforceable only if consumers could prove they were reasonable in believing, presumably at the time of purchase, that the goods would "conform to the affirmation of fact, promise or description made by the seller."⁶⁶ This would include manufacturers' advertisements as well as manufacturers' promotional literature, possibly disseminated by retail dealers at the point of sale.⁶⁷

The draft, by continuing to reach promises that relate to goods in this section, apparently would make manufacturers' promises to repair or replace goods enforceable only if consumers could prove that they had known of the promises at an unspecified time, presumably at the time of retail purchase. Promises to repair or replace defective goods, likely to be considered promises relating to the goods, are therefore within the chapeau of the subsection, but promises of this kind are performed or breached by the promissors' conduct without reference to conformity of the goods. Therefore, the manufacturer's promise referred to in subsection (d)(1) may not be a promise to repair or replace defective goods. On this reading, the draft might not impose a knowledge requirement on repair/replace promises.

The appearance of an intent of the drafters to characterize repair or replace promises as warranties under Revised section 2-313 is clouded by other provisions that describe these promises as a "term in a contract for sale or a

65. July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-313(d).

66. *Id.* § 2-313(d)(1).

67. The draft has been read by some as binding manufacturers to warranties made by retail sellers, who were authorized by manufacturers to sell their goods but were not authorized by manufacturers to create any warranty obligations. Whether the language is capable of this construction, it is undoubtedly a meaning not intended.

collateral contract.”⁶⁸ The scope provision of the article declares that the article applies to “any term in a contract for sale or a collateral contract obligating the seller to install, customize, service, repair, or replace the goods sold at or after the time of delivery.”⁶⁹ The draft contains rules, mostly in the nature of gap-fillers as to the substantive obligations of the parties and remedies for breach, which give more detailed content to repair and replacement promises.⁷⁰ In one subsection, such a promise is described as “services . . . in lieu of a warranty,”⁷¹ a locution that would be rather odd if a promise to repair or replace goods *is* a warranty under Revised section 2-313.⁷²

The sections of the revised draft that are referred to in the previous paragraph apply to the relationship of sellers and their immediate buyers as determined by contracts of sale, but nothing in their text or notes would suggest an intent that these sections should not be invoked to give meaning to Revised section 2-313(d), even though the subsection is not addressed to contracts of sale and the parties thereto.

The draft is completely silent on manufacturers’ warranties of description or promises to repair or replace goods that are packaged with the goods, such as the promises or warranties of description on a card inside the box containing the goods or on the label of the container.

2. *Manufacturers’ Implied Warranties of Quality*

The draft contains no provision on implied warranties of quality that would recognize or impose an obligation that runs directly from manufacturers to consumers. Revised Article 2 does not suggest, much less declare, that manufacturers, by putting their goods into the stream of commerce, incur some implied warranty of quality obligation that extends to consumers or beyond. The revised version of section 2-314 is drafted, like current Article 2, in terms that refer only to “the seller” and the “sale” of goods under a “contract description.” The definition of merchantability

68. See July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, §§ 2-103(a)(3), 2-301 note.

69. *Id.* The Reporter’s Note to this provision makes no reference to Revised section 2-313. See *id.*

70. *Id.* § 2-504.

71. *Id.* § 2-504(a)(1).

72. The Reporter’s Note characterizes repair and replacement promises as “a form of agreed ‘cure’ which is common in the sale of complex, expensive goods.” *Id.* § 2-504 note 1. This characterization puts another “spin” on the concept that also distances repair and replace promises from warranties.

potentially of most significance to consumers, fitness for ordinary purposes, has been modified to refer back, clearly, to a contract description.⁷³ Previously the provision declared that goods had to be fit for the ordinary purpose for "such goods,"⁷⁴ an ambiguous phrase that was not necessarily tied to the contract description. The possibility of constructing a statutory warranty of merchantability without regard to a contract description has been reduced.

3. *Pass-Through of Upstream Warranties*

The draft contains a provision, applicable to the contractual chain of distribution of goods, to the effect that warranties of quality in an upstream contract may pass through to buyers in downstream contracts. Revised section 2-318(a) declares:

(a) A seller's express or implied warranty made to an immediate buyer extends to any remote buyer or lessee of . . . the goods and who is damaged by breach of the warranty. The rights and remedies against the 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 [article]. The seller's obligation to a remote purchaser of or person affected by the goods, however, shall not exceed that owed to the immediate buyer.⁷⁵

Another provision declares that an agreement subject to Article 2 "may not limit or vary the effect of Section 2-318 concerning the extension of warranties."⁷⁶

Revised section 2-318(a) would create, in a way, warranties that "run with the goods." A seller's warranty obligation to its immediate buyer would come down the chain of back-to-back contracts. The right to enforce the upper-tier warranty would not be dependent upon finding that the lower-tier buyer was

73. See *id.* § 2-314(b)(3).

74. U.C.C. § 2-314(2)(c) (1995).

75. July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-318(a). The omitted language would extend the pass-through of upstream warranties to any "person who may reasonably be expected to purchase, use, or be affected by the goods and who is damaged by breach of the warranty." *Id.* The "damage" of non-purchasers who use goods or who are affected by them is likely to be only personal injuries or property damage. These persons have no interest in the economic value of the goods themselves. Since claims for injuries to person or property are within the field of products liability, it is better to take up this extension of warranty in the context of that subject. See *infra* Part I.B.4.

76. July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-109(b)(5).

an assignee or third-party beneficiary of the original contract. However, the draft does not, at least not expressly, supersede these common-law rules, which in some circumstances may be more favorable to the assignees and beneficiaries than the new statutory extension.⁷⁷

The warranty that could come down the chain by statute is defined by the terms of the warranty to the immediate buyer. If there is no warranty of quality in that upstream contract, nothing would descend. If a warranty exists but is narrowly drawn, the limitations would apply to any downstream buyer. For example, if a warranty were defined to expire unless the buyer gave notice of breach within a prescribed time frame, that time may expire before the goods were sold to a lower-tier buyer. Despite the prohibition of varying this section by agreement, the parties would appear to have considerable discretion in framing a warranty so that it could have little or no practical value to a downstream buyer.⁷⁸

The section is ambiguous as to whether it applies to goods that, after some period of use by the first consumer buyer and whatever deterioration in quality that resulted from wear and tear, go into the used goods market. Nothing in the text suggests that the extension of a manufacturer's warranty on new goods does not reach the buyer of second-hand goods. The possibility of the section being so read has led to criticism. Some might read the section as making manufacturers responsible for the quality of the used goods at the time of the second-hand sale. That is not a valid reading of the section because that reading would enlarge the seller's obligation beyond that owed to the immediate buyer. However, even if manufacturers' substantive obligations are not expanded by this section, the section might encourage second-hand buyers to make claims that must be defended, at perhaps

77. The statutory extension strictly limits a seller's exposure to the obligation owed to the immediate buyer. The effect of this restriction with regard to economic losses in the form of consequential damages that are suffered by a downstream buyer is not clear, particularly since the foreseeable use and risk associated with goods sold to a person buying inventory are quite different from the foreseeable use and risk associated with goods sold to a person buying goods for the purpose of consumption. If, however, the downstream buyer is a third-party beneficiary of the original contract, the seller's exposure would be measured by the foreseeable use and risk of the beneficiary. Similarly, in an assignment, if there were a novation, an assignee's claim against the seller would not be measured by the situation of the assignor.

78. The number and kinds of terms that could be inserted in the initial warranty that would detract from that warranty being useful to a downstream buyer are great. It is not uncommon for warranties to be stated as applicable to the first or immediate buyer only. Even if such a term could be negated by the "no variation by agreement" rule, the same effect could be achieved by using other terms.

considerable cost, even if the claims are eventually found unmeritorious.

4. *Products Liability and Revised Article 2*

The draft of Revised Article 2 includes a number of new provisions on products liability. The most significant of these is section 2-319 on injury to person or property resulting from breach of warranty. The section makes no direct reference to the liability of manufacturers, but does refer to the claims of remote buyers and others. Further, its stated purpose was explicitly to harmonize Article 2 with products liability law in tort.⁷⁹ Strict tort liability is largely manufacturers' liability. The section therefore should be read as applicable to warranty-based claims against manufacturers. The section provides:

SECTION 2-319. INJURY TO PERSON OR PROPERTY RESULTING FROM BREACH OF WARRANTY.

[(b) This [article] applies to a claim for injury to person or property resulting from any breach of warranty to the extent that the goods are not defective under other applicable law.]

