

Benevolent Maleficence: How a Well-Intentioned Legislature and a Deferential Court Combined to Stunt the Development of Massachusetts Product Liability Law

Philip E. Cleary

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ABSTRACT

Massachusetts product liability law is unusual. Unlike most states, Massachusetts does not recognize strict tort liability in the product area. Rather, “strict product liability” is limited to breaches of warranty under Article 2 of the Uniform Commercial Code. The Massachusetts legislature amended Article 2 in several ways to provide a “strict liability” remedy that is, in the words of the Massachusetts Supreme Judicial Court, “congruent in nearly all respects with the principles” of strict tort liability. The court has construed the amendments to the UCC as precluding the adoption of strict tort liability in Massachusetts.

In most ways, Massachusetts product liability law is in the mainstream of general American law. There are, however, vestiges of sales law that make that law unusual because of the way it developed. There are also problems of statutory interpretation caused by the engrafting of the concepts of strict tort liability into the contract law of Article 2.

This article explores some of these problems. It argues that, by either judicial or legislative action, “strict product liability” should not be restricted to warranties that arise from a sale or lease. The article also discusses one of the remaining encumbrances of sales law, the requirement that a buyer give notice of a claimed breach of warranty to the seller or be barred from any remedy, and argues that the requirement does not apply to warranty beneficiaries, who are not buyers in privity with the seller, and that, in any event, the legislature should abolish the notice requirement in all warranty cases in which there has been personal injury. The article also discusses some of the problems of statutory interpretation caused by having two statutes of limitation and two notice provisions applicable to warranty claims in Article 2 as a result of the product liability amendments.

AUTHOR

A.B., Boston College; A.M., Harvard University; J.D., Boston College Law School; Associate Dean and Professor of Law, University of Massachusetts School of Law–Dartmouth.

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“Massachusetts codified the Restatement’s definition of strict liability at section 2-318 of the U.C.C. and called it ‘breach of warranty.’”¹

“Not!”²

I. INTRODUCTION

Life, I have often reflected, would have been a whole lot simpler if Massachusetts had simply behaved like a normal state³ and

¹ Hadar v. Concordia Yacht Builders, Inc., 886 F. Supp. 1082, 1096 (S.D.N.Y. 1995).

² WAYNE’S WORLD (Paramount Pictures 1992).

³ An overwhelming majority of states, by statute or judicial decision, have adopted a form of strict tort liability. See 63 AM. JUR. 2D *Products Liability* §§ 506, 530 (West 2013). Some follow the rule of *Greenman v. Yuba Power Prods., Inc.* 377 P.2d 897, 900 (Cal. 1963) (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”). Most states adopted the rule espoused in the *Restatement (Second) of Torts* § 402A (1965), which provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

How “strict” is strict liability? In the case of a manufacturing defect, liability is truly strict. Design defects, however, have presented a much more difficult question, and there is a strong trend, exemplified by the *Restatement (Third) of Torts: Products Liability*, to apply negligence standards to design defects. See generally DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 450 (2d ed. 2011) (providing an overview of these developments); Alex Grant, *The Evolution of Massachusetts Products Liability Law and the Conundrum of Strict Liability*, 33 W. NEW ENG. L. REV. 1 (2011) (discussing these issues under Massachusetts law).

That issue is outside the scope of this article. As used in this article, the expressions “strict tort liability,” “strict product liability,” and the like refer

recognized strict tort liability in the product area.⁴

Massachusetts did not do that, however. Instead, “strict product liability” in Massachusetts is based on the law of warranty.⁵ In most cases, this does not make a bit of difference. A plaintiff injured by a defective product will generally get the same result in Massachusetts as elsewhere, but not always.

simply to a right to recover under the principles of either § 402A of the *Restatement (Second) of Torts* or § 1 of the *Restatement (Third) of Torts: Products Liability* as distinguished from a right to recover for breach of warranty.

Four states, in addition to Massachusetts, do not, strictly speaking, recognize the doctrine.

North Carolina’s Products Liability Act did not adopt strict liability. “There shall be no strict liability in tort in product liability actions.” N.C. GEN STAT. ANN. § 99B-1.1 (2012).

Delaware’s enactment of the UCC has been held to preempt judicial adoption of strict tort liability in cases involving sales of goods. *Cline v. Prowler Inds. of Maryland, Inc.*, 418 A.2d 968, 971 (Del. 1980), but not in a bailment-lease. *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 583–87 (Del. 1976); see *Franchetti v. Intercole Automation, Inc.*, 523 F. Supp. 454, 455–58 (D. Del. 1981) (holding that there is no strict liability for injuries caused by defective product sold before adoption of UCC); *Middlesex Mut. Assur. Co. v. Delaware Elec. Signal Co.*, C.A. No. 07C-12-005 THG, 2008 WL 4216145 (Del. Super. Ct. Sept. 11, 2008) (holding that UCC Art. 2A preempts strict tort liability with respect to leases).

Virginia limits recovery to the implied warranty of merchantability or a tort theory of negligent design. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1114 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988). In *Childs v. Westinghouse Elec. Corp.*, 1988 WL 391503 (Va. Cir. Ct. 1988), the court, relying in part on *Cline*, held that the UCC preempted strict tort liability. *Id.* at 1081.

“Michigan has not adopted the strict liability provision of section 402A It has, however, adopted a tort theory of product liability which it calls the ‘doctrine of implied warranty.’” *Upjohn Co. v. Rachele Labs., Inc.*, 661 F.2d 1105, 1108 (6th Cir. 1981).

⁴ Massachusetts, of course, does recognize strict tort liability in other contexts. *E.g.*, *Clark-Aiken Co. v. Cromwell-Wright Co.*, 323 N.E.2d 876, 878 (Mass. 1975) (“After careful consideration, we conclude that strict liability as enunciated in the case of *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330, is, and has been, the law of the Commonwealth.”); *Smith v. Jalbert*, 221 N.E.2d 744, 746 (Mass. 1966) (holding that the owner or keeper of a wild animal is strictly liable for personal injury or property damage caused by such animal).

⁵ See *Hadar*, 886 F. Supp. at 1096.

The anomalies of Massachusetts product liability law are the result of amendments made to the Uniform Commercial Code by the legislature, which the court has construed as precluding the recognition of strict tort liability in the product area. This has produced several problems of both substantive law and statutory interpretation, problems that could have been avoided had Massachusetts recognized strict tort liability.

First, the historical development of Massachusetts law has left a gap in recovery. Since “strict product liability” in Massachusetts is limited to breach of warranty, and since a breach of warranty actually requires a warranty to be breached, Massachusetts plaintiffs—unlike plaintiffs in other jurisdictions—do not have a “strict liability” claim unless there was a sale or lease that gave rise to a warranty. This article argues that this gap should be closed and that there should be a remedy under Massachusetts law for a plaintiff who was injured by a defective product put into the stream of commerce by a manufacturer, even if there was no sale or lease and even if the manufacturer was not negligent.⁶

To illustrate this difficulty, consider the following hypothetical: You get an unsolicited, free sample of a product in the mail. You try the product and are injured by it because it was defectively manufactured. Assume too that the manufacturer was not negligent in producing the product. Do you have a viable case? In most jurisdictions you do; in Massachusetts, you probably do not.⁷

Second, the amendments to the Massachusetts Uniform Commercial Code included the introduction of a second statute of limitations into Article 2 of the Code. This has caused problems of statutory interpretation, which could have been avoided if strict tort liability had been adopted. This article discusses some of these problems of interpretation. Because a product liability claim for breach of warranty is also actionable under chapter 93A, the Massachusetts Consumer Protection Act,⁸ this article also argues that the four-year statute of limitations applicable to chapter 93A claims⁹ should be amended to make it consistent with the three-year limitation period applicable to negligence and tort-warranty claims.¹⁰

⁶ See *infra* Part III.A.

⁷ See *infra* Part III.A.

⁸ MASS. GEN. LAWS ch. 93A (2010).

⁹ MASS. GEN. LAWS ch. 260, § 5A (2010).

¹⁰ See *infra* Part III.B.

Consider two cases. In the first, you are physically injured by a defective product that you bought from a retailer, and you want to sue the retailer—your direct seller—for breach of warranty. In the second, you suffer economic damage caused by a non-conforming product that you bought, and you want to sue the manufacturer—a remote seller—for breach of warranty as a non-privity warranty beneficiary. How much time do you have to bring suit in these cases? The normal limitation period under Article 2 of the Uniform Commercial Code is four years.¹¹ Massachusetts has enacted a non-uniform section that abolishes lack of privity as a defense in many warranty actions,¹² but has imposed a three-year limitation on actions brought under that section.¹³ The point at which the cause of action accrues differs under the two sections. The court has generally held that the second section with its three-year limitation applies to tort-based warranty claims.¹⁴

Returning to our examples, in the first case, we have a tort-based claim for personal injury, but the claim is being brought by a buyer who was in privity with the defendant and thus is not, strictly speaking, being brought under section 2-318. Do you have four years? In the second case, we have a contract-based warranty being brought by a non-privity warranty beneficiary. The latter case is being brought under section 2-318. Must it be brought within three years?

Third, the Uniform Commercial Code requires that a buyer give notice to the seller of a claimed breach of warranty as a condition of any remedy. Because Massachusetts product liability law is based exclusively on warranty law, plaintiffs in Massachusetts who wish to bring a product liability claim are faced with a contract-based requirement from which plaintiffs in other jurisdictions are free. While the legislature mitigated the notice requirement in the amendments to the Uniform Commercial Code, the notice requirement is nonetheless still there. In fact, by including a provision about the notice requirement in the amendment that abolished lack of privity as a defense, the legislature may actually have imposed a new notice requirement on non-privity warranty beneficiaries, persons who did not buy the product. Some courts, without specifically considering the issue, have interpreted the statute as requiring notice in such cases.

¹¹ See *infra* note 33.

¹² The lack of privity defense was abolished in many cases, but not all. See *infra* note 50.

¹³ See *infra* note 35.

¹⁴ See *infra* note 61.

This article argues that this interpretation of the statute is wrong. There are cases, however, in which there is a clear statutory requirement that the buyer give notice to the seller or be barred from any remedy, even when the buyer has suffered personal injury. There is no such requirement under the law of strict tort liability, and this article argues that the notice requirement should be abolished in all cases in which a plaintiff is bringing a warranty claim for personal injury.¹⁵ Consider the another hypothetical. You are injured by a product given to you as a present; the product was manufactured defectively, but not negligently. Do you have to worry about giving notice to the manufacturer as a condition of recovering? Elsewhere, the answer is no. The abolition of any notice requirement was one of the selling points of strict tort liability.¹⁶ In Massachusetts, however, you may very well have to worry about giving notice.¹⁷

These problems stem from the history and development of Massachusetts product liability law, specifically from the failure of Massachusetts to adopt a pure tort theory of recovery, independent of warranty law. This article addresses these problems.

II. THE PROBLEM AND THE RESPONSES

A. The Problem

On October 15, 1962, Anna F. Necktas bought a new 1963 Pontiac sports coupe, manufactured by General Motors, from Columbia Pontiac Co.¹⁸ A couple of weeks later, her son Edward was driving the car on Route 1 in Dedham.¹⁹ The car crossed the median strip and struck another vehicle coming from the opposite direction, killing Edward.²⁰ There was evidence that the car's power steering unit was defective.²¹

Mrs. Necktas, individually and as administratrix of her son's estate, brought several claims against GM and the car dealership.²²

¹⁵ See *infra* Part III.C.

¹⁶ See, e.g., *Anderson v. Heron Eng'g Co.*, 604 P.2d 674, 678 (Colo.1979).

¹⁷ See *infra* Part III.C.

¹⁸ *Necktas v. Gen. Motors Corp.*, 259 N.E.2d 234, 235 (Mass. 1970).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Two of her claims—the ones relevant to this article—were for breach of warranty, one against GM for the damage done to her car, the other against the dealer for wrongful death.²³ The first claim failed because she was not in privity of contract with the manufacturer;²⁴ the second claim failed because “[t]he death statute provides no right of recovery for a death resulting from a contractual breach of warranty alone.”²⁵

B. The Legislative Response: How the Legislature Addressed the Problem and in the Process Unnecessarily Complicated Massachusetts Product Liability Law.

The legislature responded to this state of affairs with various statutory amendments,²⁶ primarily to the UCC.²⁷

1. Disclaimers

First, the legislature prohibited warranty disclaimers in consumer sales.²⁸ A non-uniform section, section 2-316A, was added to the Code:

²³ *Id.* She also brought (unsuccessful) negligence claims against both defendants and a warranty claim against the dealer for which she did recover. *Id.* at 235–36.

²⁴ *Id.*

²⁵ *Id.* at 236. As of 1971, recovery for wrongful death was limited to death caused by the negligence or willful, wanton, or reckless act of the defendant. MASS. GEN. LAWS ch. 229, § 2 (as amended through Act Sept. 22, 1971, ch. 801, sec. 1, 1971 Mass. Acts 685). At the time, the cause of action was considered an exclusively statutory right. The court has since held that “the right to recovery for wrongful death is of common law origin,” not a right created by statute. *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972).

²⁶ The wrongful death statute was also amended to impose liability on “[a] person who . . . (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death” An Act Further Regulating the Amount of Damages Recoverable in Actions for Death, ch. 699, sec. 1, 1973 Mass. Acts 688, 688-89 (1973). These amendments will sometimes be referred to collectively as the “product liability amendments.”

²⁷ “The Uniform Commercial Code—as if there is a soul reading this who wouldn’t know that, but then again, the *Bluebook* is the *Bluebook*.” Marianne M. Jennings, *I Want to Know What Bearer Paper Is and I Want to Meet a Holder in Due Course: Reflections on Instruction in UCC Articles Three and Four*, 1992 *BYU L. Rev.* 385, 385 n.2.

²⁸ A valid warranty disclaimer does not preclude a warranty action against the seller by a non-party to the agreement who suffers personal injury. *Ferragamo v. MBTA*, 481 N.E.2d 477, 482–83 (Mass. 1985) (holding that a disclaimer of warranties was not binding on a buyer’s employee); *cf.* *Theos & Sons, Inc. v.*

The provisions of section 2-316 [governing warranty disclaimers] shall not apply to sales of consumer goods, services or both. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable.

Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of such manufacturer's express warranties, shall be unenforceable, unless such manufacturer maintains facilities within the commonwealth sufficient to provide reasonable and expeditious performance of the warranty obligations.²⁹

Three years later, the section was amended to provide that “[t]he provisions of this section may not be disclaimed or waived by agreement.”³⁰ The section was again amended in 1996, and now states in relevant part:

(1) The provisions of section 2-316 shall not apply to the extent provided in this section.

(2) Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a

Mack Trucks, Inc., 729 N.E.2d 1113, 1117–18 (Mass. 2000) (holding that a disclaimer of the implied warranty of merchantability was enforceable against a subsequent corporate purchaser).

²⁹ MASS. GEN. LAWS ch. 106, § 2-316A, *added by* An Act Providing That Any Attempt to Exclude or Modify the Warranty of Merchantability or Fitness for a Particular Purpose in a Sale of Consumer Goods Shall be Unenforceable, ch. 880, 1970 Mass. Acts 809. Further citations to the UCC will be to the Code as enacted in Massachusetts. The official text of the Code, where different from the Massachusetts version, will be cited as “UCC § _.” In 2003, an amended Article 2 was promulgated, but it has not been enacted in any state and, according to the conventional wisdom, will not be. *See generally* William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131 (2009) (providing a brief explanation of the rise and fall of the amended article). In 2011, the 2003 amendments were withdrawn from the official text of the Code. *See Current Projects*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4 (last visited Sept. 16, 2012). The definition of “consumer goods” in MASS. GEN. LAWS ch. 106, § 9-102(23), “goods that are used or bought for use primarily for personal, family, or household purposes,” applies to Article 2. MASS. GEN. LAWS ch. 106, § 2-103(3).

³⁰ An Act Further Regulating the Limitation, Exclusion or Waiver of Warranties in the Sale of Consumer Goods and Services, ch. 799, sec. 1, 1973 Mass. Acts 785 (codified as amended at MASS. GEN. LAWS ch. 106, § 2-316A).

particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable.

....

(4) Any language, oral or written, used by a seller or manufacturer of goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify remedies for breach of those warranties, shall be unenforceable with respect to injury to the person. This subsection does not affect the validity under other law of an agreement between a seller or manufacturer of goods and services and a buyer that is an organization (see Section 1-201(28)), allocating, as between them, the risk of damages from or providing indemnity for breaches of those warranties with respect to injury to the person.

(5) The provisions of this section may not be disclaimed or waived by agreement.³¹

2. The Statute of Limitations

The second change to the law was that the statute of limitations for the relevant warranty claims was conformed to the general tort limitation period.³² The normal limitation period for breach of contract actions under Article 2 is four years after the cause of action accrues.³³ In the case of a breach of warranty, the cause of action ordinarily accrues on tender of delivery, regardless of the aggrieved party's knowledge.³⁴ Product liability cases, however, were made subject to a three-year limitation period, which begins to run when the injury and damage occur.³⁵

³¹ MASS. GEN. LAWS ch. 106, § 2-316A (2010) (as amended by An Act Further Amending the Uniform Commercial Code Relative to Personal Property Leasing, ch. 377, sec. 5, 1996 Mass. Acts 1437, 1471).

³² MASS. GEN. LAWS ch. 260, § 2A (2010).

³³ MASS. GEN. LAWS ch. 106, § 2-725(1) (2010).

³⁴ *Id.* at § 2-725(2).

³⁵ *Id.* at § 2-318 (“All actions under this section shall be commenced within three years next after the date the injury [and damages] occurs.”). The original limitations period was two years from “the date the injury occurs.” Act of Sept. 7, 1973, ch. 750, sec. 1, 1973 Mass. Acts 739, 740. The words “and damages” were added as part of the 1974 amendment. Act of April 25, 1974, ch. 153, 1973 Mass. Acts 80, 81. The effect of these amendments was to make the section 2-318 statute of limitation parallel the tort statutes of limitation. *See* MASS. GEN. LAWS ch. 260, §§ 2A & 4. *See e.g.*, *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1352–54 (Mass. 1989) (holding that the statute of limitations of section 2-318 applies to tort-based warranty claims).