(c) Claims under subsection (b) to which this [article] applies are also subject to the following rules:

- (1) A claim is not barred for failing to give notice as required by Section 2-608(c)(1).
- (2) Any agreement, however expressed, that excludes or limits consequential damages for injury to the person is unenforceable.
- (3) A [cause of action/claim for relief] accrues when the purchaser discovers or should have discovered the breach. An action must be commenced within four years after the cause of action has accrued.
- (4) A seller's warranty extends to an "immediate" buyer and any "remote" buyer, user or person affected protected under Section 2-318.⁸⁰

To understand the full meaning of this section, it is necessary to consider also Revised section 2-318, both subsection (a), already discussed in Part

79. July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-319 note 1.

80. *Id.* § 2-319.

I.B.3, and subsections (b) through (d).

Subsection (a) of Revised section 2-318, as noted, passes through upstream warranties to downstream purchasers, those who have an interest in the economic value of the goods and those who may suffer economic losses if the goods are not satisfactory. That subsection has other language, not previously discussed, that passes through upstream warranties to any person who “may reasonably be expected to . . . use, or be affected by the goods and who is damaged by breach of the warranty.”⁸¹ Users of goods they did not purchase may suffer personal injuries. Anyone, whether a user or not, who suffers personal injuries caused by goods has been affected by the goods.

Revised section 2-318(b) is completely different from the pass-through warranty subsection (a). Subsection (b) refers, first, to the express warranties that sellers may make to remote buyers.⁸² It also refers, quite opaquely to be sure, to some law or decision, apparently outside of Article 2, that permits a buyer to enforce a claim for breach of warranty against a remote seller.⁸³ The language of Revised section 2-318(b) requires careful reading to perceive its effect. That section provides:

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

(b) If a seller makes an express warranty to a remote buyer or lessee under Section 2-313(d) or for reasons other than the assignment of a right or claim of warranty under Section 2-403 the remote buyer or lessee may enforce a claim for breach of warranty directly against the seller, the following rules apply:

- (1) The remote buyer or lessee may maintain an action against the seller without regard to the terms of the contract between the seller and the immediate buyer; and
- (2) The remote buyer’s or lessee’s rights and remedies against the seller are determined under this [article], subject to subsection (c).

(c) A remote buyer or lessee under subsection (b) has the rights and remedies available against the seller provided by this [article], except as follows:

81. *See id.* § 2-318(a).

82. *Id.* § 2-318(b).

83. *Id.*

(1) The time for giving a required notice begins to run when the remote buyer or lessee receives the goods.

....

(4) A [cause of action/claim] for relief for breach of warranty accrues no earlier than the time when the remote buyer or lessee receives the goods.

(d) A seller may not exclude or limit the operation of this section.⁸⁴

The most obvious effect of Revised section 2-319 would be its creation of exceptions to the sales law so that warranty-based claims for personal injury or property damage would not be subject to the ordinary requirement of timely notice⁸⁵ and would be governed by a different (discovery rule) statute of limitations. Further, agreements excluding a seller's liability for consequential damages would be null and void. This section plainly was an effort to revise Article 2 so that sales law would not differ substantially from the tort law of products liability on these three matters.⁸⁶

This attempt at harmonization of tort and warranty laws would fail in several ways. Tort law of products liability sets a minimum standard for marketable goods in the concept of "defect," a concept that is not derived from the contract description of goods. This standard applies directly to manufacturers of goods. Manufacturers who put defective goods into the market are liable for the personal injuries of victims without regard to whether or not those persons were purchasers of the goods.

84. *Id.* § 2-319.

85. The relationship of Revised section 2-319(c)(1) to Revised section 2-318(c)(1) is not clear. The latter section allows greater time for giving notice, but the former declares that failure to give notice does not bar a claim. It may be that the failure to give notice within the extended time does not bar the claim, but a seller might nonetheless get some relief, short of a bar, if it were able to show prejudice under Revised section 2-608(c)(1): "a failure to give [timely] notice bars the buyer from a remedy only to the extent that the seller establishes that it was prejudiced by the failure." July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-608(c)(1).

86. A four-years-from-discovery tort statute of limitations is certainly exceedingly rare, if any exist at all. The meaning of the bracketed language in Revised section 2-319(b) is not clear. Drafted in scope terminology, this subsection could be read to mean that Article 2 does not apply to claims for injury to person or property resulting from breach of warranty unless the goods "are [held to be] not defective under other applicable law." July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-319(b). So read, personal injury and property damage claimants would be denied the right to commence proceedings under Article 2 until they had tried and lost claims for relief in tort. Under a different reading, the subsection might permit claimants to proceed simultaneously under alternative theories, but require courts to use procedural devices to insure that the tort claim is decided first.

The scheme of warranty-based law that would result from the draft is substantially different. The draft contains no statutory provision that sets a minimum standard for marketable goods comparable to the tort concept of “defect” that applies to manufacturers of goods. The concepts of “merchantability” and “defect” are not entirely dissimilar,⁸⁷ but, as already discussed, the draft uses “merchantability” only in the context of sellers and buyers in immediate contract relationships.⁸⁸ The draft does not use “merchantability” as a standard of manufacturers’ responsibility to remote consumer buyers with whom they have no contractual relationship, much less to individuals, outside the chain of distribution, who may be injured by the goods.

Revised sections 2-318(a) and 2-319, read together,⁸⁹ would extend Article 2 warranties, if any warranties exist in upstream contracts, to downstream buyers and to those who use or are affected by the goods. If an upstream warranty is breached and personal injuries result, the injured person may enforce the warranty. Revised sections 2-318(b) and 2-319, read together, would even extend some unspecified non-Article 2 warranties to some remote buyers.⁹⁰ The extension of express warranties under Revised section 2-313(d) to remote buyers under section 2-318(b) seems merely to duplicate the former section.⁹¹

The effort reflected in these sections to harmonize products liability law in tort and warranty, laudable in purpose, has not succeeded. After extensive debate on some of these provisions at the Uniform State Laws annual meeting in July 1996, the Drafting Committee announced that it would withdraw

87. One statutory definition of merchantability, fitness “for the ordinary purposes for which goods of that [contract] description are used,” *id.* § 2-314(b)(3), refers literally to certain positive qualities of the performance of goods. However, this definition can easily be read to exclude goods with some kinds of negative quality in the capacity of the goods to cause personal injuries to the individuals who bought them. Merchantability, under Revised section 2-314, draws its meaning from the contract description. *See id.* § 2-314. If a contract describes the dangerous qualities of goods, goods with those qualities would not be unmerchantable. Defect under tort law is not derived from contract description, and therefore some goods that are merchantable may be nonetheless defective.

88. *Id.* § 2-314.

89. Revised section 2-319(c)(4) has the connecting provision. *See id.* § 2-319(c)(4).

90. Without more knowledge of the source and nature of the warranty that is extended by this provision, one cannot know what value it may have to personal injury claimants. A warranty, outside of Article 2, may extend to persons other than buyers. Some pre-UCC common-law warranties did so. Subsection (b) could be read to deprive those nonbuyers of their protection under that body of warranty law.

91. If a warranty, by its terms, extends to a remote buyer, it seems unnecessary, and perhaps confusing, to extend this warranty by statute to a remote buyer.

Revised section 2-319 in its entirety. Problems of disparate sales and warranty law in the field of products liability remain to be resolved.

II. NEW PROPOSALS FOR THE DRAFT

Dissatisfaction with the July 1996 draft's provisions on manufacturers' warranties challenges any responsible critic to propose alternative provisions that may be satisfactory. In this part, I put forward a number of proposals for codification of parts of the law of manufacturers' warranties that seem to be better than those in the July draft and that, at a minimum, may be helpful in further efforts to forge an acceptable draft.

The proposals address four distinct sets of statutory subjects: manufacturers' express and implied warranties of quality extended to remote consumer buyers, pass-through of upstream warranties to downstream consumer buyers, extension of manufacturers' warranties to cover economic losses of persons not in the distribution chain, and products liability under Article 2 for injuries to person or damage to property. The first three sets of proposals are concerned primarily with the economic value of goods and the economic losses that may result if the goods do not conform to manufacturers' obligations or the manufacturers fail to perform promises to repair or replace goods that are nonconforming. The fourth set is concerned with the statutory framework for warranty-based claims that goods were the cause of personal injuries or property damage.

The difficulties in the first three areas are, for the most part, typical of the technical problem that faces any legislative drafter: to find language that says clearly what the legislator intends and to find language that does not produce unintended and harmful consequences. The Uniform State Laws Conference has a proud tradition of excellence in the demanding task of legislative drafting. The special challenge for the subjects considered here is to draft legislation on matters, now under the common law, that are contiguous to similar matters that have been codified for many years. Faced with this legislative situation, drafters are prone to extrapolate from the base of existing statutory law when writing provisions for the new area. There are advantages to avoiding seams in the statutory fabric. If, however, there are significant differences between the old and the new areas, those differences should be taken into account in the laws that govern the separate spheres.

Products liability is a field riven with fundamental policy disagreements. The demands of legislating well in such areas go far beyond deploying high level legal craftsmanship. The institutions and the process of writing and

promulgating uniform state laws, whether the Uniform Commercial Code or other uniform laws, are not well-suited to resolving basic political questions.⁹² The American Law Institute is nearing completion of a major project to improve the content of products liability law in a new edition of the *Restatement of Torts*,⁹³ which is intended to influence the course of common-law judicial decisions, not through revision of Article 2. Leaders of the Institute have expressed the hope that Article 2, as revised, will not be substantively inconsistent with the Restatement on the matters addressed therein.

A. Manufacturers' Warranties to Remote Buyers

1. Express Warranties

The proposal in this segment is to add two sections to Article 2 that deal only with manufacturers' express warranties to remote buyers, differentiated from Article 2 sections on sellers' express warranties to their immediate buyers, on the premise that warranties made outside contracts of sale are noncontractual or, if thought of as contractual, are a sui generis kind of unilateral contract. One proposed section deals with the common formal warranties that manufacturers, for much of this century, have been extending to remote, retail buyers. The second proposed section deals with warranties that may arise out of descriptions of goods in manufacturers' advertisements and promotional literature disseminated to the public.

SECTION 313A. WARRANTIES OTHER THAN AS PART OF AGREEMENTS OF SALE.

(a) If a seller makes an affirmation of fact that describes or relates to goods or a promise

92. Recent writings on the institutions and the process of formulating proposed uniform state laws, correctly observe that the Uniform State Laws Conference and the American Law Institute, joint sponsors of the Uniform Commercial Code, cannot claim the legitimacy of being democratic organizations. Members of the Conference are representatives of state governments, but they are not elected legislators. However, the Conference and the Institute, separately and together, have provided and will continue to provide invaluable service to the public. Their proposed legislative products become positive law only when democratically elected state legislatures enact and governors sign those proposals.

93. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, Mar. 13, 1995).

- (i) on the container or in the label, or
- (ii) in a record, and the seller authorizes the record to be delivered to a remote buyer or lessee, and the record is delivered as authorized in connection with a remote sale or lease,

the seller has an obligation to the remote buyer or lessee that the goods conform to the affirmation of fact and to provide the promised performance, unless the seller who made an affirmation of fact establishes that a reasonable person in the position of the remote buyer or lessee would believe that an affirmation was merely the seller's opinion or commendation of the goods.

(b) An obligation under (a) is breached

- (i) if the goods do not conform to the affirmation of fact, at the time the goods are received by the remote buyer or lessee.
- (ii) if the promised performance is not provided, at the time the performance was due.

(c) An obligation arising under this section is subject only to section 2-318 and 2-703(d) of this Article.

This section deals with the card-in-the-box and warranty-on-the-label/container situations as well as the transaction-type in which a record of a manufacturer's warranty is delivered to a retail buyer in the course of performance of a downstream purchase agreement. These warranties should be enforceable whether or not they are "part of an agreement of sale." This is probably not a controversial point; manufacturers who arrange to have their warranties transmitted to retail buyers with the goods, whether inside the package or on the label or in a separate packet of documents, expect to have those undertakings given legal force.⁹⁴

Some manufacturers' "warranties" not only describe the goods but also undertake to provide repair of goods. This draft treats that kind of undertaking as a promise to be enforced. The statute treats manufacturers' promises as enforceable without regard to the contract requirement of consideration.⁹⁵ The

94. The proposal is limited to upstream sellers' warranties. It does not encompass retailers' warranties and promises, nor third-party warranties and promises sold to consumers by retailers.

95. The common-law requirement of consideration might be met in any event. *See* *Carlill v. Carbolic Smoke Ball Co.*, 1893 Q.B. 256 (Eng. C.A.).

draft also covers other manufacturers' promises, such as a promise to replace nonconforming goods (e.g., Kodak's replacement promise on its boxes of film) or a promise to send a rebate on the price.

This section has two important substantive limitations: The first parallels traditional warranty law in treating manufacturers' general commendations of goods, in nonspecific terms, as other than actionable warranties. The second addresses the issue of the date on which breach of a manufacturer's warranty occurs. The principal legal effect is to fix the time for the limitations period to begin to run.

Subsection (c), though short in words, is long in significance. Article 2 has dozens of interrelated sections on formation, elaboration, performance, breach and enforcement of contracts of sale. These sections were drafted for contracts of sale between sellers and buyers dealing directly with each other. Manufacturers' warranties differ in a fundamental way: they arise outside of contracts of sale, indeed outside of contracts in any bilateral sense. Subsection (c) starts with the premise that, unless specifically determined to be applicable to manufacturers' warranties, Article 2's provisions on sellers' warranties do not apply. This legislative device is intended to compel section-by-section examination to determine whether contract-based provisions should apply to a noncontract setting.

How would the sections on contract formation, drafted for bilateral exchange contracts, fit when applied to manufacturers' warranties? The proposed new section on standard forms with "opportunity to review" as a prerequisite to enforcement of such documents?⁹⁶ The statutory parol evidence rule?⁹⁷ The sections that supply terms omitted from or incompletely articulated in contracts of sale?⁹⁸ The sections on title to the goods?⁹⁹ The sections on "perfect tender," inspection of the goods and payment of the contract price?¹⁰⁰ The sections on acceptance and rejection of goods tendered under contracts of sale?¹⁰¹ The sections on cure?¹⁰² The sections on remedies,

96. July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, §§ 2-206, 2-207.

97. *Id.* § 2-202. For an example of a court applying the parol evidence rule to a manufacturer's label-on-the-can warranty, see *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 291 (4th Cir. 1982).

98. *See, e.g.*, July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-303; *id.* § 2-305 (absence of place of delivery); *id.* § 2-306 (time for performance).

99. *See, e.g., id.* § 2-401 (passing of title); *id.* § 2-204 (power to transfer title).

100. *See, e.g., id.* § 2-603 (perfect tender); *id.* § 2-513 (buyer's right to inspect goods); *id.* § 2-571 (buyer's tender of payment); *id.* § 2-512 (buyer's payment before inspection).

101. *See, e.g., id.* § 2-205 (offer and acceptance); *id.* § 2-208 (electronic formation).

102. *See, e.g., id.* § 2-504 (maintenance and repair); *id.* § 2-610 (cure).

including agreed remedies and incidental and consequential damages?¹⁰³ Few, if any, of these sections could reasonably be applied, as written, to manufacturers' warranties.

The better legislative solution may be to leave matters such as these, to the extent that they arise from the situation of manufacturers' warranties, for determination by the courts on a case-by-case basis. That was the primary purpose of subsection (c). The exceptions in the proposal refer to two parts of Revised Article 2 that seemed to be appropriate to manufacturers' warranties. These concern the remedies of retail buyers and the right of persons other than retail buyers to recover against manufacturers for economic loss. These two matters are discussed below.¹⁰⁴

SECTION 2-313B. WARRANTY OBLIGATIONS ARISING FROM COMMUNICATIONS TO THE PUBLIC.

(a) If a seller

(i) makes an affirmation of fact that relates to or describes new goods or a promise in a medium for communication to the public, including advertising, and

(ii) a buyer or lessee, with knowledge of the affirmation of fact or promise, purchases the new goods from a seller or lessor in the distributive chain,

the seller has an obligation to the buyer or lessee that the goods conform to the affirmation of fact and to provide the promised performance, unless the seller who made an affirmation of fact establishes that a reasonable person in the position of the buyer or lessee would believe that an affirmation was merely the seller's opinion or commendation of the goods.

(b) An obligation under (a) is breached

(i) if the goods do not conform to the affirmation of fact, at the time the goods are received by the buyer or lessee.

103. See *id.* §§ 701-728.

104. The discussion of retail buyers' remedies is discussed in subpart 3, *infra*. Economic losses of other persons is addressed in Part II.C, *infra*.

(ii) if the promised performance is not provided, at the time the performance was due.

(c) An obligation arising under this section is subject only to section 2-318 and 2-703(d) of this Article.

The optimal treatment of obligations arising from advertisements may be to leave the subject to common law (including section 402 B of the *Restatement of Torts*¹⁰⁵) and to administrative law (e.g., Federal Trade Commission Act¹⁰⁶). The counterarguments are that section 402 B does not cover economic loss, that administrative law does not provide compensation for aggrieved consumers, and that some courts, faced in the past with claims of breach of warranties in advertisements, have looked to Article 2, which therefore should be revised to add provisions appropriate to the subject.