3. Privity

The third and most significant change involved the privity requirement. Lack of privity—the relationship between parties to a contract—was traditionally a bar to warranty claims.³⁶ Courts and commentators recognize different types of privity. “Vertical” privity refers to the relationship of the parties in the chain of distribution.³⁷ It becomes an issue when a buyer attempts to sue a remote seller. “Horizontal” privity³⁸ refers to the relationship between the seller (typically a retailer) and a non-buyer who has used or been affected by the goods.³⁹ Privity was required under the Sales Act in order to maintain a warranty claim.⁴⁰ The Code changed things.

The original official text of UCC section 2-318 was enacted in Massachusetts:

A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.⁴¹

This section expanded the number of potential plaintiffs by eliminating the defense of horizontal privity in warranty claims by a limited number of natural persons (human beings, as opposed to other legal persons) who have suffered personal injury, not economic loss or

The discovery rule applies to the section 2-318 statute of limitations. *Lareau v. Page*, 39 F.3d 384, 388–89 (1st Cir. 1994). Whether the section 2-318 limitation period, by its terms, applies to all warranty claims for personal injury is discussed in Part III.C.

³⁶ Historically, lack of privity was a bar to negligence claims as well. That rule was abolished in Massachusetts by *Carter v. Yardley & Co.*, 64 N.E.2d 693, 695–96 (Mass. 1946).

³⁷ *E.g.*, *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 796 (N.H. 1993) (“Vertical privity exists, for example, between a wholesaler and retailer, and between a retailer and the ultimate buyer . . .”).

³⁸ *Id.* (“[Horizontal privity] denotes the relationship between the retailer and one who uses or consumes the goods.”).

³⁹ Some commentators use the expression “diagonal privity” to cover the case where both vertical and horizontal privity are lacking. *See* WILLIAM D. HAWKLAND & LINDA J. RUSCH, 1 HAWKLAND UCC SERIES § 2-318:1 (West 2012).

⁴⁰ *E.g.*, *Pearl v. William Filene’s Sons Co.*, 58 N.E.2d 825, 826 (Mass. 1945).

⁴¹ MASS. GEN. LAWS ch. 106, § 2-318 (1966) (prior to 1971 amendment).

property damage.⁴² The provision did not, however, do away with the problem of vertical privity by expanding the pool of potential defendants to include remote sellers. The beneficiaries of the seller's warranty are limited to those in the family or household of "his" buyer.⁴³

In 1966, the official text of the UCC was amended by the addition of two alternative versions of section 2-318, which variously expand the number of beneficiaries of the seller's warranty.⁴⁴ In a series of amendments, starting in 1971, the legislature rewrote the section, completely abolishing lack of privity as a defense.⁴⁵ Section 2-318 now reads:

⁴² "'Person' includes an individual or an organization." MASS. GEN. LAWS ch. 106, § 1-201(30) (2010). "'Organization' includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity." *Id.* § 1-201(28).

⁴³ See *supra* text accompanying note 41.

⁴⁴ The original version of U.C.C. section 2-318 is now Alternative A.

U.C.C. section 2-318, Alternative B expands the number of warranty beneficiaries, but is limited to personal injury claims. U.C.C. § 2-318 (1966) ("A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.").

U.C.C. section 2-318, Alternative C enlarges the pool of potential plaintiffs by admitting non-natural persons and removes the limitation on the type of harm covered. *Id.* ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."); see generally *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 762–63 (Mass. 1995) (discussing alternative C)

⁴⁵ In 1973 the legislature inserted the word "lessor" in the first and second sentences and added the third and fourth sentences. An Act Providing That Lack of Privity of Contract Shall Not Be a Defense in Actions for Breach of Warranty of Negligence Brought Against a Lessor of Goods and Establishing a Statute of Limitations for the Commencement of Such Action, ch. 750, sec. 1, 1973 Mass. Acts 739, 739–40 (amending MASS. GEN. LAWS ch. 106, § 2-318). In 1974 the legislature amended the statute further by extending the limitation period from two to three years and added the words "and damage" in the last sentence. An Act Extending the Time Within Which Actions For Breach of Warranty May Be Brought, ch. 153, 1974 Mass. Acts 80, 81 (amending MASS. GEN. LAWS ch. 106, § 2-318).

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.⁴⁶

The 1973 amendment made section 2-318 applicable to lessors.⁴⁷ In 1996, Massachusetts adopted Article 2A of the UCC, which governs leases of personal property.⁴⁸ Article 2A generally parallels Article 2, except for changes in terminology reflecting the different subject matter of the two articles. The non-uniform Massachusetts versions of section 2-316A⁴⁹ and section 2-318 have been replicated in section 2A-214A⁵⁰ and section 2A-216.⁵¹ Although there are no substantive

⁴⁶ MASS. GEN. LAWS ch. 106, § 2-318 (2010).

⁴⁷ *Id.*

⁴⁸ MASS. GEN. LAWS ch. 106, Art. 2A *added by* An Act Further Amending the Uniform Commercial Code Relative to Personal Property Leasing, ch. 377, sec. 2, 1996 Mass. Acts 1437.

⁴⁹ Section 2-316A was amended as part of the same act that adopted Article 2A. An Act Further Amending the Uniform Commercial Code Relative to Personal Property Leasing, ch. 377, sec. 5, 1996 Mass. Acts 1437, 1471–72 (enacted as amended at MASS. GEN. LAWS ch. 106, § 2-316A (2010)).

⁵⁰ Section 2A-214A states:

(1) The provisions of section 2A-214 [which governs warranty disclaimers] shall not apply to the extent provided in this section.

(2) Any language, oral or written, in a consumer lease, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the lessee's remedies for breach of those warranties, shall be unenforceable.

....

(4) Any language, oral or written, in a lease which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify remedies for breach of those warranties, shall be unenforceable with respect to injury to the person. This subsection does not affect the validity

differences between the parallel sections, as a technical matter, product liability claims against lessors should now be regarded as falling under Article 2A.

“The result [of these amendments] is to provide a remedy as comprehensive as that provided by § 402A of the Restatement, a remedy not limited by the ‘Caveat’ appended to § 402A.”⁵² Or, as another court put it, “Massachusetts codified the Restatement’s definition of strict liability at section 2-318 of the U.C.C. and called it ‘breach of warranty.’”⁵³

under other law of an agreement between a lessor or supplier and a lessee that is an organization (see Section 1-201(28)), allocating, as between them, the risk of damages from or providing indemnity for breaches of those warranties with respect to injury to the person.

(5) The provisions of this section may not be disclaimed or waived by agreement.

MASS. GEN. LAWS ch. 106, § 2A-214A (2010).

⁵¹ Section 2A-216 states:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, supplier or lessor of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not rent or lease the goods from the defendant if the plaintiff was a person whom the manufacturer, supplier or lessor might reasonably have expected to use, consume or be affected by the goods. The manufacturer, supplier or lessor may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

Id. § 2A-216.

⁵² *Swartz v. Gen. Motors Corp.*, 378 N.E.2d 61, 63 (Mass. 1978) (internal citation omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 402A, Caveat (1965) (“The Institute expresses no opinion as to whether the rules stated in this Section may not apply (1) to harm to persons other than users or consumers; (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or (3) to the seller of a component part of a product to be assembled.”).

⁵³ *Hadar v. Concordia Yacht Builders, Inc.*, 886 F. Supp. 1082, 1096 (S.D.N.Y. 1995). The court’s statement is generally true, but the devil, as usual, is in the details, and there are a couple of devils that have yet to be exorcised from Massachusetts warranty law. If the statement were completely accurate, you would not be reading this article.

Perhaps the most significant result, at least from a theoretical point of view, is that the current state of Massachusetts warranty law confirms the truth of Prosser's famous description of warranty: "a freak hybrid born of the illicit intercourse of tort and contract."⁵⁴ Massachusetts may be trying to get too much mileage out of this particular hybrid.

C. The Judicial Response: How the Court Imposed Some Order on the Chaos

The product liability amendments remedied some of the deficiencies of Massachusetts warranty law. They created some additional problems, however, both by what they did and by what they did not do. It was left to the court to address these problems to the extent that the court felt that the legislature had left it any leeway to do so.

The amendments to section 2-318, in particular, muddied the waters. It was unclear from the language of the statute whether or to what extent the amendments applied to warranty claims other than "strict tort" claims, i.e. to "commercial" or contract-based warranty claims where the claimed loss is purely economic.⁵⁵

"Through the early 1980's, Massachusetts courts assumed that the privity requirement had been abolished [by the 1971 amendments to section 2-318] for all breach of warranty causes of action regardless of the type of injury claimed by the plaintiff."⁵⁶ A series of cases since

⁵⁴ William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1125 (1960).

⁵⁵ John C. Bartenstein, *Recent Developments in Commercial Warranty Law: Bay State and Canal Electric*, BOS. B.J., May–June 1991, at 4, 5.

⁵⁶ *Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 98 (D. Mass. 1998); *see, e.g., Burnham v. Mark IV Homes, Inc.*, 441 N.E.2d 1027, 1031 (Mass. 1982); *Cameo Curtains, Inc. v. Philip Carey Corp.*, 416 N.E.2d 995, 998 (Mass. App. Ct. 1981). The plaintiffs in the *Burnham* case were the buyers of modular homes who sued the manufacturer. *Burnham*, 441 N.E.2d at 1029. The court, without any discussion of the issue, merely stated that "[l]ack of privity between Mark IV, a manufacturer, and the plaintiffs, is no longer a defense." *Id.* at 1031 (citing MASS. GEN. LAWS ch. 106, § 2-318). In *Cameo Curtains, Inc.*, a (corporate) buyer sued the manufacturer of allegedly defective roofing materials. *Cameo Curtains, Inc.*, 416 N.E.2d at 996–97. The court, again without discussion of the issue, applied the statute of limitation, notice, and privity provisions of section 2-318 to the claim. *Id.* at 997–98; *cf. Marcil v. John Deere Indus. Equip. Co.*, 403 N.E.2d 430, 433 (Mass. App. Ct. 1980) ("The plaintiff [buyer of a loader] does not benefit from the enactment of St. 1971, c. 670, § 1, which amended

then has clarified many of the issues involving the applicability *vel non* of the product liability amendments to all warranty claims.

In *Wilson v. Hammer Holdings, Inc.*, the plaintiffs sought recovery when a painting that they had purchased twenty-six years earlier turned out to be a fake.⁵⁷ The issue in the case⁵⁸ was whether the applicable statute of limitation was section 2-725 (four years from tender of delivery) or section 2-318 (three years after the injury and damage occur).⁵⁹ The First Circuit held that section 2-318 did not apply because that section “is designed to cover breach of warranty actions that are in essence products liability actions, and is not designed as an alternative for contractually based warranty claims.”⁶⁰ The court did not decide in what circumstances section 2-318 would apply.⁶¹

The approach taken by the First Circuit in *Wilson* was validated a year later by the Supreme Judicial Court in *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*,⁶² the first of the two leading cases construing section 2-318. In 1972 the plaintiff ordered its eponymous steamship “Provincetown” to be built by a

G.L. c. 106, § 2-318, and eliminated the defense of privity to an action for breach of warranty, because he purchased the loader before the effective date of the statute.”); *see also* Bartenstein, *supra* note 55, at 5–6.

⁵⁷ *Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3, 4 (1st Cir. 1988).

⁵⁸ *See supra* notes 32 & 35.

⁵⁹ *Wilson*, 850 F.2d at 4.

⁶⁰ *Id.* at 7–8.

⁶¹ The First Circuit stated:

In particular, we need not consider whether section 2-318 is applicable when a plaintiff seeks breach of warranty damages only for economic loss and not for physical injuries. We note, however, that the Comment in connection with the 1973 amendment of section 2-318 suggests that that section should have a three-year statute of limitation so that it would be consistent with the period for tort actions and actions of contracts to recover for personal injuries. We view this as an indication that at least the primary purpose of section 2-318 is to govern actions involving personal injuries, which is the dominant aspect of products liability cases.

Id. at 8 n.7. In point of fact, section 2-318’s statute of limitation ought not to have been applied in *Wilson* because the parties were in privity, and the plaintiffs’ action was not “under this section.” *See infra* Part III.B.

⁶² *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350 (Mass. 1989).

shipyard.⁶³ The defendant manufactured the ship's engines.⁶⁴ The ship was put in service in 1973 in the plaintiff's passenger ferry service between Boston and Provincetown.⁶⁵ On August 17, 1980, the ship's engine malfunctioned, disrupting its operating schedule and necessitating repairs.⁶⁶ The plaintiff brought suit in May 1982, to recover damages for the cost of repair and for lost profits caused by the engine's malfunction.⁶⁷ The main issue in the case,⁶⁸ as in *Wilson*, was the applicable statute of limitation:⁶⁹ section 2-318 (three years after the injury and damage occurred on August 17, 1980) or section 2-725 (four years after the tender of delivery in 1973).

After reviewing the history and purposes of the product liability amendments to "determin[e] what the Legislature intended to achieve by amendments to section 2-318," the court "conclude[d] that the statute of limitation of section 2-318 applies to tort-based warranty claims and that the statute of limitation of section 2-725 applies to contract-based warranty claims."⁷⁰ The focus of the analysis is on the "nature" or "substance" of the warranty claim.⁷¹ A claim to recover

⁶³ *Id.* at 1351.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The defendant also argued that the plaintiff's claim was a tort-based admiralty claim and, as such, was not viable because the plaintiff had suffered only economic loss. The court rejected this argument because the plaintiff's claim was "a contract-based claim of breach of warranty and is outside admiralty jurisdiction." *Id.* at 1351–52.

⁶⁹ Privity or the lack thereof was not the issue in the case:

Caterpillar does not argue that, even if its claim were asserted seasonably, as a remote purchaser (i.e., as one not in vertical privity), Steamship would not be entitled to recover on a timely asserted contract-based warranty claim. A plaintiff not in vertical privity is a buyer in the distributive chain who did not buy directly from the defendant. In comparison, a plaintiff not in horizontal privity is one who did not buy the goods within the distributive chain but consumes, uses, or is affected by them, such as a member of the buyer's family.

Id. at 1353 n.4 (citation omitted).

⁷⁰ *Id.* at 1353.

⁷¹ *Id.* at 1355.

economic loss is contract-based and not actionable in negligence or tort-based strict liability.⁷²

Although *Bay State-Spray* specifically addressed which statute of limitations applied to contract-based warranty claims, courts and commentators have applied the analytical approach of the decision to other issues raised by the product liability amendments.⁷³

In *Jacobs v. Yamaha Motor Corp., U.S.A.*, the other leading case on the reach of section 2-318, the plaintiff bought a Yamaha motorcycle from a dealer.⁷⁴ It turned out to be a lemon.⁷⁵ He brought it in to the dealer fifteen times in his first year of ownership.⁷⁶ When he took the motorcycle in for the fifteenth time and learned that the engine was being rebuilt, he told the dealer and subsequently the manufacturer that he wanted his money back.⁷⁷ When he didn't get it back, he sued the dealer (who went out of business) and then the manufacturer on several theories, including breach of the implied warranty of merchantability.⁷⁸ The case thus involved a contract-based

⁷² *Id.* at 1353. The Supreme Judicial Court specifically approved the decision of the Appeals Court in *Marcil v. John Deere Indus. Equip. Co.*, 403 N.E.2d 430, 434 (Mass. App. Ct. 1980) (holding buyer may not maintain a claim for negligent design or manufacture where the only damages claimed were economic loss or damage caused by the product to itself).

⁷³ See Bartenstein, *supra* note 55, at 6; see also *Hadar v. Concordia Yacht Builders, Inc.*, 886 F. Supp. 1082, 1097–98 (S.D. N.Y. 1995) (finding section 2-318 applies to tort-based warranty actions and that privity is necessary in contract-based warranty claim); *Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 99 (D. Mass. 1998) (finding privity necessary in commercial warranty case); *Irish Venture, Inc. v. Fleetguard, Inc.*, 270 F. Supp. 2d 84, 87 (D. Mass. 2003) (“[P]rivacy of contract is required in implied warranty claims regarding commercial transactions.”); *Cruickshank v. Clean Seas Co.*, 346 B.R. 571, 581–82 (D. Mass. 2006) (“[P]laintiffs have failed to establish that they were in privity with Clean Seas Therefore, [the counts] alleging breach of express and implied warranties should be dismissed.”); *First Choice Armor & Equip., Inc. v. Toyobo America, Inc.*, 839 F. Supp. 2d 407, 413 (D. Mass. 2012) (dismissing plaintiff’s warranty claim as a matter of law because plaintiff could not establish privity).

⁷⁴ *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 759 (Mass. 1995).