As with proposed section 2-313A, this draft adds substantive limitations not in the current draft. The non-enforcement of “puffing” statements in advertisements is an issue of major concern to the advertising community. Here, too, a means is provided for determining the date on which breach occurs.

Professor Donald Clifford, among others, calls attention to the asymmetry of this warranty’s protecting only buyers with knowledge of the advertisement when there is no such limitation in the card-in-the-box type of warranty.¹⁰⁷ It has been suggested that any buyers within the group to which advertising had been directed should be able to enforce warranties made in the advertisements.

If a knowledge requirement is retained, an array of interpretive problems can be foreseen: If a buyer had seen or heard a manufacturer’s advertisement, but had no conscious awareness or recall of that advertisement when entering

105. RESTATEMENT (SECOND) OF TORTS § 402B (1965). Section 402B provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

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

Id.

106. 15 U.S.C. § 41-77 (1994).

107. See Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413 (1997).

into a retail transaction, is the buyer protected? If a buyer is influenced to select certain goods by another person who had seen or heard an advertisement, is this indirect knowledge imputed to the buyer so as to meet the requirement? The draft does not give anyone any assistance in finding answers to such questions.¹⁰⁸

The proposals described above were submitted to the Drafting Committee before its meeting in September 1996.¹⁰⁹ The Drafting Committee adopted, with modifications, most of subsections (a) and (b) of these proposals.¹¹⁰ The Drafting Committee concluded that no allocation of the burden of proof should be made in the text of either section, although a comment might be appropriate.¹¹¹ Elimination of the knowledge requirement for advertisement warranties was discussed, but no decision was made.

The Drafting Committee did not accept the limiting provision that advertisement warranties should extend only to buyers of new goods. In suggesting this limitation, I was influenced by the reality that almost all of the goods which are advertised by manufacturers are goods coming to the market as new goods. Manufacturers' advertisements do not, typically, describe the quality of second-hand goods. Occasionally, however, some manufacturers of "big ticket" items do make claims with regard to goods that have been in the consumer market for some time. General Motors, from time to time, makes advertising claims for the quality of its used cars, sometimes described as "previously owned" vehicles, when sold by GM's authorized new car dealers. Volvo has advertised claims as to the durability of its cars, specifically referring to the percentage still on the roads in Sweden after a long period. These advertisements could be read to influence the second-hand market. Better drafting of the limiting provision would be based on identification of the goods that are the subjects of advertisements, whether new or "previously owned."

108. Another question not addressed in the draft is the effective life of advertisements as sources of warranty obligations. Concern has been expressed that a buyer's recollection of past advertisements, perhaps regarding a product that is no longer offered for sale, may linger and be applied to an item purchased some time after the advertisement has been withdrawn.

109. In formulating the proposals, I received helpful comments from Professors Amy Boss, Donald Clifford, and William Henning. None of them is responsible for the proposals submitted.

110. Accounts of the meeting are drawn from notes prepared by Professor Donald Clifford and by Professor Linda Rusch.

111. The Drafting Committee decided to add a provision, in both sections, dealing with warranties created by a manufacturer's use of a sample or model. *See* Draft, Uniform Commercial Code Revised Article 2—Sales § 2-404(a), (b) (Nat'l Conference of Comm'rs on Unif. State laws, Jan. 24, 1997), available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997).

The Drafting Committee did not approve proposed subsection (c) for either section. The two parts of Article 2 that would be applicable to manufacturers' warranties, under subsection (c), concern retail buyers' remedies and the right of persons other than retail buyers to recover against manufacturers for economic loss. These specific matters are discussed below.¹¹²

2. *Implied Warranties*

Neither current Article 2 nor the July draft of the revision of the Article provide that all manufacturers, or component suppliers, give an implied warranty of merchantability to retail buyers. Generally, the decision not to provide a statutory warranty of merchantability for manufacturers or components suppliers is sound.¹¹³ We will come back, in a moment, to an idea that the express warranties that some manufacturers have elected to give buyers may carry an implication of quality that goes beyond the expressed terms. Before that, however, it is helpful to rehearse the inapplicability of the familiar statutory implied warranty of merchantability framework to a manufacturer's obligation to retail buyers.

Merchantability, as an implied-in-fact warranty of quality under Article 2, is now defined, coherently, within the context of ordinary direct contractual sales agreements. Multiple definitions of merchantability in Revised section 2-314(b) all derive from other terms of the sales agreement or the contract description of the goods in transactions between parties dealing with each other. Manufacturers, components suppliers and other upstream sellers do not have that kind of contractual relationship with downstream consumer buyers; these remote parties do not have the contractual context from which to construct an implication in fact of the quality of the goods. Commonly, purchasers of consumer goods have no idea what firms manufactured or assembled the goods or what firms supplied components. Even "big ticket"

112. The discussion of retail buyers' remedies is in subpart 3, *infra*. Economic losses of other persons is addressed in Part II.C, *infra*.

113. There is not a sufficient consensus to support a legislative solution. Professor Richard Speidel and I have published quite different views of this general question. Compare Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void*, 67 B.U. L. REV. 9 (1987), with REITZ, *supra* note 26, § 8.03. The PEB Study Group that preceded this drafting committee was divided and made no recommendation. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT (Dec. 1, 1992).

items may be identified to the consumers only by the retailers' "store-brands."

However, many manufacturers and components suppliers describe their goods or make promises about the goods that are transmitted to potential consumer buyers. (These are the express warranties discussed under proposed Revised sections 2-313A and 2-313B.) Revised Article 2 could provide that a manufacturer's or component supplier's express description of the goods, communicated to a retail buyer, also conveys an implication that the goods are fit for the ordinary purposes for which goods of that description are used. This implication could be attached to the proposed drafts of sections on manufacturers' express warranty obligations, perhaps by adding the italicized clause below to sections 2-313A and 2-313B:

(b) An obligation under (a) is breached

(i) if the goods do not conform to the affirmation of fact *or are not fit for the ordinary purposes for which goods of that description are used*, at the time the goods are received by the remote buyer or lessee.

If an implied fitness-for-ordinary-purpose warranty were attached to manufacturers' express warranties to retail buyers, then Article 2 would correspond, to some degree at least, to provisions on manufacturers' implied warranties in the Magnuson-Moss Warranty Act. Manufacturers' express warranties, if the warranties are "written warranties" under that Act, trigger a provision declaring that implied warranties cannot be disclaimed.¹¹⁴ The federal Act's prohibition is meaningful as to manufacturers only if there are manufacturers' implied warranties under state law.¹¹⁵ The proposed revision of Article 2 supplies the federal act with a reference point with regard to manufacturers' implied warranties.

The manufacturers' implied fitness-for-ordinary-purpose warranty in this proposal would not be not limited to manufacturers' express warranties that are "written warranties" within the scope of the Magnuson-Moss Act. Many, perhaps most, warranties of description would not be Magnuson-Moss "written warranties." The implied warranty, under the proposal, arises from a manufacturer's act of describing the goods. Any description of the goods, made by a manufacturer to retail buyers, would carry the implied obligation.

The purpose for adding this implied warranty is to give fuller meaning to

114. 15 U.S.C. § 2308(a) (1994).

115. See 16 C.F.R. § 700.4 (1996) (defining which parties "actually mak[e]" written warranties).

express warranties made by manufacturers in order to protect retail buyers against economic losses that may result from nonconformity of the goods. The United States Convention on Contracts for International Sales (“CISG”) provides that “goods do not conform with the contract unless they . . . (a) are fit for the purposes for which goods of the same description would ordinarily be used.”¹¹⁶ CISG does not refer to this elaboration of contract description as an implied warranty or as separate from an express warranty,¹¹⁷ but rather incorporates the idea of fitness-for-ordinary-purpose into the general concept of a seller’s obligation to provide goods which are of the quality required by the contract.¹¹⁸

This proposal is not intended to speak broadly to manufacturers’ implied warranties as the basis for personal injury and property damage claims, the general matter of products liability. The relationship between products liability law and Article 2 is discussed in Part II.D below.

If a fitness-for-ordinary-purpose warranty is codified as an elaboration of manufacturers’ express warranties in Revised Article 2, the question of “disclaimers” is presented. May the statutory implication be negated, and if so, how? In the context of contracts of sale, we are accustomed to think of disclaimers as possible terms of those contracts. Current Article 2 contains rules, and the July draft contains proposed new rules on the manner of sellers’ contracting out of implied warranties to their immediate buyers.¹¹⁹ Contract-assent rules make no sense in the context of manufacturers’ warranties to retail buyers. In light of that, it is better not to use the word “disclaimer,” with all its connotative baggage, in connection with the possible negation of the fitness-for-purpose warranty by manufacturers.