⁷⁵ *Id.* at 760.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

warranty claim by a consumer buyer of a consumer good against a remote seller for economic loss.⁷⁹

The manufacturer argued that the warranty was given only by the actual seller, “the defunct dealer from which the plaintiff purchased the motorcycle.”⁸⁰ The court rejected the argument based on the language of two of the amended sections.⁸¹

First, section 2-316A “denies enforcement of exclusions or limitation of any implied warranty of merchantability attempted ‘by a seller or manufacturer of consumer goods[.]’ The implication of that language is that a manufacturer of consumer goods makes an implied warranty of merchantability to the consumer.”⁸²

Second, and more important, the court construed section 2-318 to allow the buyer of consumer goods to bring a contract-based warranty claim directly against a manufacturer.⁸³

The fact that § 2-318 was enacted with a focus on remedies for personal injuries caused by a breach of warranty . . . should not inhibit the independent development of the law concerning warranties extended to the buyer of defective goods. Contract-based warranty claims involving commercial transactions may generally call for different treatment than tort-based warranty claims. . . . However, contract-based warranty claims of buyers of consumer goods themselves deserve separate consideration because of special legislation affecting them. We respond to this special legislative treatment by implementing the purposes of § 2-316A and § 2-318 and recognizing the right of a buyer of consumer goods to sue the manufacturer directly for a breach of an implied warranty of merchantability. We conclude that a buyer of consumer goods has the right to maintain an action for breach of the implied warranty of merchantability against the manufacturer of that product.⁸⁴

Jacobs came as a bit of a surprise to those who thought that *Bay State-Spray* had definitively confined section 2-318 to tort-based warranties. The *Jacobs* court did, however, strongly hint that its

⁷⁹ The motorcycle qualified as a consumer good within the meaning of the statute. See *supra* note 29. The manufacturer’s attempt to disclaim implied warranties was therefore ineffective under section 2-316A. *Jacobs*, 649 N.E.2d at 761

⁸⁰ *Id.* at 762.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 763 (citations omitted).

holding was limited to consumer contracts, and there are several post-*Jacobs* decisions in the federal courts holding that privity is required to maintain a commercial contract-based warranty claim.⁸⁵

D. Summary: The Dust Settles

Many of the uncertainties created by the product liability amendments have been resolved. Two categories of warranty claims have been distinguished. Tort-based claims for personal injury or property damage,⁸⁶ and contract-based claims for economic loss or damage caused by the product to itself.⁸⁷ The second category is divided further into consumer claims and commercial claims.⁸⁸

Lack of privity is not a defense to tort-based warranty claims. When brought by non-privity beneficiaries, such claims accrue when the injury or damage occurs and are subject to the three-year statute of limitation.⁸⁹ Disclaimers are ineffective with respect to consumer goods and with respect to other goods if personal injury results.⁹⁰ Remedy limitations for breach are also unenforceable.⁹¹

Lack of privity is likewise not a defense to a contract-based warranty claim for economic loss in the case of consumer goods.⁹² Disclaimers of the implied warranties and remedy limitations are

⁸⁵ See cases cited *supra* note 73.

⁸⁶ That is to say damage to property other than the product at issue. Damage to the product itself is considered a type of “economic loss.” *E.g.*, *Marcil v. John Deere Indus. Equip. Co.*, 403 N.E.2d 430, 434 & n.3 (Mass. App. Ct. 1980). Damage to property other than the product itself brings the case under the three-year limitation period of section 2-318. *Fine v. Huygens, DiMella, Shaffer & Assocs.*, 783 N.E.2d 842, 845–46 (Mass. App. Ct. 2003).

⁸⁷ *Jacobs*, 649 N.E.2d at 763.

⁸⁸ *Id.*

⁸⁹ See *supra* text accompanying note 44.

⁹⁰ MASS. GEN. LAWS ch. 106, §§ 2-316A(2), (4) (2010); see *supra* Part II.B.

⁹¹ *Id.* § 2-316A(2), (4). As a general rule, Article 2 contract remedies may be limited by agreement under section 2-719, but “[I]mitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. . . .” *Id.* § 2-719(3). The specific language of section 2-316A(2) and (4) making such limitations “unenforceable” should preclude any attempt to rebut the presumption of unconscionability under the language of section 2-719(3).

⁹² See *supra* note 44 and accompanying text.

prohibited.⁹³ The applicable statute of limitations is probably four years.⁹⁴

Privity is required in commercial warranty cases, and the normal rules relating to disclaimers and remedy limitations apply.

III. HOW THE LEGISLATURE AND THE COURT STUNTED THE DEVELOPMENT OF PRODUCTS LIABILITY LAW

One result of the product liability amendments is that the court has declined to recognize strict tort liability in the product area as part of Massachusetts law.⁹⁵ “Declined,” actually, is a bit of an understatement. The court has construed the amendments as preempting the field of liability without fault for defective products, thus prohibiting the recognition of strict tort liability or the extension of warranty liability to transactions other than sales or leases.⁹⁶

⁹³ *Jacobs*, 649 N.E.2d at 761.

⁹⁴ *See supra* note 32 and accompanying text.

⁹⁵ *E.g.*, *Swartz v. Gen. Motors Corp.*, 378 N.E.2d 61, 63 (Mass. 1978); *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1326 (Mass. 1997) (“We have declined to allow claims for strict liability in tort for defective products, but we have recognized that, by eliminating most contractually-based defenses to the implied warranty of merchantability (such as the requirements of privity and of notice), the Legislature has imposed duties on merchants as a matter of social policy, and has expressed its intent that this warranty should establish liability as comprehensive as that to be found in other jurisdictions that have adopted the tort of strict product liability.”); *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 763 n.6 (Mass. 1995) (“We were led to this approach, probably unavoidably, by the Legislature’s expansive amendments of § 2-318. St. 1971, c. 670, § 1; St. 1973, c. 750, § 1; St. 1974, c. 153”). *See also* *Back v. Wickes Corp.*, 378 N.E.2d 964, 968–69 (Mass. 1978); *Mason v. Gen. Motors Corp.*, 490 N.E.2d 437, 442 (Mass. 1986).

Sometimes plaintiffs bring a product claim labeled as a strict liability claim. The courts will ordinarily either treat such claims as warranty claims or dismiss them when the plaintiff has also brought a warranty claim. *E.g.*, *Smith v. Robertshaw Controls Co.*, 410 F.3d 29, 32 (1st Cir. 2005) (treating a strict products liability claim as a breach of warranty claim); *Cruickshank v. Clean Seas Co.*, 346 B.R. 571, 577–78 (D. Mass. 2006) (dismissing a strict liability count where plaintiffs asserted separate claims for breach of warranty.); *Public Serv. Mut. Ins. v. Empire Comfort Sys., Inc.*, 573 F. Supp. 2d 372, 380–81 (D. Mass. 2008) (holding that a strict liability claim fails as matter of law).

⁹⁶ *Mason*, 490 N.E.2d at 442; *cf.* *Soule v. Mass. Elec. Co.*, 390 N.E.2d 716, 719 (Mass. 1979) (holding that the enactment of a statute codifying “attractive nuisance” doctrine twenty three years after plaintiff injured does not foreclose

The Legislature has jettisoned many of the doctrinal encumbrances of the law of sales, and what remains is a very different theory of recovery from that traditionally associated with the sale of goods. The Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965).⁹⁷

“Thus, a claim for breach of the implied warranty of merchantability should be considered in light of the requirements for warranties contained in [M.]G.L. c. 106, §§ 2-314 to 2-318, as well as the principles expressed in § 402A of the Restatement.”⁹⁸

This article explores some of the remaining “doctrinal encumbrances of the law of sales”⁹⁹ that make Massachusetts law incongruent with general principles of product liability law elsewhere or that create unnecessary problems of statutory interpretation. The “encumbrances” considered are the restriction of strict liability to sales and leases and the notice requirement. The problems of statutory interpretation considered are those caused by the introduction into Article 2 of two statutes of limitations¹⁰⁰ and two notice provisions¹⁰¹ by the product liability amendments. This article will make a few suggestions about what the Courts—of both the General and the Supreme Judicial variety—should do about the situation. This article argues that, by either judicial or legislative action, “strict product liability” in Massachusetts should not be restricted to cases arising out of sales or leases, but that there should be a remedy under Massachusetts law for a plaintiff who was injured by a defective product put into the stream of commerce by a manufacturer even if there was no sale or lease and even if the manufacturer was not negligent.

After discussing some of the problems of statutory interpretation caused by having two statutes of limitation applicable to warranty

court from recognizing common-law duty of reasonable care by a landowner to prevent harm to foreseeable child trespassers).

⁹⁷ *Back v. Wickes Corp.*, 378 N.E.2d 964, 969 (Mass. 1978).

⁹⁸ *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1326–27 (Mass. 1997) (internal citations omitted). In a footnote, the court noted that the American Law Institute had recently approved “a new formulation of the law of product liability” in the *Restatement (Third) of Torts: Products Liability*, but did not consider its applicability to the case. *Id.* at 1327 n.6.

⁹⁹ *Back*, 378 N.E.2d at 969.

¹⁰⁰ MASS. GEN. LAWS ch. 106, §§ 2-318, 2-725 (2010).

¹⁰¹ *Id.* §§ 2-318, 2-607(3)(a).

claims, this article suggests that the four-year statute of limitations applicable to chapter 93A claims should be amended to make it consistent with the three-year limitation period applicable to negligence and tort-warranty claims.

Finally, this article argues that the notice provision of section 2-318 should not be construed to impose a notice requirement on non-privity warranty beneficiaries and that, in any event, the notice requirement should be abolished in all cases in which a plaintiff—whether in privity with the defendant or not—is bringing a warranty claim for personal injury.

A. The Sales Requirement

One of the “doctrinal encumbrances of the law of sales” that is still part of Massachusetts product liability law is the law of sales itself.¹⁰² If the liability is to be based on breach of warranty, the underlying transaction must have given rise to a warranty, the breach of which caused the plaintiff’s injury.

1. The Problem of the Self-Service Case

The plaintiff in *Lasky v. Economy Grocery Stores* went into a self-service store.¹⁰³ She wanted to buy six bottles of tonic.¹⁰⁴ While she was taking a bottle from the case, it exploded, severely injuring her.¹⁰⁵ She sued the store for breach of warranty under the Sales Act and lost because a contract for sale—with the concomitant warranty obligation—had not been formed yet.¹⁰⁶

The precise question at issue in *Lasky* has not arisen since the case was decided.¹⁰⁷ Were the SJC confronted with the same issue today,¹⁰⁸

¹⁰² See *Back*, 378 N.E.2d at 969. The “sales requirement” includes the “lease requirement” for cases arising under Art. 2A. See *supra* text accompanying notes 45–50.

¹⁰³ *Lasky v. Econ. Grocery Stores*, 65 N.E.2d 305, 305 (Mass. 1946).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 307.

¹⁰⁷ In *Hadley v. Hillcrest Dairy, Inc.*, 171 N.E.2d 293 (Mass. 1961), a case decided under the Sales Act, the plaintiff was injured when a glass milk jug, which the defendant had delivered to his house, shattered when he placed it on the table. The court held that it was “immaterial whether or not the property in the jug passed to the plaintiff . . . a sale of the container, as such, is not necessary in order for the implied warranties of fitness and merchantability to attach in this transaction.” *Id.* at 295.

it would probably conclude that a “sale” or a “contract for sale”¹⁰⁹ had taken place to give rise to the implied warranty of merchantability. That is generally the result under the UCC.¹¹⁰ A slight variation in the standard fact pattern could change that result, however. In *McQuiston v. K-Mart Corp.*, a customer injured her wrist when she lifted the lid of a cookie jar displayed on a store shelf and the lid came apart.¹¹¹ She had lifted the jar’s lid to see if the price tag was located inside.¹¹² She had not formed any intent to purchase.¹¹³ She sued the retailer and the manufacturer on theories of strict liability and breach of implied warranty.¹¹⁴ The circuit court upheld the district court’s grant of summary judgment on the implied warranty theory because no sale of

In *McKone v Ralph’s Wonder Market, Inc.*, 27 Mass. App. Dec. 159, 4 UCC Rep. Serv. 943 (1963), an action against a market for injuries received from the explosion of a glass bottle filled with milk which had been purchased from the market, the court stated that the UCC Article 2 implied warranty of merchantability provision required a sale of the article involved and that there was no evidence of a sale of the bottle.

The *McKone* decision is surely wrong. Under § 2-314(2), “[g]oods to be merchantable must be at least . . . adequately contained, packaged, and labeled as the agreement may require . . .” See *Shaffer v. Victoria Station, Inc.*, 588 P.2d 233 (Wash. 1978) (holding that a restaurant was liable for breach of warranty of merchantability where a wine glass broke injuring a patron’s hand even though the restaurant did not sell the glass itself).

¹⁰⁸ *Lasky* was cited as recently as 2003 in a larceny case for the proposition that customers in self-service stores have conditional possession of the goods that they remove from display areas. *Commonwealth v. Vickers*, 798 N.E.2d 575, 579 (Mass. App. Ct. 2003).

¹⁰⁹ MASS. GEN. LAWS ch. 106, § 2-106(1) (2010) (“‘Contract for sale’ includes both a present sale of goods and a contract to sell goods at a future time. A ‘sale’ consists in the passing of title from the seller to the buyer for a price . . .”).

¹¹⁰ See, e.g., *Gillispie v. Great Atl. & Pac. Tea Co.*, 187 S.E.2d 441, 444 (N.C. Ct. App. 1972) (holding that a sale consummated and implied warranties arise if the seller completes delivery and that no further act of delivery was necessary when buyer takes possession of goods with intention of paying for them); see also *Fender v. Colonial Stores, Inc.*, 225 S.E.2d 691, 693 (Ga. Ct. App. 1976) (holding that a contract for sale of goods comes into being when a buyer accepts the seller’s offer by taking physical possession of goods with intent to pay for them).

¹¹¹ *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1347 (11th Cir. 1986) (per curiam).

¹¹² *Id.* at 1348.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1347.

the product had occurred.¹¹⁵ As against the retailer, there can be no implied warranty without a sale, and no sale had occurred even under the self-service line of cases.¹¹⁶ The plaintiff's (unsuccessful) strict liability claim did go to trial.¹¹⁷ In Massachusetts, the customer would not have a claim against the store.¹¹⁸

Although as a policy matter, there is little reason to distinguish between a store's liability before and after the buyer pays for the goods, there clearly is no liability on the part of the buyer to pay for the goods and therefore no sale or contract for sale. It is clearly an artifice to treat the buyer's taking an item from the shelf as being an agreement to purchase the item subject to a condition subsequent.

States that have adopted the strict tort liability theory have avoided the necessity of extending the implied warranty of merchantability to cover the situation here considered, by holding that the seller who puts a dangerous product on display is liable to those coming within the zone of danger without regard to whether there has been a sale or not.¹¹⁹

2. The Problem of Bailments and Goods Not Tendered for Delivery

In *Mason v. General Motors Corp.*, the leading Massachusetts case on this issue, the plaintiff's decedents were killed in an accident while test-driving a motor vehicle with the permission of the defendant dealership.¹²⁰ The court upheld summary judgment in favor of the dealership on the breach of warranty claim because there was no

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1349.

¹¹⁸ The customer could bring a negligence claim, but *negligence* claims against retail sellers are ordinarily limited to claims based on a failure to warn of known dangers. *See Enrich v. Windmere Corp.*, 616 N.E.2d 1081, 1084 (Mass. 1993) ("A seller of a product manufactured by another is not liable in an action for negligence unless it knew or had reason to know of the dangerous condition that caused the accident."); RESTATEMENT (SECOND) OF TORTS § 402 (1965) ("A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.").

¹¹⁹ 3 LARY LAWRENCE, ANDERSON ON THE U.C.C. § 2-314:532 cmt. (West 2012).

¹²⁰ 490 N.E.2d 437, 439 (Mass. 1986).

warranty in the transaction.¹²¹ “There is no statutory language, however, that reasonably may be construed as either creating or sanctioning the judicial creation of a warranty in connection with a bailment of the kind that occurred in this case.”¹²² The statements made in earlier cases about the congruity of Massachusetts warranty law and section 402A were made in cases in which there had been a sale.¹²³

Once a transaction has occurred in which a warranty is implied by our statute, as in the cases cited above, the nature of the warranty and the parties benefited by it are the same as, or at least very similar to, the warranties and beneficiaries recognized in § 402A of the Restatement, and the remedies are congruent. However, unlike our warranty law, under § 402A an injured plaintiff may recover damages resulting from a defective product regardless of whether title to the product passed or there was a contract to pass title to the product or the product was leased. We did not intend our statements to encompass transactions other than contracts of sale and leases. In any event, our statements did not insert in the statute words that the Legislature had not put there.¹²⁴

The court reiterated its refusal to create additional common-law warranty remedies or to recognize strict tort liability apart from liability for breach of warranty under the Code.¹²⁵ These are “matters of social policy to which the Legislature has given its attention,” and the court had “decided [in earlier cases] to defer to the Legislature’s judgment in those matters, and, we believe, rightly so.”¹²⁶

The court did not use the word “preemption,” but that is, in effect, what the court held. By enacting the product liability amendments to the UCC, the legislature had not only preempted strict tort liability in the area of sales and leases, it had also effectively prohibited the development of strict liability in non-sale transactions. Massachusetts

¹²¹ *Id.* at 440 (“[T]he issue is whether, as [the dealer] contends, a sale, or a contract to sell, or a lease is necessary in order for a warranty of merchantability to be implied under Massachusetts law.”).

¹²² *See id.* at 441. There is, however, language in the official comment to UCC section 2-313 that the warranty provisions of Art. 2 are not designed to disturb the developing case law that warranties need not be confined to sales contracts. *See infra* note 160 and accompanying text.

¹²³ *Mason v. Gen. Motors Corp.*, 490 N.E.2d at 441–42.

¹²⁴ *Id.* at 442.

¹²⁵ *See* sources cited *supra* note 4.

¹²⁶ *Mason*, at 490 N.E.2d at 442.

law, as so construed, is thus, if not unique, at least that of an infinitesimally small minority of states.¹²⁷ Delaware has held that the UCC provisions on the sale of goods preempted the field, thus preventing extension of the doctrine of strict tort liability to the law of sales,¹²⁸ but it did recognize strict tort liability in a bailment lease.¹²⁹ A lower court in Virginia has followed Delaware.¹³⁰

Mason highlights the limitations of Massachusetts product liability law imposed by the refusal to adopt strict tort liability.¹³¹ Courts in other jurisdictions would allow strict liability claims on facts similar to those in *Mason*.¹³² In *Long v. Yingling*, for example, prospective

¹²⁷ See sources cited *supra* note 3.

¹²⁸ *Cline v. Prowler Inds. of Md., Inc.*, 418 A.2d 968, 968 (Del. 1980); see also *Franchetti v. Intercole Automation, Inc.*, 523 F. Supp. 454, 458 (D. Del. 1981) (holding that strict tort liability is inapplicable in an action for personal injuries caused by defective equipment manufactured and sold prior to effective date of UCC).

¹²⁹ *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 584 (Del. 1976) (holding that the legislature did not preempt field as to bailments and leases and the court was free to apply strict tort liability to a bailment lease).

¹³⁰ In *Childs v. Westinghouse Elec. Corp.*, 1988 WL 391503 (Va. Cir. Ct. May 24, 1988), the court, relying in part on the *Cline* case, held that the UCC preempted strict tort liability.

¹³¹ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 cmt. a (1998) (“After the promulgation of § 402A, courts began to extend strict liability for harm caused by product defects to some nonsale commercial transactions involving the distribution of products. Rather than stretching to call these transactions ‘sales,’ courts simply declared that the same policy objectives that supported strict liability in the sales context supported strict liability in other contexts. The first significant extension involved commercial product lessors. Although title does not pass in lease transactions, courts have reasoned that the same policy objectives that are served by holding commercial product sellers strictly liable also apply to commercial product lessors. Over time, courts have extended strict products liability to a wide range of nonsale, nonlease transactions.”).

¹³² See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20, cmt. f (1998) (“Bailments typically involve short-term transfers of possession. Several categories of cases are fairly clear. When the defendant is in the business of selling the same type of product as is the subject of the bailment, the seller/bailor is subject to strict liability for harm caused by defects. Thus, an automobile dealer who allows a prospective customer to test-drive a demonstrator will be treated the same as a seller of the demonstrator car. Even when sale of a product is not contemplated, the commercial bailor is subject to strict liability if a charge is imposed as a condition of the bailment. Thus, a laundromat is subject to strict liability for a defective clothes dryer, and a roller

customers who were injured while test driving a used car could maintain a strict liability claim against the used car dealer.¹³³ A most striking illustration of the difference between strict tort liability and warranty liability in a non-sale situation is *O'Malley v. American LaFrance, Inc.*¹³⁴ A volunteer fireman was seriously injured while inspecting a partially-constructed fire truck that was being manufactured by the defendant under a contract with the fire department.¹³⁵ The fireman brought strict tort liability and implied warranty claims against the manufacturer whose defense to both claims was that the product had not yet been placed into stream of commerce.¹³⁶ The court, on a motion for summary judgment, rejected this defense with respect to the strict tort claim, but granted summary judgment on the warranty claim.¹³⁷

Finding that plaintiffs have not sustained their breach of warranties causes of action, while allowing for the possibility that their products liability claim is valid, is not an inconsistent result. Because a contract defines “tender of delivery” as one of its terms, and tort law defines “stream of commerce” as a jurisprudential term of art, a product can enter the stream of commerce without having been tendered for delivery. As discussed above, a car taken for a test drive enters the stream of commerce, and if a prospective purchaser is injured while on the test drive, the automobile dealer is liable under a products liability theory. However, because no contract of sale has been entered into, and therefore no tender of

rink that rents skates is treated similarly. When products are made available as a convenience to customers who are on the defendant’s premises primarily for different, although related purposes, and no separate charge is made, strict liability is not imposed. Thus, bowling alleys that supply bowling balls for customer use and markets that supply shopping carts are not subject to strict products liability for harm caused by defects in those items. Similarly, doctors who use medical devices while treating patients are not considered distributors of those products.”).

¹³³ 700 A.2d 508 (Pa. Super. Ct. 1997); *see also* Van Horn v. Reinhart Flynn Inc., No. 01-1794, 2003 WL 22719334 (Pa. Com. Pl., July 23, 2003) (permitting a strict liability claim by plaintiffs injured while test driving vehicle owned by defendant dealer).

¹³⁴ No. 00-CV-1421 (ARR), 2002 WL 32068354 at *1 (E.D.N.Y. Dec. 30, 2002).

¹³⁵ *Id.* at *1.

¹³⁶ *Id.* at *2.

¹³⁷ *Id.* at *9.

delivery pursuant to that contract has been made, the prospective purchaser does not have recourse to a breach of warranty claim.¹³⁸

3. The Problem of Samples and Other Freebies

Consider another situation.¹³⁹ Assume that a manufacturer, unsolicited and not in return for any consideration, sends a free sample of its product to the plaintiff. The product contains a “manufacturing defect.”¹⁴⁰ The plaintiff is injured by the defect. The manufacturer was not negligent in making the product.

In a strict liability jurisdiction, the plaintiff would have a claim: He was injured by a defective product that the manufacturer, a commercial entity, had distributed into the stream of commerce.¹⁴¹ Does the plaintiff have any recourse in Massachusetts? There is, *ex hypothesi*, no negligence claim; the plaintiff’s remedy, if any, is for breach of warranty, but there hasn’t been a “sale”¹⁴² or a “lease,”¹⁴³ just a gift.

¹³⁸ *Id.* (citing *Mason v. General Motors Corp.*, 397 Mass. 183, 490 N.E.2d 437 (1986) (interpreting Massachusetts’ codification of the U.C.C. and holding that a prospective purchaser injured during a test-drive does not have a breach of warranty cause of action)).

¹³⁹ This hypothetical was developed from an argument made by Justice Liacos in his dissent in *Mason*:

The test drive was a bailment for mutual benefit. The plaintiffs may have been able to demonstrate that the over-all transaction of an automobile sale or lease might include a bailment, which, standing alone, would otherwise seem to have been gratuitous, but as one part of the entire transaction, would come within the statute.

Mason v. Gen. Motors Corp., 490 N.E.2d 437, 445 (Liacos, J., dissenting) (footnotes omitted).

¹⁴⁰ “A product (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

¹⁴¹ *Cf. McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967) (“One who delivers an advertising sample to another with the expectation of profiting therefrom through future sales is in the same position as one who sells the product.”). See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20, Reporters’ Notes *b* (1998) (“[A] commercial entity is subject to strict liability for products it distributes free of charge, since title has passed to the consumer.”) and cases cited.

¹⁴² MASS. GEN. LAWS ch. 106, § 2-106(1) (2010) (“A ‘sale’ consists in the passing of title from the seller to the buyer for a price”)

There is some authority for extending the warranty of merchantability to such gifts.¹⁴⁴ One authority holds that:

A distinction should be made between ‘pure’ gifts having no sales overtones, and those that are part of an advertising arrangement with the ultimate aim of making a sale. The former should be beyond the reach of the implied warranty of merchantability, whereas the latter can be considered so closely allied to selling as to become a sale for purposes of Section 2-314.¹⁴⁵

Sheppard v. Revlon, Inc. was a failure-to-warn case.¹⁴⁶ The plaintiff obtained a jar of a wrinkle remover manufactured by Revlon by purchasing \$5.00 worth of additional cosmetic products.¹⁴⁷ She was injured when she applied the cream to her face near her eyes.¹⁴⁸ The jar contained no warning against use near the eyes.¹⁴⁹ One of the defenses to the warranty claim was that the transaction was a gift, not a sale.¹⁵⁰ The court rejected this argument because the plaintiff “obtained the merchandise as a result of performing an act required, to-wit: purchasing \$5.00, or more, of Revlon cosmetics at one time,”¹⁵¹ thus satisfying the statutory definition of the passing of title for a price.¹⁵² The SJC and most other courts would most likely agree with this conclusion. The “free gift” was part of what the plaintiff bought.

In *E. I. Du Pont De Nemours & Co. v. Kaufman & Chernick, Inc.*, the SJC reached a similar result when a retailer advertised that customers who bought a tire at a price below the regular selling price would also receive a can of the manufacturer’s anti-freeze

¹⁴³ § 2A-103(1)(j) (“‘Lease’ means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease.”).

¹⁴⁴ See WILLIAM D. HAWKLAND & LINDA J. RUSCH, 1 HAWKLAND UCC SERIES § 2-314:3 (West 2012).

¹⁴⁵ *Id.*, cited in *Mason v. General Motors Corp.*, 490 N.E.2d 437, 445 n.3 (Liacos, J., dissenting).

¹⁴⁶ *Sheppard v. Revlon, Inc.*, 267 So.2d 662 (Fla. Dist. Ct. App. 1972).

¹⁴⁷ *Id.* at 663.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 664.

¹⁵¹ *Id.*

¹⁵² *Supra* note 142.

(“Zerex”).¹⁵³ The anti-freeze was a product covered by a “fair trade law,” then in effect, under which it was illegal to sell a product at less than the “fair trade” price.¹⁵⁴ The manufacturer sued to enjoin the retailer from selling its product at a price lower than the minimum permissible retail price.¹⁵⁵ The retailer defended on the ground that there had not been a sale of the anti-freeze, only a gift.¹⁵⁶

It is plain that in the case before us the delivery of Zerex to a customer in connection with and as a part of the sale of the tire was not, in fact or in law, a ‘gift.’ The money paid the defendant by the purchaser was paid not for the tire alone, but for both items. Legally and economically the transaction amounted to a combined sale of both the Zerex and the tire for a single price.¹⁵⁷

This is certainly consistent with the holding of *Sheppard*.¹⁵⁸ The *Sheppard* court went further, however. Even if the “transaction was not a sale, nevertheless, warranty liability may be imposed. Such liability is not intended to be limited only to a sales contract or only to the direct parties”¹⁵⁹ In support of this proposition, the court cited one of the UCC official comments to section 2-313:

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 warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. 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

¹⁵³ E. I. Du Pont De Nemours & Co. v. Kaufman & Chernick, Inc., 148 N.E.2d 634, 635 (Mass. 1958).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 634.

¹⁵⁶ *Id.* at 636.

¹⁵⁷ *Id.*

¹⁵⁸ *Sheppard v. Revlon, Inc.*, 267 So.2d 662 (Fla. Dist. Ct. App. 1972).

¹⁵⁹ *Id.* at 664.

with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.¹⁶⁰

Returning to the hypothetical, the sample here really is “free” in the sense that it is not part of a package deal. There are certainly “sales overtones” in the transaction, but no sale. Could the plaintiff recover in Massachusetts?¹⁶¹ Justice Liacos apparently thought that *Mason* would preclude liability.¹⁶² The *Mason* majority apparently thought that this was the result intended by the legislature when it enacted the product liability amendments. What’s wrong with this picture?

The products liability amendments, as interpreted by the SJC, have left a gap in Massachusetts law. The official comment to section 2-313, quoted above, states that the warranty provisions of the Code “are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales contracts.”¹⁶³ The comment states that the provisions of section 2-318 recognize the development of the case law.¹⁶⁴ The Massachusetts legislature enacted a non-uniform version of section 2-318 that goes beyond the most expansive of the three official alternative versions of the section. The court, however, has interpreted this pro-consumer action by the legislature as freezing the development of product liability law and thereby preventing the expansion of warranty liability beyond sales and leases and precluding the court from recognizing strict tort liability in these situations.

¹⁶⁰ U.C.C. § 2-313 cmt. 2 (1977). Section 2-313 deals with express warranties. “The word ‘Article’ shows that this assertion applies to other warranties as well as to the express warranties discussed in Section 2-313.” WILLIAM D. HAWKLAND & LINDA J. RUSCH, 1 HAWKLAND UCC SERIES § 2-314:3 (West 2012).

¹⁶¹ In *Neuhoff v. Marvin Lumber & Cedar Co.*, the plaintiff bought 60 windows from the defendant in 1991. 370 F.3d 197, 200 (1st Cir. 2004). In 1998, as a result of problems with the windows, the defendant offered to replace 33 of them for free. *Id.* In 2000, four of the replacement windows had reached a state of decay. *Id.* The court held that providing free replacement windows was more akin to a gift than a sale and therefore there was no implied warranty on the windows. *Id.* at 205. Unlike the situation where the “gift” is really part of a combined sale, the replacement windows were not coupled with any other transaction. *Id.*

¹⁶² *Mason v. Gen. Motors Corp.*, 490 N.E.2 437, 444–45 (Liacos, J., dissenting).

¹⁶³ U.C.C. § 2-313 cmt. 2 (1977).

¹⁶⁴ *Id.*

4. Merging Warranty and Negligence Liability

It is, perhaps, unrealistic to hope that the court would change its interpretation of the preemptive effect of the product liability amendments. The court has, however, been willing to revisit other aspects of product liability law.¹⁶⁵ For example, as discussed earlier,¹⁶⁶ the court in the *Jacobs* case cut back on the expansive interpretation of the abolition of the privity requirement in section 2-318.

A second area in which the court has significantly changed its interpretation of product liability law (and the scope of its authority) relates to the nature of warranty liability in failure-to-warn cases. Some background is necessary to appreciate the significance of this change.

Unlike most jurisdictions, which recognize some form of a comparative fault defense in products liability cases,¹⁶⁷ Massachusetts law allows such a defense only in negligence actions.¹⁶⁸ The leading case is *Correia v. Firestone Tire & Rubber Co.*¹⁶⁹ *Correia* began in the federal district court, which certified several questions of law to the SJC.¹⁷⁰ One of the questions was whether “Massachusetts recognize[s]

¹⁶⁵ See *supra* Part II.B..

¹⁶⁶ See *supra* Part II.B.3.

¹⁶⁷ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a. (1998) (“A strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions. Courts today do not limit the relevance of plaintiff’s fault as did the *Restatement (Second) of Torts* to conduct characterized as voluntary assumption of the risk.”).

¹⁶⁸ The court’s refusal to recognize a comparative defense to product liability claims, not based on negligence, has been the subject of criticism. See, e.g., David R. Geiger & Stephanie Copp Martinez, *Design and Warning Defect Claims Under Massachusetts Product Liability Law: Completing the Merger of Negligence and Warranty*, 43 BOSTON B.J. 12 (1999), and Alex Grant, *The Evolution of Massachusetts Products Liability Law and the Conundrum of Strict Liability*, 33 W. NEW ENG. L. REV. 1, 32-44 (2011). The court itself has stated: “[W]e believe that application of some type of apportionment principles to warranty cases may be fairer than the current system, and may make results in negligence and warranty counts in the same case more consistent with each other.” *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1315 (Mass. 1988) (citation and footnote omitted). Cautiously, the court added that “‘given the wide variety of possible solutions,’ . . . and the serious policy considerations involved, the Legislature is the appropriate forum to select from among the competing proposals.” *Id.*

¹⁶⁹ *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033 (Mass. 1983).

¹⁷⁰ *Id.*

contributory or comparative negligence or fault as a full or partial defense to an action for personal injury or wrongful death based on breach of warranty.”¹⁷¹ The court analyzed the question in two parts.

The court held first that the statute, by its terms, was applicable only to negligence claims.¹⁷² Strict liability claims do not sound in negligence, and the court rejected the view that strict liability is effectively negligence per se.¹⁷³

The court then considered whether it would adopt some form of comparative fault as a common-law defense to a warranty claim.¹⁷⁴ The court “decline[d] to take such action. To do so would be to meld improperly the theory of negligence with the theory of warranty as expressed in [M.]G.L. c. 106, §§ 2-314–2-318, and thereby to undercut the policies supporting these statutes.”¹⁷⁵ The different policies behind negligence and strict liability justify this result.

[T]he policy of negligence liability presumes that people will, or at least should, take reasonable measures to protect themselves and others from harm. This presumption justifies the imposition of a duty on people to conduct themselves in this way. A person harmed by one whose conduct “falls below the standard established by law for the protection of others against unreasonable risk,” Restatement (Second) of Torts § 282 (1965), may recover against the actor. However, if the injured person’s unreasonable conduct also has been a cause of his injury, his conduct will be accounted for in apportioning liability or damages.¹⁷⁶

¹⁷¹ *Id.* at 1039.

¹⁷² *Id.* at 1037. *See* MASS. GEN. LAWS ch. 231, § 85 (2010) (“Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff’s damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff’s negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.”).

¹⁷³ *Correia*, 446 N.E.2d at 1039.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

The policy behind strict liability, however, is to prevent the release of dangerously defective products into the stream of commerce, a duty unknown in negligence law and not dischargeable by the exercise of due care.¹⁷⁷

The liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller. Given this focus, the only duty imposed on the user is to act reasonably with respect to a product which he knows to be defective and dangerous.¹⁷⁸

A violation of this duty is the only defense based on the plaintiff's conduct to a warranty claim that the court recognized, a defense that has come to be known as the *Correia* or the "unreasonable use," defense.¹⁷⁹ The *Correia* defense is not something mandated by the product liability amendments or the rest of the Code. It derives from the *Restatement (Second) of Torts* section 402A, comment *n*.¹⁸⁰ It is a common-law defense that the SJC adopted from section 402A and read into the Code. Having done that, the court simultaneously decided that

¹⁷⁷ *Id.* at 1040.

¹⁷⁸ *Id.*

¹⁷⁹ *Haglund v. Philip Morris, Inc.*, 847 N.E.2d 315, 319 & n.2 (Mass. 2006).

The elements of this defense, as set forth in *Correia* and clarified in subsequent cases, are: (1) The plaintiff knows that the product is defective in some way—technical specificity is not required. (2) The plaintiff knows that the product is dangerous. With that subjective knowledge, the plaintiff uses the product in a way that is (3) voluntary and (4) objectively unreasonable. And, needless to say, (5) the plaintiff is injured by the product. *Correia*, 446 N.E.2d at 1040; *Allen v. Chance Mfg. Co.*, 494 N.E.2d 1324, 1326 (Mass. 1986); *Haglund*, 847 N.E.2d at 323–24; *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 16–17, 19 (1st Cir. 2001).

¹⁸⁰ RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 402A cmt. *n* (1965) (“*Contributory negligence*. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.”).

it was up to the legislature to change the law,¹⁸¹ a position reiterated, somewhat wistfully, five years later in *Colter v. Barber-Greene Co.*¹⁸²

One way in which a product can be defective for purposes of product liability law is if it lacks an adequate warning.¹⁸³ This can be the basis of a negligence action. The duty to warn is premised on actual or constructive notice of the danger.¹⁸⁴ “A manufacturer of a product has a duty to warn foreseeable users of dangers in the use of that product of which he knows or should have known.”¹⁸⁵ The lack of an adequate warning can also constitute a breach of the implied warranty of merchantability.¹⁸⁶ In one of the seminal cases in Massachusetts product liability law, the court made the following statement:

For strict liability purposes, and therefore for purposes of our warranty law, the adequacy of a warning is measured by the warning that would be given at the time of sale by an ordinarily prudent vendor *who, at that time, is fully aware of the risks presented by the product*. A defendant vendor is held to that standard regardless of the knowledge of risks that he actually had or reasonably should have had when the sale took place. The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant, as is the culpability of the defendant. Goods that, from the consumer’s perspective, are unreasonably dangerous due to lack of adequate warning, are not fit for the ordinary purposes for which such goods are used regardless of the absence of fault on the vendor’s part. . . . Liability is imposed as a matter of social policy. . . . The finding that [the defendant] did not breach its warranty, therefore, necessarily implied that the warning given was adequate regardless of when the risk to be warned about was discovered or was discoverable.¹⁸⁷

The court was apparently saying that a manufacturer might be held liable in warranty for failure to warn of a defect that was not only

¹⁸¹ *Correia*, 446 N.E.2d at 1040–41.