The primary issue is likely to come down to this: if manufacturers’ communications to retail buyers, which are the basis for those buyers’ claims of express warranties, contain language that negates a fitness-for-purpose

116. United Nations Convention on Contracts for the International Sale of Goods, art. 35(2)(a), effective Jan. 1, 1988 [hereinafter CISG].

117. CISG does not use the word “warranty” in any respect.

118. While CISG does not apply to sales of goods bought for personal, family or household use, CISG art. 2(a), the Convention’s conceptual structure unifies sellers’ quality obligations and is a useful reminder that the familiar division of warranties of quality into three separate parts is not necessary.

119. U.C.C. § 2-316(2)-(3) (1995); July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-316(b)-(d). The content of the revision of this section is a difficult matter on which no consensus has yet emerged. The controversy over the revision, in the context of retail sellers and their immediate buyers, centers on the way that those contracts are formed. The July draft suggests that some special form of consumer assent may be required. See July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-316(b)-(d).

obligation, is juxtaposition of affirmations and negations sufficient to make the latter effective? Manufacturers' express warranties, as proposed in Revised sections 2-313A and 2-313B, are created without regard to retail buyers' assent; these express warranties arise from the unilateral acts of the warrantors. Invocation of the historic principle that warrantors are the master of their warranties would lead to the conclusion that manufacturers could, by so declaring, negate an implication of a fitness-for-purpose warranty.¹²⁰ Current practice suggests that many manufacturers may prefer an obligation that is phrased in terms of free-from-defect-in-materials-and-workmanship to a fitness-for-purpose obligation.

If the legislative policy judgment is made to allow manufacturers to negate a fitness-for-purpose obligation as a necessary corollary to all express warranties, a subordinate question arises as to whether this is practicable. Express warranties in the box or on the container or in documents delivered to retail buyers are in a form that readily permits manufacturers to include additional language of negation.¹²¹ Other express warranties, the kind that may be created from manufacturers' advertisements and communications to the public, are not in a form that permits meaningful negation of a fitness-for-purpose obligation. This difference might justify a decision to attach the fitness-for-purpose implication to warranties under Revised section 2-313A, but not to warranties under section 2-313B.

The Drafting Committee, at its September 1996 meeting, took no definitive action on the proposal of an implied warranty as a corollary to manufacturers' express warranties.¹²²

120. This does not pretermit the issues of interpretation that arise in the search for the meaning of any text. In the context of sellers' contract disclaimers of the implied warranty of merchantability, disclaimer language that merely "mentions merchantability" as the content of the disclaimed warranty has been treated as not only necessary, see U.C.C. § 2-316(2) (1995), but as sufficient to bind buyers of consumer goods. My intuition is that very few consumer buyers understand what "merchantability" means. Empirical research would be useful. An ordinary rule of interpretation for contracts is that language should be construed to have the meaning that a reasonable person in the position of the reader/hearer would give to it. That rule would throw into doubt the effectiveness, at least in sales of consumer goods, of warranty disclaimers that track statutory phrasing.

121. For a case that upheld a manufacturer's disclaimer of an implied warranty of merchantability by a statement on the label of the container, see *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993) (manufacturer's seed sold by a dealer to a farmer). See also *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287 (4th Cir. 1982).

122. Professor Clifford's and Professor Rusch's notes do not refer to any action on the proposal by the Drafting Committee, although it does appear to have been discussed.

3. *Remedies for Manufacturers' Breach of Warranty*

These proposals for codification of the law of manufacturers' warranties to remote buyers do not contain provisions for the measure of damages or other remedies in the event of manufacturers' breach of warranty, express or implied. Subsection (c), if approved, would have the effect of bypassing Article 2's statutory remedies for breach of these warranties, thereby giving rise to two related questions. First, are statutory remedies provisions, specifically designed for breach of manufacturers' warranties, a necessary part of the codification of the law of such warranties? And second, can remedies be fashioned by the courts for breach of statutorily defined warranties? This appears to be both feasible and practical.

Ordinary principles of common law may suffice to determine the remedies for breach of manufacturers' warranties to remote buyers. Revised section 2-703(d) already provides that Article 2 does not impair a remedy for breach of any obligation or promise collateral or ancillary to a contract for sale. The general expectation principle, expressed in section 1-106,¹²³ may also be invoked.

Under ordinary common-law expectation principles, the remedy for breach of a manufacturer's rebate promise would be the amount of the rebate. The remedy for breach of a repair or replacement promise would be the reasonable cost of obtaining the promised performance from another provider. The remedy for breach of manufacturers' warranties in the form of descriptions of the goods would be measured by the value of conforming goods; this parallels the remedy against immediate sellers in Revised section 2-727, but "acceptance" of goods, an element of that section, refers to the performance stage of sales contracts and is not germane to manufacturers' obligations, which are ancillary to those sales contracts.

It is incoherent to use "revocation of acceptance" in connection with remedies for breach of a manufacturer's warranty to a remote buyer. Without regard to acceptance and revocation of acceptance, however, there may well be breaches of manufacturers' warranties that, under common-law remedial principles, justify a measure of damages that includes the full amount of the retail price paid. The right to this remedy in an action against a manufacturer does not need to be associated with the notion of "revocation of acceptance."

May manufacturers who extend warranties to consumer buyers exclude

123. U.C.C. § 1-106 (1995).

liability for consequential damages? The policy question here closely parallels the question of negation of warranties. The same answer seems to apply, although the pattern of remedial law, posited above, is entirely outside Article 2. Presumably, under common law, manufacturers may exclude liability for consequential economic losses if the language of exclusion of remedies is juxtaposed with the language of affirmation that shapes the manufacturers' obligations with regard to the quality of goods.¹²⁴ Nothing needs to be added to Article 2 for this purpose.¹²⁵

An issue regarding one type of consequential damages deserves additional consideration. Consumer buyers of "big ticket" items frequently borrow a substantial part of the purchase price of the goods. If goods are nonconforming, continuation of a buyer's obligation to repay the full amount of the loan exacerbates the buyer's economic loss. Expenses incurred to unwind or adjust loan agreements may well be severe consequences of some manufacturers' breaches of warranty.

As against sellers, buyers in this situation would be entitled to offset the unpaid price against damages owed by the sellers.¹²⁶ The Federal Trade Commission's Rule on Preservation of Consumers' Claims and Defenses¹²⁷ ("FTC Rule") would extend buyers' power to set off to lenders if the retail transactions involved both the sale of goods and extension of credit and the sellers thereafter assigned the debts to lenders.¹²⁸ The statutory power to set off, extended by the FTC Rule, would be useful only if buyers' claims with respect to the goods are claims against sellers. In sales of "big ticket" items where the only warranties of quality are those made by the manufacturers, there is no claim against the retail sellers and no right to set off against them. Therefore, the extension of the FTC Rule to lenders is of no benefit to

124. For cases that upheld manufacturers' exclusion of liability for consequential damages by means of a statement on the label of the container, see *Martin Rispens*, 621 N.E.2d 1078 and *BASF Wyandotte*, 696 F.2d 287.

125. The Magnuson-Moss Warranty Act, in its scheme for manufacturers' warranties, allows manufacturers to exclude responsibility for consequential damages. See REITZ, *supra* note 26, at 104. The Magnuson-Moss Act regulates the manner of exclusion of responsibility for consequential damages if a manufacturer elects to give a "full warranty." See 15 U.S.C. § 2302 (1994). To the extent that manufacturers might seek to exclude liability for personal injury or property damage, they would act in the shadow of manufacturers' potential liability in tort for such harms, liability that, under principles of tort law, cannot be excluded by contract.

126. U.C.C. § 2-717 (1995).

127. 16 C.F.R. § 433.2 (1996).

128. *Id.* The FTC rule also reaches direct loans to consumers by lenders if sellers refer consumers to the lenders or if the sellers are affiliated with the lenders by common control, contract, or business relationship. *Id.*

consumers.

For breaches of manufacturers' warranties, consumers have no ability to offset the balance of the retail price due. A consumer's obligation to pay the retail price does not run to a manufacturer. Typically, there is no contractual connection between manufacturers and the consumer credit providers in the arrangements made as part of retail transactions. The FTC Rule does not subject independent lenders to consumers' claims against manufacturers.¹²⁹ The Article 2 self-help setoff remedy is unavailable to consumers aggrieved by manufacturers' breaches of warranty.¹³⁰ This may justify further consideration, in some legislative or rulemaking form, of manufacturers' exclusion of liability for this kind of consumers' consequential damages. It may be a matter that could be addressed in Revised Article 2.