¹⁸² See *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1315 (Mass. 1988), quoted *supra* note 168.

¹⁸³ See *e.g.*, *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986); *Yates v. Norton Co.*, 525 N.E.2d 1317, 1320 (Mass. 1988).

¹⁸⁴ *Mitchell*, at 1376.

¹⁸⁵ *Id.*

¹⁸⁶ *E.g.*, *Yates*, 525 N.E.2d at 1320.

¹⁸⁷ *Hayes v. Ariens Co.*, 462 N.E.2d 273, 277–78 (Mass.1984) (emphasis in original) (citations omitted).

unknown but also scientifically unknowable at the time of manufacture. The issue of the “state of the art” in warning cases under Massachusetts law next arose in a series of diversity cases in the federal courts.¹⁸⁸ These courts all held that the statement in *Hayes* was mere dictum and that state of the art evidence was admissible and highly relevant in a breach of warranty case for a failure to warn.¹⁸⁹ When the issue was next before the SJC, however, the court went out of its way to set the matter straight:

[The defendant] argues that the quoted passage from *Hayes* is not an accurate statement of Massachusetts law. In order to dissipate any confusion on this matter, we take this occasion to emphasize that the quoted language does indeed state Massachusetts law accurately, and, we think, clearly. As we said in *Correia v. Firestone Tire & Rubber Co.*, in connection with the application of strict liability principles to breach of warranty cases, “the liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller.” We adhere to these views.¹⁹⁰

Six years later, however, the court abandoned its position and significantly altered Massachusetts law in *Vassallo v. Baxter Healthcare Corp.*¹⁹¹ The *Vassallo* court stated:

[A] defendant will not be held liable under an implied warranty of merchantability for failure to warn or provide instructions about risks that were not reasonably foreseeable at the time of sale or could not have been discovered by way of reasonable testing prior to marketing the product. A manufacturer will be held to the standard of knowledge of an expert in the appropriate field, and will remain subject to a continuing duty to warn (at least

¹⁸⁸ In re Mass. Asbestos Cases, 639 F. Supp. 1 (D. Mass. 1985); *Collins v. Ex-Cello-O Corp.*, 629 F. Supp. 540, 542–43 (D. Mass. 1986), *aff’d mem.*, 815 F.2d 691 (1st Cir. 1987); *Anderson v. Owens-Illinois, Inc.*, 799 F.2d 1, 1, 4 (1st Cir. 1986) (“[The district court] considered the law of Massachusetts as a whole, and concluded that, notwithstanding the *Hayes* dictum, Massachusetts law requires a seller to warn only of reasonably foreseeable or scientifically discoverable dangers. We agree in all respects with the court’s resolution.” “We believe the *Hayes* dictum is not the law.”); *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 505 U.S. 1215, *after remand*, 981 F.2d 7 (1st Cir. 1992).

¹⁸⁹ *See id.*

¹⁹⁰ *Simmons v. Monarch Mach. Tool Co.*, 596 N.E.2d 318, 320 n.3 (Mass.1992) (internal citation omitted).

¹⁹¹ *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923–24 (Mass. 1998).

purchasers) of risks discovered following the sale of the product at issue.¹⁹²

The changes made by *Vassallo* were continued in two cases decided on the same day: *Hoffman v. Houghton Chemical Corp.*¹⁹³ and *Lewis v. Ariens Co.*¹⁹⁴

Hoffman is particularly significant. In *Hoffman*, the court dealt with the “bulk supplier doctrine,” under which the manufacturer or supplier of bulk products may satisfy its duty to warn end users by reasonable reliance on an intermediary who understands the risks involved and is able to pass on warnings about the risks to end users.¹⁹⁵ The court “adopt[ed] the bulk supplier doctrine as an affirmative defense to products liability negligence claims.”¹⁹⁶ The court then turned to products liability warranty claims:

In [*Vassallo*], we implicitly recognized that negligent failure to warn and failure to warn under breach of warranty are to be judged by the same standard: the reasonableness of the defendant’s actions in the circumstances. We expressly recognize that convergence now. Under our holding in *Vassallo*, then, an instruction on the bulk supplier doctrine may apply to both a claim of negligent failure to warn and a claim of breach of warranty failure to warn in products liability actions.¹⁹⁷

In *Lewis*, the court dealt with another type of warning issue: whether a manufacturer has a continuing, post-sale duty to warn.¹⁹⁸ The court adopted the principles of Restatement (Third) of Torts: Products Liability section 10.¹⁹⁹ The most important thing, for present

¹⁹² *Id.*

¹⁹³ *Hoffman v. Houghton Chem. Corp.*, 751 N.E.2d 848 (Mass. 2001).

¹⁹⁴ *Lewis v. Ariens Co.*, 751 N.E.2d 862 (Mass. 2001).

¹⁹⁵ *Hoffman*, at 854, 857.

¹⁹⁶ *Id.* at 857.

¹⁹⁷ *Id.* at 859–60 (footnotes omitted).

¹⁹⁸ *Id.* at 863–64.

¹⁹⁹ *Lewis*, 751 N.E.2d at 866 n.12. Section 10 states:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller’s failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller’s position would provide such a warning.

(b) A reasonable person in the seller’s position would provide a warning after the time of sale if: (1) the seller knows or reasonably

purposes, is that the court reiterated that in *Vassallo* the court had “implicitly recognized that negligent failure to warn and failure to warn under breach of warranty are to be judged by the same standard: the reasonableness of the defendant’s actions in the circumstances.”²⁰⁰

The court, in this line of cases, has thus judicially brought about what, in *Correia*, it had said was up to the legislature to do: the merger, at least in failure-to-warn cases, of negligence liability with warranty liability.²⁰¹

The *Mason* case precluded warranty liability where there is no sale.²⁰² We have considered other situations—the self-service case, the untendered goods case, the gift case—in which there is no sale or contract for sale, as those terms are defined in the UCC.²⁰³ We posit that the product contained a manufacturing defect, not caused by the

should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 10 (1998).

²⁰⁰ *Lewis*, at 866 n.12.

²⁰¹ *Correia v. Firestone Tire & Rubber Co.*, 446 N.E.2d 1033, 1040–41 (Mass. 1983). These cases also undermine the policy reasons that the *Correia* court gave for not allowing apportionment of damages in a warranty case. The court refused to adopt the principles of comparative negligence in *Correia* because “[t]o do so would be to meld improperly the theory of negligence with the theory of warranty as expressed in [M.]G.L. c. 106, §§ 2-314–2-318, and thereby to undercut the policies supporting these statutes.” *Id.* at 1039.

The duty imposed by the law of strict liability “is unknown in the law of negligence and it is not fulfilled even if the seller takes all reasonable measures to make his product safe. The liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller.” *Id.* at 1040.

That has changed. The focus in warning cases, whatever the label put on the plaintiff’s theory of recovery, now is on the conduct of the seller, and the standard by which that conduct is judged is reasonableness. When the inevitable case arises in which a negligent plaintiff brings a warranty claim based on a failure to warn, the court should complete what it has begun and recognize a comparative responsibility defense to the claim. *See generally* Geiger & Martinez, *supra* note 168.

²⁰² *Mason v. Gen. Motors Corp.*, 490 N.E.2d 437, 442 (Mass. 1986).

²⁰³ *See* U.C.C. § 2-106(1) (2011).

manufacturer's negligence. A Massachusetts plaintiff injured by the product would most likely not be able to recover in these cases: There's no negligence, no warranty, no strict liability.

This anomalous result, ungrounded in public policy,²⁰⁴ is the consequence of the court's interpretation of the legislature's intent in adopting the product liability amendments. It is perhaps a forlorn hope that the court would reconsider its interpretation of the preemptive effect of the product liability amendments. There oughta be a law. If the court is precluded from extending warranty liability to these cases or from recognizing a common-law remedy apart from negligence, the legislature should act to plug this gap in Massachusetts product liability law by enacting a statute that would impose strict liability on a manufacturer for injuries caused by a defective product that the manufacturer had introduced into the stream of commerce, regardless of whether there was a sale or lease and regardless of whether the manufacturer was negligent.

B. The Statute of Limitations Problem Caused by Section 2-318.

Most of the problems with respect to the statute of limitations applicable to various warranty claims, as discussed in Part II.B.2, were resolved—and properly so—in the *Bay State-Spray* case. There are some problems raised by the product liability amendments that are yet to be decided, problems resulting from warranty law doing double duty and from inconsistent draftsmanship.

The *Jacobs* case was concerned solely with the privity issue: whether the consumer-buyer could maintain a contract-based warranty action directly against the manufacturer.²⁰⁵ The statute of limitations was not an issue in the case. The plaintiff bought the motorcycle in April 1983 and commenced the action against the dealer in June 1984. The manufacturer was added as a defendant in July 1986.²⁰⁶ What if the plaintiff had brought suit in May 1986, more than three, but less than four years after the tender of delivery?

Jacobs raises questions about the statute of limitations applicable to a contract-based warranty claim by a non-privity buyer of consumer goods. In *Bay State-Spray*, it should be remembered, the (commercial)

²⁰⁴ Grant, *supra* note 3, at 78.

²⁰⁵ *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758 (Mass. 1995).

²⁰⁶ *Id.* at 759–60. For purpose of the statute of limitations, the amended complaint would relate back to the date of the original complaint. MASS. R. CIV. P. 15(c).

buyer was suing a component manufacturer, a remote seller with whom it was not in privity. The privity issue was not pressed by the defendant.²⁰⁷ Nonetheless, as the court noted, the section 2-318 statute of limitations did literally apply to the case.²⁰⁸ The relevant sentence in section 2-318 contains a significant phrase: “All actions *under this section* shall be commenced within three years next after the date the injury and damage occurs.”²⁰⁹ The *Bay State-Spray* court completely ignored this language, focusing rather on the legislative purpose underlying section 2-318 and the substantive nature of the warranty claim in question to conclude that section 2-318’s statute of limitation applied to a tort-based warranty claim.²¹⁰

Nevertheless, *Bay State-Spray* was a warranty claim brought by a non-privity buyer. Lack of privity was not an issue by virtue of section 2-318’s abolition of the defense, and the action was, technically, brought under that section. The same (correct) result would have been reached, had the court concluded that section 2-318 was inapplicable to commercial warranty claims—an interpretation strongly hinted at in *Jacobs*²¹¹ and arrived at in a series of decisions by the federal courts.²¹²

The focus in *Bay State-Spray* was entirely on choosing the appropriate statute of limitations. Lack of privity and the applicability of section 2-318 were very much the focus in *Jacobs*. The court held that a consumer buyer, under section 2-318, could directly sue the manufacturer for breach of the implied warranty of merchantability.²¹³ Therefore, such an action would be an action “under this section.” It is unlikely that the court would apply the section 2-318 statute of limitations to the case, however, based on the policy reasons

²⁰⁷ *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1353 n.4 (Mass. 1989).

²⁰⁸ *Id.* at 1353.

²⁰⁹ MASS. GEN. LAWS ch. 106, § 2-318 (as amended by St. 1974, c. 153) (emphasis added).

²¹⁰ *Bay State-Spray*, 533 N.E.2d at 1352–53.

²¹¹ *Jacobs*, 649 N.E.2d at 763 (Contract-based warranty claims involving commercial transactions may generally call for different treatment than tort-based warranty claims).

²¹² *See, e.g., Sebago, Inc. v. Beazer E., Inc.*, 18 F. Supp. 2d 70, 99 (D. Mass. 1998).

²¹³ *Jacobs*, 649 N.E.2d at 762–63 (where the court placed great emphasis on the fact that § 2-318 refers to “damages,” rather than “injury to the person,” and is thus not limited to recovery for personal injury).

articulated in *Bay State-Spray*. But it would be doing so at the cost of ignoring the actual language of the statute.²¹⁴

The reverse situation—the case of a buyer who is in privity with the seller and brings a tort-warranty claim—is equally problematic. The policy reasons for applying the three-year limitation and the accrual rule of section 2-318 to the claim are compelling, but the privity buyer’s action is unquestionably not brought “under this section.”

Had the statute of limitations been an issue in *Jacobs* or were a privity buyer to bring a tort-warranty claim against his direct seller more than three years after the injury or damage, but within four years of the tender of delivery, the court would most likely apply the four-year statute in the former case and the three-year one in the latter. To reach this result, though, the court would have to act like a finicky gourmet at a smorgasbord, picking one morsel from section 2-318 and another from section 2-725, to arrive at a palatable result, an exercise that would be unnecessary if strict tort liability had been on the menu in the first place.

The irony in all this is that the plaintiff in either case would have four years to bring suit anyway. The statute of limitations applicable to the Massachusetts Consumer Protection Act²¹⁵ is four years.²¹⁶

Chapter 93A prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce.”²¹⁷ It creates a cause of action in favor of both consumers and businesses who are injured by a violation of the statute.²¹⁸

The Attorney General is authorized to promulgate regulations under chapter 93A.²¹⁹ Some of the regulations bear on product liability cases. The most important of them is section 3.08(2) of the Code of Massachusetts Regulations, Title 940, which declares it an unfair or

²¹⁴ *Bay State-Spray*, 533 N.E.2d at 1355 n.8 (stating that “[w]e would also reject any suggestion that the statute of limitation of § 2-318 would apply to an original purchaser’s contract-based claim for economic loss as well.”).

²¹⁵ MASS. GEN. LAWS ch. 93A (2010).

²¹⁶ MASS. GEN. LAWS ch. 260, § 5A.

²¹⁷ MASS. GEN. LAWS ch. 93A, § 2(a).

²¹⁸ *See id.* §§ 9, 11.

²¹⁹ *See id.* § 2(c).

deceptive act or practice “to fail to perform or fulfill any promises or obligations arising under a warranty.”²²⁰

Chapter 93A applies to a product liability tort-warranty claim for personal injury, at least where negligence is involved,²²¹ or for property damage.²²²

If the warranty claim is brought under chapter 93A, the applicable statute of limitations is the four-year period of section 5A, even though the same claim, if brought under the UCC, would be governed by the three-year limitation period of section 2-318.²²³

These questions of the interpretation of section 2-318, though hardly insoluble, are the result of the legislature attempting to make warranty law do double duty. In drafting section 2-318, the legislature may not have foreseen the problems it would create by attempting to solve the product liability problem in the way it did. The kitchen sink approach employed by the legislature created a number of ambiguities about the application of the section. The statute of limitations issues are, perhaps, the least of the problems; but they are nonetheless examples of issues that could have been avoided if the legislature had itself created a cause of action for strict tort liability or not taken the steps it did take that were interpreted by the court as precluding judicial recognition of strict tort liability.

The legislature’s treatment of the statute of limitation applicable to product liability warranty actions highlights another anomaly of Massachusetts product liability law. The obvious intent of the legislature when it put a three-year limitation period in section 2-318

²²⁰ 940 MASS. CODE REGS. secs. 3.01, 3.08 (establishing that the definition of warranty includes the three warranties of quality that can arise under the UCC: express warranties and implied warranties of merchantability and fitness for a particular purpose). Not every breach of warranty is automatically a violation of chapter 93A. *See* Sherry L. Rajaniemi-Gregg & Michael D. Weisman, *Products Liability Claims Pursuant to Chapter 93A*, in CHAPTER 93A RIGHTS AND REMEDIES § 15.2.2 (2010) (discussing warranty claims giving rise to a chapter 93A claim). That issue is outside the scope of this article. For purposes of this discussion, it is assumed the warranty claim does give rise to a chapter 93A claim.

²²¹ *Maillet v. ATF-Davidson Co.*, 552 N.E.2d 95, 98 (Mass. 1990) (failing to reach the issue of whether chapter 93A liability would be imposed where the breach of warranty was not negligent).

²²² *E.g.*, *Fine v. Huygens, DiMella, Shaffer & Assocs.*, 783 N.E.2d 842 (Mass. App. Ct. 2003).

²²³ *Id.* at 846, 848–849; *see also* *Mahoney v. Baldwin*, 543 N.E.2d 435 (Mass. App. Ct. 1989) (discussing how § 5A applies to consumer protection claims).

was that tort-warranty claims and negligence claims would be subject to the same limitation period. That policy is undercut by the four-year limitation applicable to chapter 93A claims based on breach of warranty. The legislature should consider amending section 5A to make it consistent with section 2-318 and thus provide a uniform three-year limitation period for all product liability claims, whether those claims are based on negligence, breach of warranty, or an unfair or deceptive act or practice.

C. The Slam-Dunk, Nuclear Booby-Trap: The Notice Requirement

One of the encumbrances of the law of sales that is still part of Massachusetts product liability law is the notice requirement.

You know that something variously described as “a booby-trap,”²²⁴ “an obvious threat,”²²⁵ “a very rough rule,”²²⁶ “the ‘slam-dunk’ provision,”²²⁷ “a thunderbolt out of the sky,”²²⁸ and even “a nuclear bomb,”²²⁹ might cause a problem or two.

The notice requirement of sales law is one of the encumbrances of Massachusetts products liability law precisely because of the way that law has developed. The lack of a notice requirement—a *contract* defense—was one of the selling points of strict tort liability when that theory was in its infancy. The *Greenman* case, which got the strict liability ball rolling, regarded the contract-based notice requirement of the Sales Act as inappropriate in an action brought by an injured

²²⁴ W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 691 (5th ed. 1984) (“Both the Sales Act and the Commercial Code contain provisions which prevent the buyer from recovering on a warranty unless he gives notice to the seller within a reasonable time after he knows, or ought to know, of the breach. As between the immediate parties to the sale, this is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.” (footnote omitted)).

²²⁵ 1 THOMAS M. QUINN, QUINN’S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST §§ 2-607[B][3], 2-607[A][5][a] (rev. 2d ed. 2001 & Supp. 2011) (citations omitted).

²²⁶ *Id.* at § 2-607[A][5][a].

²²⁷ 18 WILLISTON ON CONTRACTS § 52:42 (4th ed.).

²²⁸ Barkley Clark, *First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 UCC L.J. 105, 105 (1982).

²²⁹ William H. Henning & William H. Lawrence, *A Unified Rationale for Section 2-607(3)(a) Notification*, 46 SAN DIEGO L. REV. 573, 575 (2009).

consumer against a remote seller.²³⁰ The Restatement took a similar position.²³¹

The fact that there is any notice requirement in a product liability case is a problem that could and should have been avoided by the legislature at the outset. First, the notice requirement itself is not applicable to every warranty claim, but only to claims by actual buyers. The courts that have interpreted section 2-318 to impose a notice requirement—without actually considering the issue—on non-buyer warranty beneficiaries are wrong. Second, if these decisions are what the legislature intended when it enacted the product liability amendments, then the legislature got it wrong and should act to bring Massachusetts product liability law into line with the rest of the country by abolishing the notice requirement in warranty claims for personal injury. This section of the article also discusses the problems of interpretation created by the legislature when it included a provision about notice in section 2-318.

1. Background

The notice requirement imposed by section 2-607(3)(a) states, “(3) Where a tender has been accepted . . . (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy”²³² This provision derives from section 49 of the Uniform Sales Act, the predecessor of Article 2 of the UCC.²³³

²³⁰ *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963).

²³¹ RESTATEMENT (SECOND) OF TORTS § 402A cmt. *m* (1965) (“The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to ‘buyer’ and ‘seller’ in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act”).

²³² *Id.*

²³³ Unif. Sales Act. § 49, 1A U.L.A. 99 (1950) (“In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.”).

The rule is not an ancient feature of our law of sales. Professor Samuel Williston introduced the rule into our law in section 49 of his 1906 draft of the Uniform Sales Act, in part drawing his inspiration from a provision in the German Commercial Code. The common law still does not recognize such a rule. . . .²³⁴

The official comments, courts, and commentators have identified a number of purposes that the notice requirement serves,²³⁵ such as the investigation and settlement of claims; the prevention of commercial bad faith; the repair or replacement of the non-conforming goods or other cure; protection of the seller's right to inspect the goods; mitigation of damages; and staleness.²³⁶ Some of these purposes, such as the replacement of non-conforming goods, are relevant only to commercial or, at least, to contract-based warranty claims. The purposes of the notice requirement in product liability warranty cases that have been identified by the Massachusetts courts are to inform the seller of the breach and thus allow for settlement of the case,²³⁷ to allow the defendant to gather evidence in a timely way, and to prevent surprise by a suit years after the sale.²³⁸

The effect of not giving sufficient notice under section 2-607(3)(a) is draconian: “[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy”²³⁹ Section 2-318 in Massachusetts mitigates the harshness of this rule: “Failure to give

²³⁴ John C. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C. § 2-607(3)(a)*, 73 CORNELL L. REV. 534, 534–35 (1988) (footnotes omitted).

²³⁵ Henning & Lawrence, *supra* note 229, at 574; Harry G. Prince, *Overprotecting the Consumer? Section 2-607(3)(a) Notice of Breach in Nonprivity Contexts*, 66 N.C. L. REV. 107, 115–16 (1987); Jerry J. Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457, 465–70 (1972).

²³⁶ Phillips, *supra* note 235, at 465; Reitz, *supra* note 234, at 540–41; *see also* Henning & Lawrence, *supra* note 229, at 576–78 (arguing for a prejudice-based treatment of the notice requirement as exemplified by the proposed amended section, UCC § 2-607(3)(a) (2003)).

²³⁷ *Smith v. Robertshaw Controls Co.*, 410 F.3d 29, 35 (1st Cir. 2005) (quoting *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066, 1072 (Mass. 1985)).

²³⁸ *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 449 (1st Cir. 1997).

²³⁹ MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

notice shall not bar recovery *under this section* unless the defendant proves that he was prejudiced thereby.”²⁴⁰

In order to prevail on the prejudice defense, a defendant must prove two things: an unreasonable delay and resulting prejudice.²⁴¹ First, the defendant must show that there was an unreasonable delay in giving notice.²⁴² This is a factual question and depends on the reasonableness of the buyer’s conduct in the circumstances.²⁴³ This “thorny issue”²⁴⁴ is the more difficult of the two factors. In some cases, the delay has been found unreasonable as a matter of law or the plaintiff has not contested the issue.²⁴⁵ In other cases, the issue was held to be a jury question.²⁴⁶

Second, the defendant must make the “relatively easy”²⁴⁷ showing that the delay caused prejudice. It is not necessary to show formal prejudice. It suffices that the delay could have deprived the defendant of useful evidence or prevented the defendant from fully investigating the circumstances of the case and thus developing evidence, and it is not necessary to show that the lost evidence would have changed the result.²⁴⁸

²⁴⁰ *Id.* § 2-318 (emphasis added).

²⁴¹ *E.g.*, *Henrick v. Coats Co.*, 458 N.E.2d 773, 775 (Mass. App. Ct. 1984); *Robertshaw*, 410 F.3d at 36.

²⁴² *E.g.*, *Sacramona*, 106 F.3d at 448–49.

²⁴³ *Robertshaw*, 410 F.3d at 35.

²⁴⁴ *Sacramona*, 106 F.3d at 449.

²⁴⁵ *Id.* at 449 (filing of notice three years after the injury was “plainly delayed”); *Robertshaw*, 410 F.3d at 36 (filing of notice three years after the injury was not contested by plaintiff).

²⁴⁶ *Castro v. Stanley Works*, 864 F.2d 961, 963 (1st Cir. 1989) (20 month delay; jury found prejudice); *Henrick v. Coats Co.*, 458 N.E.2d 773, 774–75 (Mass. App. Ct. 1984) (No notice other than filing complaint three years after injury; issue should have been submitted to jury); *Chapman ex rel. Estate of Chapman v. Bernard’s Inc.*, 167 F. Supp. 2d 406, 415 (D. Mass. 2001) (where a three-year delay was a material question of fact); *Cameo Curtains, Inc. v. Philip Carey Corp.*, 416 N.E.2d 995, 998 (Mass. App. Ct. 1981) (the notice was not found to be delayed when given by plaintiff as soon as the defect in the product was known to the plaintiff); *New London County Ins. Co. v. Broan Nutone, LLC*, No. BACV 20020130, 2006 WL 2221838, at *2–*3 (Mass. Super. Ct. July 3, 2006) (holding that a twenty-five day delay was not unreasonable as a matter of law).

²⁴⁷ *Sacramona*, 106 F.3d at 449.

²⁴⁸ *Id.*; *Castro*, 864 F.2d. at 964; *Chapman*, 167 F. Supp.2d at 415.

It is irrelevant that the plaintiff may also have been prejudiced, nor does it matter that a third party may have been responsible for the loss.²⁴⁹

Failure to give notice bars recovery, of course, only if there was an obligation to give notice in the first place.

2. When Is Notice Required in Massachusetts?

Who must give notice to whom in a product liability warranty case for personal injury? In the case of a buyer suing his immediate seller for breach of warranty, there is no question that the buyer is required to give the seller notice even if the claim is for personal injury. That is simply what the Code says.²⁵⁰ The plaintiff in *Nugent v. Popular Markets, Inc.* was injured by wood splinters in a jar of berries that he purchased from the defendant supermarket.²⁵¹ The defendant challenged the sufficiency of the notice because the letter sent by the plaintiff did not give the date of the sale.²⁵² Noting that the UCC notice requirements were intended to be “less rigorous” than those under the Sales Act, the court held that the notice was sufficient under section 2-607(3)(a).²⁵³ Similarly, in *Manfredi v. James C. Fettes, Inc.*, the plaintiff was injured when a bottle of Canada Dry exploded.²⁵⁴ He had purchased the bottle from the defendant package store.²⁵⁵ He sued the package store for breach of warranty and the bottling company for negligence.²⁵⁶ In upholding a jury verdict for the plaintiff, the court simply noted that adequate notice under section 2-607 had been given to the package store.²⁵⁷

²⁴⁹ *Smith v. Robershaw Controls Co.*, 410 F.3d 29, 37 (1st Cir. 2005).

²⁵⁰ MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

²⁵¹ *Nugent v. Popular Mkts., Inc.*, 228 N.E.2d 91, 92 (Mass. 1967).

²⁵² *Id.* at 93.

²⁵³ *Id.* at 94.

²⁵⁴ *Manfredi v. James C. Fettes, Inc.*, 226 N.E.2d 365, 366 (Mass. 1967).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*; see also *Ford v. Barnard, Sumner & Putnam Co.*, 294 N.E.2d 467, 468 (Mass. App. Ct. 1973) (holding that where notice was insufficient when a plaintiff was injured by a cosmetic that she bought a defendant’s store); *Sullivan v. H. P. Hood & Sons, Inc.*, 168 N.E.2d 80, 85–86 (Mass. 1960) (holding that where the plaintiff drank milk from a container in which there was a dead mouse, the statement of the plaintiff’s son to the seller’s president that the plaintiff had been made ill and should bring suit was sufficient notice under the Sales Act).

In none of these cases did the court discuss the question whether notice was required in such a case: The plaintiff was the “buyer”,²⁵⁸ the defendant was the (immediate) seller,²⁵⁹ and the transaction was a “sale,” that is, “the passing of title from the seller to the buyer for a price.”²⁶⁰ The cases called for a straight-forward application of the Code as written.

Matters become complicated when the warranty claimant is not a buyer, or at least not a buyer from the defendant. Matters become even more complicated in Massachusetts because of the notice provision in section 2-318.

Although one occasionally comes across statements in the cases to the effect that section 2-318 imposes a notice requirement,²⁶¹ that is not actually true. The notice requirement is found in section 2-607(3)(a).²⁶² Section 2-318 mitigates the potential harshness of the all-or-nothing rule of section 2-607(3)(a). To paraphrase what the SJC has said about another aspect of section 2-318, the plaintiff’s failure to give notice does not bar recovery unless the defendant proves that he was prejudiced by the failure. The fact that a prejudicial failure to give notice is a defense sheds no light on the logically prior question whether the plaintiff was required to give notice in the first place.²⁶³

²⁵⁸ MASS. GEN. LAWS ch. 106, § 2-103(1)(a) (2010) (“‘Buyer’ means a person who buys or contracts to buy goods.”).

²⁵⁹ *Id.* § 2-103(1)(d) (“‘Seller’ means a person who sells or contracts to sell goods.”).

²⁶⁰ *Id.* § 2-106(1).

²⁶¹ *New London County Ins. Co. v. Broan Nutone, LLC*, No. BACV20020130, 2006 WL 2221838 (Mass. Super. Ct., July 3, 2006) (timely notice required by § 2-318) (citation omitted); *Cameo Curtains, Inc. v. Philip Carey Corp.*, 416 N.E.2d 995, 998 (Mass. App. Ct. 1981) (stating “[b]ecause of the express provision concerning notice in [§] 2-318, there is no occasion to consider the applicability of [M.]G.L. c. 106, [§] 2-607(3)(a).”).

²⁶² *Smith v. Robersshaw Controls Co.*, 410 F.3d 29, 35 (1st Cir. 2005) (“Because of its UCC origins, warranty liability in Massachusetts contains certain technical requirements not found in strict tort liability. One such requirement is prompt notice. Under Massachusetts law, ‘the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred or be barred from any remedy.’” (citing MASS. GEN. LAWS ch. 106, § 2-607(a)(3))).

²⁶³ *Mason v. General Motors Corp.*, 490 N.E.2d 437, 440 (Mass. 1986) (“It is true, of course, that under [M.]G.L. c. 106, § 2-318, lack of privity between a plaintiff and a defendant is not a defense to a claim for breach of an implied warranty of merchantability. But, the fact that lack of privity is not a defense to a breach of

“Buyer” is a defined term: “a person who buys or contracts to buy goods.”²⁶⁴ A “buyer,”²⁶⁵ obviously, must notify the seller²⁶⁶ of a claimed breach. With the abolition of the privity requirement by section 2-318, however, warranties run to persons other than buyers. They run to “a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods.”²⁶⁷ Such a person could be a “buyer.” He could also be a “purchaser,”²⁶⁸ or simply a bystander.

There are several cases, none of them decided by the SJC, in which the prejudicial effect of a *non-buyer's* failure to comply with the notice requirement was the issue.²⁶⁹ In all of these cases, the injured plaintiff was not the buyer of the product.²⁷⁰ The question was not raised whether the plaintiff was required to give notice in the first place.²⁷¹

warranty claim sheds no light on the logically prior question whether a warranty has indeed been made.”).

²⁶⁴ MASS. GEN. LAWS ch. 106, § 2-103(1)(a) (2010).

²⁶⁵ *Hebron v. American Isuzu Motors, Inc.*, 60 F.3d 1095, 1097-98 (4th Cir. 1995) (holding that under Va. Law, the notice requirement applied to all “buyers,” including retail consumers).

²⁶⁶ MASS. GEN. LAWS ch. 106, § 2-103(1)(a).

²⁶⁷ *Id.* § 2-318.

²⁶⁸ *Id.* § 1-201(33) (2010) (“‘Purchaser’ means a person or his nominee who takes by purchase.”); *see also id.* (32) (defining purchase as “taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property”).

²⁶⁹ The SJC, upon occasion, makes general statements in dictum about the notice requirement. *See e.g.*, *Hayes v. Ariens Co.*, 462 N.E.2d 273, 275 n. 2 (Mass. 1984) (“Of course, the defendant might not be liable even though a breach of warranty is established. A failure to give timely notice of breach of warranty, if prejudicial to the defendant constitutes a defense.” (citing M.G.L. c. 106, §§ 2-318, 2-607 (3)(a))); *Swartz v. General Motors Corp.*, 378 N.E.2d 61, 63 (Mass. 1978) (“In 1973, the section was extended to lessors, and the defense of failure to give notice was limited to cases where the defendant proved prejudice.”).

²⁷⁰ *See Castro v. Stanley Works*, 864 F.2d 961, 962 (1st Cir. 1989) (plaintiff injured by product in the course of employment); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444 (1st Cir. 1997) (service station manager); *Henrick v. Coats Co.*, 458 N.E.2d 773 (Mass. App. Ct. 1984) (service station employee); *see also Smith v. Robertshaw Controls Co.*, 410 F.3d 29 (1st Cir. 2005) (where the plaintiff who was burned while attempting to light a propane water heater in his basement may or may not have been the actual buyer of the product).

²⁷¹ This usually occurs because the parties concede that the law requires notice. *See Sacramona*, 106 F.3d at 448 (“[n]either side disputes that Massachusetts law embodies a notice requirement for warranty claims”).

The only Massachusetts case that has directly addressed the question whether a non-buyer warranty beneficiary is required to give notice is an early decision of the Appellate Division, *Menard v. Great Atlantic & Pacific Tea Co.*²⁷² A mother bought a can of tuna at the defendant's supermarket.²⁷³ She and her minor son were injured by a foreign object in the fish.²⁷⁴ The plaintiffs' attorney sent a notice to the defendant, but the notice was held legally insufficient to satisfy section 2-607(3)(a).²⁷⁵ The mother's claim therefore failed because she—the buyer—had not given proper notice, “a condition precedent to establishing the defendant's liability in her case.”²⁷⁶ Not so the son's case.

The son, who was in the family of the buyer and suffered personal injury because of the breach of warranty, was a beneficiary of the warranty.²⁷⁷ The court held that he, as a third-party beneficiary of the warranty, was not bound by the notice provisions of section 2-607(3)(a):

No case law on the question of the type of notice, if any, required of third party beneficiaries has developed as of now. We do not think it was intended to make the rights of this large group, to whom the warranty has been extended, dependent upon notice being given by the buyer. Experience tells us that there will be instances in which an alleged breach of warranty will cause injury only to third parties.

Neither do we feel that one in this group is required to personally notify the seller of the alleged breach. It might be

²⁷² *Menard v. Great Atl. & Pac. Tea Co.*, 22 Mass. App. Dec. 170 (1961). *Menard* was apparently the first case in the country to construe § 2-607(3)(a).

²⁷³ *Id.* at 170.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 174–75 (“The notice in the present case does not assert, and it cannot be inferred, a sale of the tuna fish was made by the defendant. The date, or approximate date, of purchase is not given . . . It does not ‘indicate that the claim arose out of the sale.’ Reference in the notice to ‘your product’ and ‘negligence’ is confusing, making it uncertain whether the plaintiff sought to hold the defendant liable as a manufacturer or seller.”). The Appellate Division in *Barry v. Stop & Shop, Inc.*, 37 Mass. App. Dec. 213, 215 n.2 (1967), stated that this holding was probably overruled by *Nugent v. Popular Markets, Inc.*, 228 N.E.2d 91 (Mass. 1967) (holding that the UCC notice requirement was less rigorous than under the Sales Act).

²⁷⁶ *Menard*, 22 Mass. App. Dec. at 173 (citing *Burns v. Jordan Marsh Co.*, 26 N.E. 368, 373 (Mass. 1940)).

²⁷⁷ *Id.* at 175 (citing MASS. GEN. LAWS ch. 106, § 2-318 (1960)).

difficult, if not impossible, in some circumstances, for a third party to give a notice concerning the details of a sale. To hold otherwise would require our reading into § 2-607(3)(a) that notice, now required only of the buyer, be given *by anyone claiming an extended warranty, under § 2-318* (emphasis supplied). The provisions of this code received the attention in its drafting of eminent legal authorities, and if it was so intended it could have been readily stated. We cannot read it into the statute. The son's minority is immaterial. That the result reached here seems to be incongruous is the concern of the legislature.²⁷⁸

Menard is the only Massachusetts case that has expressly considered the question whether a warranty beneficiary, who was not a buyer, is required to give notice as a condition of recovering for a breach of warranty.²⁷⁹ The case law on the issue, whose absence was noted by the court,²⁸⁰ has developed in other jurisdictions and the great weight of authority in other states has aligned with the conclusion reached by the *Menard* court.²⁸¹

In *Tomczuk v. Town of Cheshire*, perhaps the leading case on this point, the Carta family bought a bicycle for their minor daughter.²⁸² The bicycle was manufactured by the defendant, Union Cycle Co., and sold to the general public through the manufacturer's dealer, also a

²⁷⁸ *Id.* at 175–76.