The Drafting Committee, at its September 1996 meeting, discussed the remedies appropriate to breach of manufacturers' warranties, but apparently made no definitive decisions on whether to add provisions on remedies to the draft and, if so, what should be the content of such provisions. As mentioned, the Drafting Committee did not approve proposed subsection (c), one part of which would refer remedial matters to common law.

B. Pass-Through to Remote Buyers of Manufacturers' Warranties to Their Immediate Buyers

The matters discussed in the previous part concern manufacturers' express and implied warranties that come directly to remote buyers, outside of the chain of contracts that move goods from factory to market. Another, quite different form of warranty protection for retail buyers arises if manufacturers' warranties to their immediate buyers are passed through the distribution chain to retail buyers. The theory would be akin to recognizing "warranties that run with the goods." A novel and interesting provision for pass-through of upstream warranties was included in the July draft,¹³¹ but that draft needs further consideration. The following proposal builds on the July draft, but adds a number of refinements to the idea of pass-through warranties.

129. See REITZ, *supra* note 26, at 214-16. The legal gap between the channels for supply of consumer goods and supply of consumer credit does not close, even when the manufacturer of the goods and the credit supplier are sibling corporations under a common parent. *Cf.* Block v. Ford Motor Credit Co., 286 A.2d 228 (D.C. 1972).

130. See U.C.C. § 2-717 (1995) (buyer's setoff remedy).

131. July 1996 Annual Meeting Draft, Art. 2, *supra* note 2, § 2-318(a).

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

(a) Except as provided in (b), a seller's express or implied warranty extends to any subsequent purchaser of the goods. The seller's obligation as extended by this subsection shall be determined by and shall not exceed the enforceable terms of the original warranty.

(b) A seller's warranty is not extended under this section

(i) if the seller's warranty, by its terms, is limited to a designated purchaser;

(ii) if, in the subsequent purchase transaction, the description of the goods in that purchase is inconsistent with the description of the goods in the seller's warranty; or

(iii) if the warranty terms in the subsequent purchase transaction are inconsistent with the terms of the seller's warranty.

This proposal narrows the scope of these two subsections to pass-through of warranties to retail buyers, persons who have an economic stake in the value of the goods and in the economic uses to which the goods can be put. The July draft of these subsections combined pass-through of upstream warranties through the distribution chain with a different matter, the extension of warranties beyond the chain of distribution to nonbuyers. For a number of reasons to be discussed, it is important to unbundle those two issues. The proposal above does not turn the corner from vertical to horizontal privity. That is a matter to which I return in Part II.C below.

The proposal has limiting terms not in the July draft: A downstream purchaser does not have a claim against an upstream seller if the goods are sold downstream under a contract description that is inconsistent with the description in the upstream sale. A downstream purchaser who elects to take the goods from its seller with a different warranty that is inconsistent with an upstream warranty does not receive the benefit of the upstream seller's warranty. A seller is able to make its warranty to its immediate buyer non-extendable under this section, i.e., for the benefit of the immediate buyer or first consumer buyer only.

The Drafting Committee, at its September 1996 meeting, was closely divided on the proposal in (b)(i) that would allow a seller to limit pass-through of a warranty made to its immediate buyer. The outcome on that matter is uncertain. The committee endorsed (b)(ii) in principle. The issue in

(b)(iii) may not have been discussed.

C. Manufacturers' Warranties and Economic Losses of Persons Not in the Distribution Chain

To this point, the focus has been on the matter of manufacturers' warranties to retail buyers, the persons who pay the retail price for consumer goods and who, therefore, have a considerable interest in having goods whose value-in-use is commensurate with the money they have given in exchange. Now, however, the focus widens slightly, to take into consideration the economic interest of persons, other than retail buyers, who have a personal stake in the economic value of the goods or who suffer economic losses if goods do not conform to warranty. We are not yet ready to consider the much broader, and much more important, topic of manufacturers' products liability to those, other than retail buyers, who suffer personal injuries or property damage. The subject here is still only economic loss, but economic loss incurred by someone other than the retail buyer. The issue is one aspect of what is often called horizontal privity.

Current Article 2 is essentially silent on this subject. Section 2-318, the only provision on horizontal privity, has three alternatives, but Alternatives A and B deal only with personal injuries. Alternative C extends to any kind of loss, including therefore economic loss, but few states have selected this alternative.

Section 2-318, unfortunately, has blinded some courts to the merit of claims of nonbuyers for protection from manufacturers' breach of warranty. *Johnson v. General Motors Corp.*¹³² illustrates this proposition. On November 7, 1977, General Motors gave a warranty to the retail purchaser of a new Buick Regal. Less than a year later, the buyer died and title to the car passed to his widow. Early in 1981, before the statute of limitations had expired, the widow experienced transmission trouble and sought to enforce the warranty.¹³³ The Pennsylvania Superior Court held that her claim of economic loss could not be enforced against General Motors because she was neither an assignee of the warranty given to her husband nor a personal injury claimant under the Pennsylvania version (Alternative A) of section 2-318.¹³⁴

132. 502 A.2d 1317 (Pa. Super. Ct. 1986). *But see* REM Coal Co. v. Clark Equip. Co., 563 A.2d 128 (Pa. Super. Ct. 1986).

133. *Johnson*, 502 A.2d at 1317-18.

134. *Id.* at 1318-22.

Section 2-318 was not intended to displace ordinary law that recognizes the contract rights of third-party beneficiaries and assignees. Consumer goods are bought commonly for the economic benefit of a family member of the buyer, whether as a gift or in a form of shared ownership. The economic interests of those persons are certainly entitled to legal protection. Consumer goods, after a period of initial use by the retail buyer, may be sold to another consumer. Transfer by purchase to a second owner should be deemed to entail an assignment of the warranty rights of the retail buyer, even if there is no explicit use of the language of assignment. This is closely analogous to the idea of pass-through of upstream warranties to retail buyers.

Section 2-318 was not intended to undermine laws that involve property transfers by operation of law. The widow of the buyer of the Buick became the owner of the vehicle under the law of decedents' estates. Such transfers should convey to the transferees all of the unexpired warranty rights of the transferors.

Legislation to meet these objectives could be drafted as additional positive law under Article 2, but the need may be met with less effort through a simple declaration, added to the text of Article 2, to the effect that nothing in the Article should be read to supersede the effectiveness of the laws regarding assignment, third-party beneficiaries, or transfers by operation of law. While a statement to that effect now exists in the comment to section 2-318 it seems to have been an insufficient signal to some courts, like the *Johnson* court, that other law applies. My proposal was a subsection (c) for Revised section 2-318:

(c) This section is intended to supplement and not displace rights and remedies of third party beneficiaries and assignees under the law of contracts of persons to whom goods are transferred by operation of law.

The Drafting Committee, at its September 1996 meeting, discussed this proposal. Some of the discussion may have blended the proposal with concern for products liability protection of persons other than retail buyers. The Drafting Committee did not make any definitive decisions.

D. Article 2 and Products Liability: Recovery for Breach of Manufacturers' Warranties

Sales law under Article 2 and the law of products liability, according to their fundamental purposes, have different spheres of application. Products

liability law is broadly concerned with all individuals who suffer personal injuries that are causally related to defective goods. The focus of Article 2 is on sales of goods to buyers, some of whom may suffer personal injuries that are consequential damages resulting from sellers' breach of warranty. Both have concerns for personal injuries, but each, in its primary sphere, can be applied independently of the other. Sales law and products liability law overlap in those situations where injured buyers have claims for relief under both bodies of law, one claim sounding in contract for breach of warranty and another claim in tort for sale of defective goods.

The main problem of concern is not the few cases of buyers with alternative causes of action. A much broader issue is posed when sales law extends beyond the interests of buyers. Sales law is not strictly limited to the legal relationship of sellers and buyers. Along the axis of what is called horizontal privity, sellers may be deemed to have liability to many persons who are not buyers. Individuals on the so-called axis of horizontal privity are unlikely to have an economic stake in the value of the goods. Their primary interest in sellers' liability would be to obtain compensation for personal injuries that are related to goods that were sold by those sellers to someone else. A fundamental legislative question for Revised Article 2 is to determine what individuals, other than buyers of goods, may seek to recover for personal injuries on the ground that the goods did not conform to sellers' warranties.

If the horizontal axis of Article 2 were extended to include everyone who suffers such personal injuries, the universe of potential claimants under sales law would be coextensive with the universe of potential claimants under the law of products liability. Any products liability claimant would have an alternative claim for breach of warranty. The legislative question, therefore, is how far to expand Article 2 toward complete overlap of the two spheres of law. I conclude that only a small overlap of Article 2 and products liability law is necessary and wise.

1. How This Issue Arises: A Look Back

Early development of products liability law, sellers' and manufacturers' responsibility for personal injuries and property damage caused by defective products, used a vague concept of warranty as the basis of the obligation. This occurred during the period when the statutory law of sales in most states was

based on the Uniform Sales Act, although the development was not grounded in the text of that Act.¹³⁵

Products liability law required two significant legal moves, neither of which was contemplated by the Sales Act: holding manufacturers directly accountable to retail buyers for defects in some consumer goods and allowing nonbuyers to recover. Courts ruled that manufacturers of certain kinds of goods, goods that people ate, drank, or applied to their bodies, made implied-in-law warranties to retail buyers that the goods were safe to consume. Courts also allowed some nonbuyers to enforce these implied-in-law warranties. Decisions of this kind were collected by Professor Prosser in his 1960 article and used by him as the justification for the new, strict tort.¹³⁶

When Article 2 was formulated, the drafters stayed within the essentially 19th century framework of the Uniform Sales Act. The prototype transaction was a contract of sale between a seller and a buyer. The drafters of Article 2 did not attempt to codify the case law that had found warranty obligations running to consumer buyers from the manufacturers of food, beverages, and related products. The drafters did, however, incorporate into the original Article 2 a provision that allowed certain nonbuyer personal injury claimants to recover from sellers on the ground of breach of warranty, presumably for breach of the warranties codified by the Code.

Section 2-318, as initially promulgated, extended the right to relief for personal injuries to members of the retail buyer's family or household and to houseguests of the buyer. The section was plainly grounded in the idea of third-party beneficiaries, individuals for whom buyers could be expected to have special concern. Section 2-318 expanded the zone of warranty obligation to encompass those individuals without regard for whether or not sellers had agreed to this extension. Statutory treatment displaced traditional

135. To the extent that the Uniform Sales Act was applied to products liability cases, it presented doctrinal difficulties to claimants. One example was the warranty of merchantability, which, under that Act, was made only if goods were sold "by description." UNIF. SALES ACT § 14 (1908). Although undefined by the Sales Act, merchantability was the most likely statutory peg on which to hang claims that injury-causing goods did not conform to sellers' warranty obligations. Transactions for the sale of consumer goods, at retail, commonly involved present goods. Such buyers could not claim breach of warranty of merchantability. Faced with this limited warranty, some courts construed the concept of "particular purpose" in the statutory warranty of fitness for particular purpose to mean "ordinary purpose." *See, e.g.,* Ward v. Great Atl. & Pac. Tea Co., 120 N.E. 225 (Mass. 1918). Since the particular-purpose warranty was not restricted to sales by description, this construction allowed buyers of present goods to recover.

136. *See* Prosser, *supra* note 45. The Uniform Sales Act was never amended to provide either for manufacturers' warranties to retail buyers or for personal injury claims of nonbuyers.

third-party-beneficiary law, which required sellers' (at least) tacit consent to the creation of beneficiary status. The statute dispensed with any need to show sellers' acquiescence in extending protection to persons closely affiliated with buyers.

Section 2-318 did not refer, even obliquely, to liability of manufacturers or other upstream sellers. That part of case law was mentioned in a comment, but its further development was left entirely in the hands of the courts.

Several years later, alternative versions of section 2-318 were promulgated, versions which expanded the horizontal axis of Article 2 to virtually anyone who had a personal injury claim. The statutory phrase used, in what became Alternatives B and C, was any person "who may reasonably be expected to use, consume or be affected by the goods."¹³⁷ The foreseeable set of users and consumers of goods is tied, to some degree, to the actual buyers. Users and consumers of goods do so with the consent of the owners; those expected to be users and consumers would be related in some way to buyers. The "affected by" phrase, however, is essentially boundless. Injury is, undoubtedly, an "effect." The persons affected may be persons unrelated to, or not even known by the buyers. It is reasonable to expect that strangers to buyers, mere bystanders when the goods are being used by others, may be "affected by" the goods. The universe of individuals defined by the "affected by" phrase is the same as the universe of individuals who can proceed under the strict tort.

When adding Alternatives B and C to section 2-318, the drafters did not propose to revise Article 2 so as to include any provision that declared or recognized manufacturers' warranties to retail buyers, much less to the broader classes of persons who use, consume or are affected by goods. The language of liability remained focused on retail sellers. The extended horizontal axis applied to breach of warranty by those sellers.

These changes in Article 2, while potentially of importance, were a sideshow to the main event, the emergence of the strict tort proposed by Prosser and others over thirty-six years ago. That tort has been recognized as part of the common law in nearly all states. Not only has the tort been recognized as an available ground for relief, it has become the ground preferred by almost all personal injury claimants. As a result tort law cases have eclipsed the potential of warranty-based claims, even by retail buyers of the goods. Given the law in action, there has been no urgency to implement

137. See U.C.C. § 2-318 (1995).

formally the second part of Prosser's manifesto for the law of products liability, "only a tort."

Occasions have arisen, however, when some personal injury claimants, buyers and nonbuyers, have looked for relief in warranty-based claims. Courts have been required to decide whether warranty law, common-law or statutory, is different from products liability law in tort. The question has been posed in various procedural settings, such as the content of jury instructions when both theories have been tried, but the issue has been drawn most sharply when personal injury claimants, having lost on the merits on one of the theories, seek to recover under the other.

Many state courts, faced with such cases, have said that the elements of their versions of the strict tort are essentially the same as the elements of the implied-in-law warranties of earlier times. Some state courts have said that the elements of their versions of the strict tort are essentially the same as the elements of the implied warranty of merchantability in section 2-314. Other state courts have found that the elements of strict tort and warranty do not completely overlap.¹³⁸ The multiplicity of views as to the substance of the strict tort and the differing views as to the substance of manufacturers' warranty obligations found in the cases make it impossible to restate neatly what is "the law" on this matter.

2. *The Restatement of Products Liability*

The American Law Institute ("ALI") is well along toward concluding a project to revise the *Restatement of Torts* with regard to products liability. The *Restatement of Products Liability* is likely to be influential in refining the substance of tort law as determined by state courts. The definition of "defect" in the new restatement is a very significant elaboration on the nature and extent of manufacturers' liability.¹³⁹ The effort to restate, and by restatement to reform, the tort law of products liability is occurring simultaneously with the process of revising Article 2. The new restatement cannot change sales law; nor can the restatement solve issues created by the overlapping of tort and sales law.

Representatives of the American Law Institute have been concerned that

138. The most recent notable example of the latter is the decision of the New York Court of Appeals in *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995).

139. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, Mar. 13, 1995).

the efforts to improve the law of torts can be undermined by the revision of Article 2. The Institute is, together with the Uniform State Laws Conference, a sponsor of the Uniform Commercial Code. The concerns expressed by Institute representatives are, to some extent, well-founded with regard to current Article 2. Those concerns may be exacerbated by changes emerging in the revision of that article.

3. *Revising Article 2*

Given the confused, perhaps confusing, history of products liability law and reflections of that in current Article 2, and given the ongoing activity in the ALI to restate the law of products liability, how should the revision of Article 2 proceed?

One possible answer would be to make no change whatsoever in Article 2 with regard to products liability. The Article could leave manufacturers' obligations for the inherent safety of their products to other law, whether tort law or common law, but, at the same time, continue to offer various alternative provisions for the horizontal axis provisions that extends "sellers'" liability for personal injuries to nonbuyers. Such an inertial response by the drafters could be justified, perhaps, on the ground that compelling reasons for changing the statute have not been advanced. Article 2, which has become only a sideshow with respect to products liability, could be allowed to remain essentially as it is.

However, before the Drafting Committee for Revised Article 2 are proposals, which would, for the first time, codify the law of manufacturers' warranties running directly to retail buyers or passing through the chain of distribution. This codified law of manufacturers' warranties is coupled with other proposals for statutory provisions on horizontal privity in the broadest "affected by" terms. With these changes, Article 2 could become the basis for a greatly revitalized body of sales law on products liability. This newly energized body of sales law would completely overlap the law of torts on the same subject, but would not incorporate any of the refinements that are being considered in the *Restatement of Products Liability*.