²⁷⁹ There are a few Massachusetts cases involving non-buyer plaintiffs in which the court discussed the notice requirement. In none of these cases, as far as appears, did the court or the parties raise the issue whether notice was actually required to be given. But see *Olsen v. BBRG Mass. Rest., Inc.*, 2005 Mass. App. Div. 23, 2005 WL 552365, in which the plaintiff brought a warranty claim after breaking two teeth on a metal item in french fries ordered at the defendant's restaurant. In discussing the notice issue, the court stated, "It is not entirely clear that the notice requirement in [M.]G.L. c. 106, § 2-607(3)(a), which seems to address breach of contract issues in the context of shipping and receiving goods, would apply in the context of a consumer's purchase of a prepared meal in a restaurant." 2005 WL 552365, at *2. The court's dictum highlights the problem of using warranty law as the basis of strict product liability. A literal reading of the statutory language shows that the plaintiff was required to give notice to his seller. Section 2-314(1) specifically says that "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." The plaintiff and the restaurant were a "buyer" and a "seller" within the meaning of section 2-103(1)(a), (d).

²⁸⁰ *Menard*, 22 Mass. App. Dec. at 175.

²⁸¹ See, e.g., *Tomczuk v. Town of Cheshire*, 217 A.2d 71, 74 (Conn. Super. Ct. 1965).

²⁸² *Id.* at 71–72.

defendant.²⁸³ Sandra Tomczuk, while a guest at the Carta home, was injured when she was thrown from the bicycle due to certain alleged defects in it.²⁸⁴ Two of the counts in the complaint were for breach of express and implied warranties by the manufacturer.²⁸⁵ Union Cycle demurred to these counts on the ground that it had not been given notice of the claimed breach.²⁸⁶

The manufacturer made a two-step argument. It argued first that the definition of “seller”²⁸⁷ is not limited to the retailer or immediate vendor, but included a manufacturer that sold the product to the retailer.²⁸⁸ It argued second,

[S]ince the plaintiffs seek to impose on it all the duties imposed by the Uniform Commercial Code on sellers, it is only reasonable that Union Cycle be given the notice rights of a seller, since the underlying theory of notice is to give the defendant an opportunity to inspect allegedly defective goods so that he can assess his liability.²⁸⁹

The court rejected the first argument based on the plain language of the statute.²⁹⁰ The plaintiff was not a “buyer.” Second, no “sale”²⁹¹ took place between Union Cycle and the Cartas.²⁹²

It cannot be said that a ‘sale’ was made by Union Cycle to the Cartas. It is not disputed that the bicycle was sold by Union Cycle to [the retailer]. Thus, title passed from the former as seller to the latter as buyer, and when [the retailer] sold to the Cartas, once again title was passed by [the retailer] as the seller to the Cartas as the buyer. Section [2-313] speaks of certain conduct ‘by the seller to the buyer.’ Section [2-315] embodies reference to ‘the seller’ and to ‘the buyer . . . relying on the seller’s skill or judgment.’ The legislature intended to make a distinction between the manufacturer as a seller to a retailer as buyer and the retailer as a seller to the public as buyer, for in § [2-607(5)] it is provided that

²⁸³ *Id* at 72.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ U.C.C. § 2-103(1)(d) (2011) (“[A] person who sells or contracts to sell goods.”).

²⁸⁸ *Tomczuk*, 217 A.2d at 72.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 73.

²⁹¹ U.C.C. § 2-106(1) (2011) (“A ‘sale’ consists in the passing of title from the seller to the buyer for a price . . .”).

²⁹² *Tomczuk*, 217 A.2d at 73.

‘where the buyer is sued for a breach of a warranty . . . he may give his seller written notice of the litigation.’ The term ‘his seller’ obviously refers to the person who made the immediate sale to one who is his buyer.²⁹³

There was nothing to indicate a legislative intent to require non-buyer warranty beneficiaries to give notice under section 2-607(3)(a) as a condition of recovery.²⁹⁴

The plaintiff in *Frericks v. General Motors Corp.* was a passenger in an automobile.²⁹⁵ He was injured when the driver (the son of the buyers) fell asleep and lost control of the car.²⁹⁶ He and his father brought an action against the manufacturer and the dealer, based on an alleged design defect in the locking mechanism of the seat in which he was riding which enhanced the injuries he received in the accident.²⁹⁷ The plaintiffs’ claims included one for breach of warranty against both defendants.²⁹⁸ The trial court held that a third-party beneficiary of warranties should be treated as a buyer for purposes of section 2-607(3)(a) and therefore granted summary judgment to the defendants on the warranty counts because the plaintiffs had not given notice to the defendants until they brought suit.²⁹⁹

On appeal, the court held that a third-party beneficiary of a warranty was not required by section 2-607 to notify the seller of a breach of warranty.³⁰⁰ Section 2-607 is limited to actual buyers, as defined in section 2-103(1)(a).³⁰¹ “We are not free, in view of the unambiguous language of § 2-607 requiring only the buyer to notify the seller of breach, and the definition of buyer in § 2-103, to extend that requirement to encompass the plaintiffs here.”³⁰²

²⁹³ *Id.*

²⁹⁴ *Id.* at 73–74.

²⁹⁵ *Frericks v. Gen. Motors Corp.*, 363 A.2d 460, 460–61 (Md. 1976).

²⁹⁶ *Id.* at 461.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 462

³⁰⁰ *Id.* at 463.

³⁰¹ *Id.*

³⁰² *Id.* at 465.

The great majority of courts that have considered the issue agree with these decisions.³⁰³ There are courts that hold otherwise.³⁰⁴

In *Lariviere v. Dayton Safety Ladder Co.*, a worker—a non-buyer warranty beneficiary—who was injured by a ladder brought warranty and various other claims against the manufacturer.³⁰⁵ The plaintiff had given notice to the manufacturer and the issue was the sufficiency of that notice.³⁰⁶ In that context, the Rhode Island court noted in passing that:

plaintiff is not a merchant, nor is he a retail buyer. Rather, he is properly considered a “beneficiary” of the warranty. Comment 5 to § 6A-2-607 suggests that a beneficiary is required to give notice only that an injury has occurred and that the beneficiary should be held to the requirement of good faith.³⁰⁷

Under Illinois law, non-buyer warranty beneficiaries are subject to the notice requirement.³⁰⁸

³⁰³ WILLISTON, *supra* note 227 (stating that generally the ultimate buyer does not have to provide notice because there is no privity between the ultimate buyer and the seller that made the warranty); *e.g.*, *Mattos, Inc. v. Hash*, 368 A.2d 993, 996-97 (Md. 1977) (holding that requiring the plaintiff employee to give notice to the seller because the plaintiff’s employer was the buyer); *Chaffin v. Atlanta Coca Cola Bottling Co.*, 194 S.E.2d 513, 515 (Ga. Ct. App. 1972) (holding that the notice provision was not applicable to the plaintiff injured by a foreign substance in a soft drink who was a third-party beneficiary of the supermarket’s warranty); *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1048 (4th Cir. 1998) (deciding that an employee injured while using a ladder purchased by the employer was considered a non-purchaser and not required to give notice as a condition precedent to a warranty claim for personal injury); *Simmons v. Clemco Indus.*, 368 So.2d 509, 513-14 (Ala. 1979) (holding that employees injured by a another employee were not required to give notice).

³⁰⁴ *See, e.g.*, *Lariviere v. Dayton Safety Ladder Co.*, 525 A.2d 892, 898 (R.I. 1987).

³⁰⁵ *Id.* at 893.

³⁰⁶ *Id.* at 897-98.

³⁰⁷ *Id.* at 898 (footnote omitted).

³⁰⁸ *Ratkovich v. Smithkline*, 711 F. Supp. 436, 438 (N.D. Ill. 1989) (stating that the requirement of notice extends to non-buyer beneficiaries); *Maldonado v. Creative Woodworking Concepts, Inc.*, 694 N.E.2d 1021, 1025 (Ill. App. Ct. 1998) (stating that the notice requirement applies to all warranty beneficiaries); *In re McDonald’s French Fries Litig.*, 503 F. Supp. 2d 953, 956 (N.D. Ill. 2007) (stating that by filing the lawsuit against the seller will serve as an exception to direct notice).

The related issue is whether a buyer is required to give notice to a remote seller. The great weight of authority is that notice is not required to be given to a remote seller.³⁰⁹

In Massachusetts and the few other jurisdictions that do not recognize strict product liability, the notice requirement does not necessarily apply. Under Virginia law, only “buyers,” as defined in the Code, are required to give notice while non-buyers are not required to give notice to the manufacturer.³¹⁰ Under the North Carolina product liability act, there is no strict liability, and warranty actions are included under the rubric of “product liability action[s].”³¹¹ In *Halprin v. Ford Motor Co.*, the court discussed, but did not decide the question whether notice of breach had to be given to a remote seller.³¹² There is some authority that the notice requirement applies to non-privity plaintiffs.³¹³

The Delaware court, in *Cline v. Prowler Industries of Maryland, Inc.*, held that the adoption of the UCC preempts the judicial adoption of strict product liability.³¹⁴ Research has not revealed any cases in which the Delaware courts have been asked whether the notice requirement applies to a non-buyer warranty beneficiary or a remote

³⁰⁹ See generally Wanda Ellen Wakefield, Annotation, *Necessity that Buyer of Goods Give Notice of Breach of Warranty to Manufacturer under UCC § 2-607, Requiring Notice to Seller of Breach*, 24 A.L.R. 4th 277 (1983) (discussing how § 2-607 requires notice to the immediate seller and not to the remote manufacturer); 1 JAMES J. WHITE, ET AL., UNIFORM COMMERCIAL CODE § 12:20 nn. 4, 6 (6th ed. 2012); 9 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 101:66 (Robert L. Haig ed., 2012) (noting that the majority of courts only require that the immediate seller be given notice); 3 MODERN TORT LAW: LIABILITY AND LITIGATION § 27:19 (2d ed., 2012) (stating that notice to the seller will suffice).

³¹⁰ *Yates v. Pitman Mfg., Inc.*, 514 S.E.2d 605, 606–07 (Va. 1999); *Cole v. Keller Inds., Inc.*, 132 F.3d 1044, 1047–48 (4th Cir. 1998).

³¹¹ N.C. Gen. Stat. §§ 99B-1(3), 99B-1.1 (2010).

³¹² *Halprin v. Ford Motor Co.*, 420 S.E.2d 686, 688–89 (N.C. Ct. App. 1992).

³¹³ See *Horne v. Novartis Pharms. Corp.*, 541 F. Supp. 2d 768, 786–87 (W.D.N.C. 2008) (assuming that the requirement applied and holding that it was a jury question whether the filing of the action could constitute seasonable notice); cf. *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681, 685 (N.C. 1981) (stating a three-year delay by the buyer in notifying the seller until suit filed is not unreasonable as a matter of law).

³¹⁴ *Cline v. Prowler Inds. of Md., Inc.*, 418 A.2d 968, 980 (Del. 1980).

seller, although there are some passages in the *Cline* case that indicate the notice requirement would be applied in cases of this sort.³¹⁵

One question that has divided the courts in this area is Official Comment 5 to UCC section 2-607:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.³¹⁶

Some courts have relied on Comment 5 to impose the notice requirement in non-privity cases.³¹⁷ The majority of courts, however, have not followed the comment in third-party beneficiary cases.³¹⁸ These courts rely on the plain language of the statute itself, although they are certainly influenced by the underlying policy considerations that are in play.³¹⁹

³¹⁵ *Id.* at 974, 976–77.

³¹⁶ U.C.C. § 2-607 cmt. 5 (2011).

³¹⁷ *E.g.*, Lariviere v. Dayton Safety Ladder Co., 525 A.2d 892, 898 (R.I. 1987); Ratkovich v. Smithkline, 711 F. Supp. 436, 438 (N.D. Ill. 1989); Collins v. Pfizer, Inc., No. 1:08-cv-0888-DFH-JMS, 2009 WL 126913, at *3 (S.D. Ind. Jan. 20, 2009); U.S. Tire-Tech, Inc. v. Boeran, B.V., 110 S.W.3d 194, 199 (Tex. App. 2003); Alvarado v. Conmed Corp., No. EP-06-CV-0198-KC, 2008 WL 2783510, at *9 (W.D. Tex. Mar. 13, 2008).

³¹⁸ *E.g.*, Simmons v. Clemco Inds., 368 So.2d 509, 514 (Ala. 1979); Cole v. Keller Inds., Inc., 132 F.3d 1044, 1048 (4th Cir. 1998) (applying Virginia law); Taylor v. American Honda Motor Co., 555 F. Supp. 59, 64 n.7 (M.D. Fla. 1983); Frericks v. Gen. Motors Corp., 363 A.2d 460, 464 (Md. 1976); McKnelly v. Sperry Corp., 642 F.2d 1101, 1107 n.9 (8th Cir. 1981) (applying Iowa law).

³¹⁹ Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 979 (1990) (“Based on the principle of liberal construction in accordance with purpose, a reasonable construction of the buyer notification requirement could include third-party warranty beneficiaries. While some commentators have supported comment 5’s argument that the policies underlying the section apply to third-party beneficiaries as well as buyers, courts consistently have held to the contrary. They usually justify ignoring the comment’s suggestion in terms of

Massachusetts is the only state whose legislature has addressed the notice issue in non-privity cases.³²⁰ “Failure to give notice shall not bar recovery *under this section* unless the defendant proves that he was prejudiced thereby.”³²¹

[T]he action taken by the Massachusetts legislature suggests that it perceived a need to act in an explicit manner to exempt nonprivity parties from the notice requirement. One could infer that in the absence of language speaking to the issue, the legislature believed that the statute and comments required notice.³²²

One could draw that inference, and perhaps that is the inference implicitly drawn by the courts that have imposed a notice requirement on third-party warranty beneficiaries. That is not, however, the only inference that can be drawn. The notice provision of section 2-318 should be construed to apply only to “buyers,” not to non-buyer warranty beneficiaries. In section 2-318, the legislature was modifying the obligation that section 2-607 imposes on buyers. Under section 2-318, the lack of privity would no longer be a bar to suit by a buyer.

If, by the product liability amendments, the legislature was intending to preempt the field in the product liability area and to provide a remedy that was the substantial equivalent of strict tort liability, it is strange that the legislature would have imposed the notice requirement, a contract matter, on a plaintiff who was not a party to that contract. Buyers, under the plain language of section 2-607, are under an obligation to notify sellers of the breach of warranty.³²³

A seller’s warranty, under the original version of section 2-318, extended

to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that

proper statutory construction: if the statute meant to include both buyers and third-party beneficiaries it would have said so. A more principled explanation of judicial disregard of the comment’s suggestion is that extrinsic and independent policy considerations require a narrower reading.” (footnotes omitted)).

³²⁰ Prince, *supra* note 235, at 152-53, 166-67.

³²¹ MASS. GEN. LAWS ch. 106, § 2-318 (2010) (emphasis added).

³²² Prince, *supra* note 235, at 167.

³²³ MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.³²⁴

In the 1971 amendment, the legislature rewrote the section abolishing privity as a defense

in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods.³²⁵

The notice provision in section 2-318 was added in 1973.³²⁶

These new warranty beneficiaries were not required to give notice under section 2-607. Writing in 1976, three years after the notice provision was inserted into section 2-318, the Maryland court observed: “[The defendants] have cited no case, nor have we found any case, in which the word ‘buyer’ has been extended to encompass third party beneficiaries for the purposes of section 2-607 as the defendants now urge.”³²⁷

A buyer bringing a tort-warranty claim against his immediate seller is unquestionably bound by the notice provision of section 2-607. If the legislative intent was that section 2-318 apply to *all* tort-warranty claims, including those by a buyer against his immediate seller for personal injury or property damage, the legislature may very well have inserted the notice provision into section 2-318 because that buyer, unlike a third-party warranty beneficiary, clearly is required to give notice under section 2-607.

A buyer might, in fact, be required to notify a remote seller under section 2-607. That is certainly a plausible interpretation of the

³²⁴ An Act Establishing the Uniform Commercial Code, ch. 765, sec. 1, 1957 Mass. Acts 764, 786 (1957).

³²⁵ An Act Providing that Lack of Privity of Contract Shall Not be a Defense in an Action for Breach of Warranty or Negligence Brought Against a Manufacturer or Seller of Goods, ch. 670, sec. 1, 1971 Mass. Acts 497 (1971).

³²⁶ An Act Providing that Lack of Privity of Contract Shall Not be a Defense in Actions for Breach of Warranty or Negligence Brought Against a Lessor of Goods and Establishing a Statute of Limitations for the Commencement of such Actions, ch. 750, sec. 1, 1973 Mass. Acts 739, 739–40 (1973).

³²⁷ *Frericks v. Gen. Motors Corp.*, 363 A.2d 460, 465 (Md. 1976).

statute,³²⁸ even though many courts disagree.³²⁹ If a buyer is injured by a remote seller's product, or if, as the *Jacobs* court held, section 2-318 is intended to apply to a consumer buyer bringing a contract-warranty claim against a remote seller,³³⁰ and if the legislature did believe that section 2-607 required notice to a remote seller, it would explain the addition of a notice provision to section 2-318.

The notice provision of section 2-318 should be construed to apply only to buyers, who fall within the terms of section 2-607, and not to impose a new requirement—a contract-based requirement—on those to whom the warranty extends as a matter of public policy.

3. Should Notice Be Required in Product Liability Cases?

Controversies between “town and gown” are notorious. There is a similar controversy, this time between judicial robe and academic gown, on the question whether the notice requirement of section 2-607 should be applied in product liability cases. Many commentators argue for the imposition of the notice requirement in non-privity cases, even those involving personal injury.³³¹ On the other hand, the great weight of judicial authority does not impose a notice requirement on third-party warranty beneficiaries.³³²

a. *The Notice Requirement and Product Liability Cases*

Whatever the uncertainties of interpretation with regard to non-privity plaintiffs, the Code itself is quite clear that a buyer must give

³²⁸ See Fred H. Miller, *The Crossroads: The Case for the Code in Products Liability*, 21 OKLA. L. REV. 411, 434 n.83 (1968) (“[Comment 5] does not deal, however, with the case of a consumer-buyer suing the manufacturer. It does not because the drafters of § 2-607(3)(a) no doubt contemplated that § 2-607(3)(a) itself covered this case as where the buyer sues his immediate seller.”).