Society may not need two different bodies of law for products liability in this broad sense. If tort law is better suited to the field, as many would now contend, then the revisers of Article 2 should take steps to avoid Revised Article 2 becoming a broadly overlapping body of products liability law that is applicable to anyone "affected by" goods.

a. Persons Entitled to Recover in Warranty

An appropriate legislative solution may be to draft Revised Article 2, insofar as personal injuries are concerned, to take account of the injuries only as suffered either by retail buyers or by persons closely affiliated with retail buyers. This would require that the outer limit of the horizontal axis provision be carefully drawn. It could be similar to the current Alternative A version of section 2-318. This would not require elimination of the new, vertical axis of Revised Article 2, which recognizes warranties from some manufacturers (and components suppliers) to retail buyers.

If the scope of Article 2 were drawn with a narrow horizontal axis, tort and contract law would be applied within the spheres appropriate to their fundamental precepts. Defect in tort law, measured by public policy standards of goods that should not be in the marketplace because of the risks the goods pose, would apply to all those who suffer injuries attributable to those defects. Contract law would remain centered on the reasonable expectations of buyers of goods, expectations created by manufacturers' express and implied warranties of quality. Expectations of the quality of goods, derived from sellers' express and implied warranties, are not synonymous with the tort standards of "defective products." If warranties are breached, buyers may incur losses of various kinds, loss of the expected value of the goods, other economic losses, and sometimes consequential damages in the form of personal injury and property damage. Contractual expectations of quality, primarily expectations of buyers, can be extended, consistently with contract precepts, to other individuals, associated with buyers, who have reason to share in the buyers' expectations.

Sound arguments exist that it is not within the necessary or proper mission of Article 2 to provide a warranty-based cause of action for everyone who suffers a personal injury, and that Article 2 should be drawn so as to extend protection through warranty only to warrantees or to persons who have some appropriate nexus to the warrantees.¹⁴⁰ The Drafting Committee is not yet

140. The idea of separating products liability law from Article 2 has found supporters within the Uniform State Laws Conference. Motions have been made at both of the last two annual meetings of the Uniform State Laws Conference that no one should be permitted to recover for personal injuries or property damage under Article 2. The sense of the motions was that liability for personal injuries should be found, if at all, only in tort. The motions, which were defeated on both occasions, were too broad in their reach. They would have had the effect of denying buyers the right to recover for personal injuries that resulted from breach of sellers' express or implied warranties of the safety of their products. By rejecting these motions, the Conference would allow buyers to recover, in warranty-based

ready to accept these arguments. The committee debated the matter at its September 1996 meeting, but no firm conclusions emerged.

b. Warranty Obligation: Content

Insofar as manufacturers' warranties to retail buyers are codified within Article 2, the revision could clarify the meaning of manufacturers' implied warranties by taking into account some of the wisdom that has come out of the preparation of the *Restatement of Products Liability*. The contract principle of protection of expectation might be given useful content with regard to buyers' expectations of safety in the use or consumption of goods through reference to standards of defective goods in tort law. Simply put, buyers can ordinarily expect goods that are not defective by tort standards.¹⁴¹ To the extent that the expectation principle takes account of tort law, a helpful convergence of the two bodies of law may result.

For that purpose, I suggested that a comment might be added to an appropriate place in Revised Article 2. The proposal was for a comment to Revised section 2-314, but the comment might be better located in the comments to sections that deal with manufacturers' liability to remote buyers as well as among the comments in Revised section 2-314. The comment might read:

The obligation that goods be fit for the ordinary purposes for which goods of that description are used is contract-based. The obligation is derived from the description of the goods in a warranty. This obligation is not synonymous with the obligation, in the law of product liability, that goods not be defective. Conforming goods may be defective if the contract description contemplates goods with those

claims, for all harms, economic losses, personal injuries, and property damage, that were the results of sellers' breaches of warranty. Claims for consequential damages would be subject to the familiar limitations on such liability. The motions, as made, were limited to Article 2 and, therefore, did not address manufacturers' liability for personal injuries and property damage.

141. The obligation that goods be fit for the ordinary purposes for which goods of that description are used is contract-based. The obligation is derived from the description of the goods. This obligation is not synonymous with the obligation, in the law of product liability, that goods not be defective under criteria for goods that entail risks unacceptable as a matter of public policy. Conforming goods, that is, goods that meet contract description, may nonetheless be defective. Goods without defect may fail nonetheless to conform to contract description. In many situations, however, the contract expectation and the tort obligation will be substantially similar. In those situations, determinations whether goods are fit for ordinary purposes may be guided by determinations that the goods are or are not defective under product liability law.

qualities. Goods without defect may fail nonetheless to conform to a particular contract description. In many situations, however, the contract and the tort obligations will substantially overlap. In those situations, determinations whether goods are fit for ordinary purpose may be guided by determinations that the goods are or are not defective under product liability law.

The Drafting Committee, at its September 1996 meeting, deferred consideration of this proposal to a future meeting.

c. Other Matters

Once the decision is taken to codify in Article 2 some of the subject of manufacturers' warranties to retail buyers, drafters must decide how extensive the codification must be or should be. My suggestions for Revised sections 2-313A and 2-313B made two related points. One was explicit: Do not characterize manufacturers' warranties to retail buyers as if they were identical to sellers' warranties to their immediate buyers. Provisions in Article 2 designed for contracts of sale should not be adopted wholesale with regard to manufacturers' warranties to retail buyers. Some, but probably only a few, sections of Article 2 would be appropriate to manufacturers' warranties. The larger, implicit point was that Revised sections 2-313A and 2-313B could be free-standing enactments. No other legislation was necessary to permit them to be made effective.

The Drafting Committee did not accept either point at its September meeting.

III. CONCLUSION

Manufacturers' warranties on consumer goods are an important aspect of the marketplace. The law that applies to these warranties is a matter of great concern for both consumers and manufacturers. Although UCC Article 2 does not deal with these warranties, courts, counsel, and commentators have frequently turned to Article 2, rather than to common law, as the governing law. In the process of revising Article 2, proposals to add sections specifically addressing manufacturers' warranties have been brought forward. In this paper, I reviewed the proposals that were included in the July 1996 draft of Revised Article 2 and suggested a number of additional and different provisions. With this background, the basic question returns: Should the Drafting Committee include any of these proposals in its final

recommendations for the text of Revised Article 2?

The fundamental question is whether it is better to try to legislate on the matter of manufacturers' warranties of consumer goods or to leave the matter to common law. Has a persuasive case been made that the common law is inadequate? A partial affirmative answer is that the common law's frequent borrowing of inappropriate rules from Article 2 is indicative of a felt need for legislative answers to these matters. However, the existence of a body of decisions that mistakenly referred to Article 2 is not strong evidence that a need for legislation exists, except perhaps for a more clear declaration of the scope of Article 2 in this regard. A case for dismissing common law as functionally inadequate has not been made.

Manufacturers' warranties of consumer goods are, for the most part, an aspect of the national economy for which having a unified body of law may be an important goal. Common law, at the state level, could be non-uniform. The ideal of uniform state laws, from the inception of the Uniform State Laws Conference, was implemented by means of legislation. Other devices, such as restatements of the law, may lead to less diversity, but they are not so successful in producing uniformity as is general enactment of proposed uniform legislation. There may be a basis for a contention that the law of manufacturers' warranties of consumer goods should be made statutory, not because of inadequacy of common law, but rather to provide uniform legal answers to these matters.¹⁴² If legislation is needed and justified, UCC Article 2 is the plausible site in the Uniform Commercial Code.

A resolution to reject codification of the law governing manufacturers' warranties of consumer goods would have the virtue of placing those warranties within the same body of common law that now governs manufacturers' products liability. The economic loss issues associated with breach of manufacturers' warranties of consumer goods could be one part of that larger body of common law.

UCC Article 2 is a modern reflection of a 19th century movement to codify areas of the common law. The movement sought not to reform the law, but to reduce the principles worked out in case-by-case litigation to black-letter propositions. One of the areas selected for that work was the law of sales. The codification movement flourished for a relatively short time

142. There are notable differences in the common-law answers to some questions. A good example is the disagreement on the situation of manufacturers in buyers' actions to revoke acceptance of goods.

during which only a few areas of commercial law were codified. Large and important commercial transactions were left uncoded. The product of that brief spurt of codification remains with us and tends to be accepted as the natural order of the legal structure. The law of sales of goods is "naturally" statutory, but the law of real estate transactions and the law of sales of services are not.

In the larger scheme of things, putting manufacturers' warranties of consumer goods on the nonstatutory side of the Uniform Commercial Code may be the optimal choice, a decision that serves the interests of consumers and manufacturers better than efforts to codify all or parts of this area of the law into Article 2.

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