³²⁹ See, e.g., *Frericks*, 363 A.2d at 464–45.

³³⁰ See e.g., *Kolarik v. Cory Int’l Corp.*, 721 N.W.2d 159, 163 n. 3 (Iowa 2006) (construing Iowa’s version of § 2-318 and distinguishing between “extended beneficiaries” of warranties, who are not required to give notice under § 2-607, and remote buyers seeking economic-loss damages, who must be in privity with the warrantor).

³³¹ See, e.g., Prince, *supra* note 235, at 168; Arlie R. Nogay, Comment, *Enforcing the Rights of Remote Sellers under the UCC: Warranty Disclaimers, the Implied Warranty of Fitness for a Particular Purpose and the Notice Requirement in the Nonprivity Context*, 47 U. PITT. L. REV. 873, 902 (1986); WHITE ET AL., *supra* note 309, at § 12:20; Richard C. Ausness, *Replacing Strict Liability with a Contract-Based Products Liability Regime*, 71 TEMP. L. REV. 171, 212 (1998).

³³² See *supra* Part III.C.2.

notice to his immediate seller.³³³ In most jurisdictions, an injured plaintiff is not required to give formal notice as a condition of recovering for his injury. Notice is not required in a product liability case based on strict tort liability or negligence.³³⁴ A plaintiff whose warranty claim fails because of a prejudicial failure to give notice may still recover in negligence for the same injury.³³⁵

Two states have amended their versions of section 2-607 to abolish the notice requirement in personal injury cases.³³⁶ The Maine statute states in relevant part:

- (3) Where a tender has been accepted,
 - (a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
 -
 - (7) Subsection (3), paragraph (a) shall not apply where the remedy is for personal injury resulting from any breach.³³⁷

The South Carolina version of section 2-607(3)(a) states:

- (3) Where a tender has been accepted
 - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be

³³³ U.C.C. § 2-607(3)(a) (2011).

³³⁴ See *supra* notes 221–222 and accompanying text.

³³⁵ E.g. *Castro v. Stanley Works*, 864 F.2d 961, 963–64 (1989) (plaintiff recovered on negligence claim; warranty claim was barred by unreasonable delay in giving notice). It has actually been mooted whether the intent of the Code is to require notice as a condition of recovery on any theory. Jerry J. Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457, 462 (1972). Phillips cites *Nelson v. Boulay Bros. Co.*, a case in which the failure of a warranty claim under the Sales Act because of lack of timely notice did not preclude a negligence claim. 135 N.W.2d 254, 256 (Wis. 1965) (“The instant action arose before the effective date of the Uniform Commercial Code. We note, however, that there is broad language in the new [§2-607(3)(a)], which would suggest that a buyer who fails to give notice is ‘barred from any remedy.’ We are not called upon to determine whether a different conclusion would result from the new legislation.”).

³³⁶ ME. REV. STAT. ANN. tit. 11, § 2-607(7) (2012); S.C. CODE ANN. § 36-2-607(3)(a) (2012).

³³⁷ ME. REV. STAT. ANN. tit. 11, § 2-607(3)(a), (7) (2012).

barred from any remedy; however, no notice of injury to the person in the case of consumer goods shall be required³³⁸

The Permanent Editorial Board for the UCC disapproved the South Carolina amendment stating, as its “Reason for Rejection,” that “[t]he amendment to subsection (3)(a) may have merit, since notice may be dispensed with by classifying the liability as strict liability in tort. But it seems unnecessary if ‘reasonable time’ is read as suggested in Comment 4.”³³⁹

The Editorial Board’s Comment is an example of one of the frequent arguments made by proponents of requiring notice in non-privity personal injury cases: the availability of the alternative remedy of strict tort liability, which does not impose a notice requirement.³⁴⁰

The argument is also made that satisfying the notice requirement is part and parcel of a remedy under the Code. As one judge has stated:

[T]he majority of this court recognized the existence of two separate remedies, one, strict liability in tort, and the other, implied warranty, provided by the Uniform Commercial Code. When the Uniform Commercial Code remedy is sought it logically should be accompanied by both the benefits and the detriments expressly provided by the statute.³⁴¹

In a similar vein, another commentator has stated:

Present-day courts, however, should recognize the differences between the two existing causes of action, and not allow the confluence to result in the slighting of the statutory requirement of notice of breach in accepted goods when a contract cause of action is advanced. If the consumer seeks to recover a remedy from a seller as a remote vendee in an action for breach of contract, then

³³⁸ S.C. CODE ANN. § 36-2-607(3)(a) (2012).

³³⁹ AMERICAN LAW INST. & NAT’L CONF. OF COMM’RS ON UNIFORM STATE LAWS, REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 48 (1967); U.C.C. § 2-607, cmt. 4 (“The time of notification is to be determined by applying commercial standards to a merchant buyer. ‘A reasonable time’ for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.”).

³⁴⁰ WHITE ET AL., *supra* note 309, at § 12:19 n. 12 (“[M]ost plaintiffs seeking recovery for personal injury will invoke a theory of strict tort liability; hence recovery is not conditioned on the buyer notifying the seller of defect.”).

³⁴¹ Redfield v. Mead, Johnson & Co., 512 P.2d 776, 781 (Or. 1973) (Denecke, J., concurring).

the buyer must satisfy the requisites of the Uniform Commercial Code, including the giving of reasonable notice of breach in accepted goods.³⁴²

The idea that an action under the Code is a package deal is a reasonable one. A plaintiff who chooses to sue under the Code must take the good with the bad. That is the problem. In Massachusetts, unlike most other States, plaintiffs do not have a choice: If they wish to pursue a “strict liability” product claim, they must proceed under the UCC with its notice requirement. In a great many cases, of course, notice will not be a problem. But the fact remains that plaintiffs who might otherwise have a viable case can lose because of the notice requirement.

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

Even so, it might be better to scrap the notice requirement in consumer-related cases that involve either personal injury or property damage. To be sure, the notice requirement is useful in commercial transactions. However, in other cases, the notice requirement does little more than alert the seller to the fact that a demand for compensation will shortly be forthcoming. Consequently, the notice requirement appears to serve no useful purpose in such cases and probably ought to be dispensed with.³⁴³

The prejudice requirement in section 2-318 can obviate some of the problem. As it has been interpreted in case law, however, it is not always fair to the plaintiff. “The question is simply whether the defendant was prejudiced by the lost evidence, not whether the plaintiff was also prejudiced, or who was prejudiced more, or whether the plaintiff (as opposed to some third party) was responsible for the

³⁴² Prince, *supra* note 235, at 150 (discussing the judicial confusion in the non-privity notice cases between contract warranty and strict products liability and arguing that the two causes of action are distinct and that the notice requirement should be applied in warranty cases under the Code).

³⁴³ Ausness, *supra* note 331, at 212.

loss.”³⁴⁴ That is inequitable. If evidence is lost, both parties should be treated in the same way. The loss of evidence should not result in an automatic win for the defendant.

A prejudicial failure to give notice will bar the warranty claim.³⁴⁵ But it will have no effect on a negligence claim or a chapter 93A claim based on the same facts. A plaintiff can lose on the warranty claim but still recover on a negligence claim.³⁴⁶ If the notice defense prevails in a warranty action, however, it is an all-or-nothing proposition. The plaintiff is simply “barred from any remedy”³⁴⁷ under the Code, regardless of whether the plaintiff was also prejudiced or was even responsible for the loss of potential evidence.

b. Spoliation: A Better Alternative

The source of prejudice identified in the case law under section 2-318 is the loss of potential evidence.³⁴⁸ The loss of evidence, however, can be as prejudicial to the plaintiff as it is to the defendant. The legitimate interests of both the plaintiff and the defendant could be protected by the doctrine of spoliation: A plaintiff who has negligently or intentionally caused the loss or destruction of evidence is subject to sanctions up to and including, in a proper case, the dismissal of the action.³⁴⁹ The remedy for spoliation is “carefully tailored to remedy the precise unfairness occasioned by that spoliation. A party’s claim of prejudice stemming from spoliation is addressed within the context of the action that was allegedly affected by that spoliation.”³⁵⁰

The doctrine of spoliation allows for a more nuanced balancing of the interests of both parties than does the prejudice requirement of section 2-318. The court has wide discretion in imposing sanctions for the spoliation of evidence. Those sanctions can include a dismissal of the case, although that ultimate sanction is not favored.³⁵¹

³⁴⁴ Smith v. Robertshaw Controls Co., 410 F.3d 29, 37 (1st Cir. 2005).

³⁴⁵ Swartz v. Gen. Motors Corp., 378 N.E.2d 61, 63 (Mass. 1978).

³⁴⁶ E.g., Castro v. Stanley Works, 864 F.2d 961, 963–64 (1st Cir. 1989).

³⁴⁷ MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

³⁴⁸ Castro, 864 F.2d at 964 (citing Morales v. National Grange Mutual Ins. Co., 423 A.2d 325, 329 (N.J. Super. Ct. Law Div. 1980)).

³⁴⁹ Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 427–28 (Mass. 2002).

³⁵⁰ *Id.* at 426.

³⁵¹ 9 JOSEPH R. NOLAN & BRUCE HENRY, CIVIL PRACTICE § 26.6 (3d ed. 2011).

The doctrine of spoliation would apply to all theories used by the plaintiff: breach of warranty, negligence, and violation of chapter 93A. If the plaintiff had intentionally or negligently lost or destroyed the evidence or if the evidence had been lost or destroyed by a person for whose conduct the plaintiff is not responsible, the result would be the same across the board. The sanction, if the court were to impose one, would apply to the warranty claim as well as to the negligence claim.³⁵² If the sanction were something less than the dismissal of a negligence claim, the warranty claim would also not be dismissed. A negligence claim is unlikely to be dismissed on the ground of spoliation unless the destruction of the evidence was willful or intentional, whereas, under section 2-318, the case can be dismissed even if a third person were responsible for the loss of the evidence.³⁵³

In the *Sacramona* case, the court had to deal with both a spoliation issue and a notice issue.³⁵⁴ The plaintiff, a service station manager, was injured when he tried to mount and inflate a sixteen-inch tire on a sixteen-and-a-half inch wheel and the tire exploded.³⁵⁵ The plaintiff's attorney was able to obtain the tire and wheel about four months after the accident from the customer, who had removed them and left them unprotected in his yard.³⁵⁶ About five months later, the attorney gave the tire and wheel to a consulting engineer, who ultimately gave them to the plaintiff's liability expert about two and a half years after that.³⁵⁷ In the meantime, with one day left on the statute of limitations, the plaintiff brought suit for both negligence and breach of warranty.³⁵⁸ At the time suit was filed, the service station had been sold and many relevant evidentiary area items were gone.³⁵⁹ In addition, the wheel

³⁵² See *Public Serv. Mut. Ins. v. Empire Comfort Syss., Inc.*, 573 F. Supp.2d 372, 381 n.13 (D. Mass. 2008) (discussing, but not reaching, the spoliation issue because warranties were not established).

³⁵³ *Kippenhan v. Chaulk Servs., Inc.*, 697 N.E.2d 527, 530 (Mass. 1998) (“The rule excluding evidence as a remedy for spoliation is based on both the unfair prejudice that would otherwise result and the fact of a negligent or intentional destruction of physical evidence. Spoliation, therefore, does not include a fault-free destruction or loss of physical evidence.”).

³⁵⁴ *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 446 (1st Cir. 1997).

³⁵⁵ *Id.* at 445.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

had been subjected to a “somewhat destructive’ examination” by the consulting engineer and an “extensive cleaning” by the liability expert, all of which made it impossible to check the markings on the inside of the wheel that might have been relevant to the plaintiff’s theory of the case.³⁶⁰

The court, on the warranty question, held that the defendant had been prejudiced by the loss of evidence and thus the warranty claim was barred by section 2-318.³⁶¹ The district court had granted summary judgment in favor of the defendant on the negligence claim because, with the exclusion of the wheel as evidence as a sanction for the spoliation, the plaintiff would not have been able to prove his case.³⁶² The court on appeal indicated that a dismissal was disproportionate to the prejudice suffered by the defendant.³⁶³ It upheld the judgment, however, because the plaintiff’s conduct was “patent negligence,” and his negligence claim would still fail even if a more limited sanction were imposed.³⁶⁴

The product involved in the *Chapman* case was a daybed.³⁶⁵ The plaintiff’s 15-month-old son was found dead, wedged between the mattress and the side rail of the bed.³⁶⁶ The bed itself was broken up and taken to the dump by the boy’s father and uncle shortly after the accident, literally, in fact, before the boy was in his grave.³⁶⁷

About six months later, the plaintiff bought another bed, which was purportedly the same model as the one that had been destroyed.³⁶⁸ The plaintiff brought suit on several theories, including negligence and

³⁶⁰ *Id.* at 445–46.

³⁶¹ *Id.* at 448–50.

³⁶² *Id.* at 448.

³⁶³ *Id.*

³⁶⁴ *Id.* (“Under Massachusetts law, contributory negligence by the victim is a bar to any recovery if it represents more than 50 percent of the total negligence on both sides. Mass. Gen. Laws ch. 231, § 85. Whether or not the wheel or tire might have been more safely designed, it would be patent negligence by the plaintiff to select a 16-inch tire as a replacement without some good reason to think that the wheel was also 16 inches.”).

³⁶⁵ *Chapman ex rel. Estate of Chapman v. Bernard’s Inc.*, 167 F. Supp.2d 406, 410 (D. Mass. 2001).

³⁶⁶ *Id.* at 411.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

breach of warranty,³⁶⁹ and the defendant moved for summary judgment on several grounds, including spoliation and lack of proper notice.³⁷⁰

The court denied the motion for summary judgment due to spoliation.³⁷¹ Although the defendant had suffered “substantial prejudice,” the degree of prejudice did not warrant excluding evidence (e.g., the police photographs of the original bed, expert reports based on examinations of the pictures) from the case.³⁷² The absence of the actual daybed made it more difficult to prove various things (e.g., whether the actual bed had been abused by the boy’s mother), but there was other evidence that the jury could consider which might offset any prejudice.³⁷³ The court did note, however, the “strong possibility” that the defendant “may be entitled to a negative inference jury instruction at trial.”³⁷⁴

The court also denied the motion for summary judgment with respect to the notice issue.³⁷⁵ There was a genuine issue of material fact with regard to the timeliness of the notice.³⁷⁶ That finding would have been enough to deny the motion because it is necessary to establish both an unreasonable delay and resulting prejudice in order to make out the defense.³⁷⁷ As noted above, the reasonableness of the delay is typically the much more difficult question in the analysis.

The court did analyze the prejudice issue and concluded that here too there was a material issue of fact whether the defendant had been prejudiced by the failure to receive prompt notice.³⁷⁸ The bed had been destroyed almost immediately after the boy’s death and left out in a

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 413, 415.

³⁷¹ *Id.* at 413–14.

³⁷² *Id.* at 413.

³⁷³ *Id.* at 414.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 415.

³⁷⁶ *Id.*

³⁷⁷ *Smith v. Robershaw Controls Co.*, 410 F.3d 29, 36 (1st Cir. 2005) (citing MASS. GEN. LAWS ch. 106, § 2-318).

³⁷⁸ *Chapman*, 167 F. Supp.2d at 415.

dump for an unknown period of time.³⁷⁹ There was no way to know when notice would have been helpful to the defendant.³⁸⁰

The defendant also claimed to be prejudiced because it could not obtain an exemplar daybed.³⁸¹ The court agreed that this did present “potential for prejudice,” but stated that the prejudice could be cured if the exemplar daybed offered by the plaintiff were proven to be the relevant model.³⁸²

The *Chapman* case illustrates the problem. There had been a horrendous injury, and there was a very sympathetic plaintiff. The court did a thoughtful and sensitive analysis of the potential prejudice to the defendant with regard to both the spoliation issue and under the notice issue and held that the defendant, at least for purposes of summary judgment, had not proven prejudice as a matter of law. With respect to the notice issue, however, it is not clear that the court was properly applying the test as set out in the cases. In its discussion of the spoliation issue, the court had, in fact, found that the defendant had suffered prejudice because of the destruction of the bed, but did not find that the degree of prejudice warranted excluding the evidence that was available.³⁸³ The absence of the bed made it more difficult to establish facts relevant to the defense.

“But to show prejudice based on a lack of notice, the defendants needed only to prove that evidence was lost that might well have helped them, and that they have done.”³⁸⁴ “[T]he test is not . . . that formal prejudice results *only* from a loss of substance, but rather, that prejudice may result when ‘evidence which may reasonably have been developed by prompt investigation has been lost.’”³⁸⁵

The critical difference between spoliation-prejudice and notice-prejudice is the result of finding prejudice. If the notice defense is successful, if, that is to say, the notice was unreasonably delayed and the defendant prejudiced thereby, the defendant wins and the plaintiff

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 415–16.

³⁸¹ *Id.* at 416.

³⁸² *Id.*

³⁸³ *Id.* at 413–14.

³⁸⁴ *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 449 (1st Cir. 1997).

³⁸⁵ *Castro v. Stanley Works*, 864 F.2d 961, 964 (1st Cir. 1989) (quoting *Morales v. National Grange Mut. Ins. Co.*, 423 A.2d 325, 329 (N.J. Super. Ct. Law Div. 1980).

is “barred from any remedy.”³⁸⁶ If, on the other hand, the spoliation defense prevails, certain evidence may not be admitted, but that does not necessarily mean an automatic win for the defendant. In *Sacramona*, the finding of prejudice necessitated the dismissal of the warranty claim.³⁸⁷ The negligence claim was not dismissed because of spoliation of evidence; it was dismissed because the court held that the plaintiff’s contributory negligence barred the claim.³⁸⁸ The plaintiff’s claims should be treated consistently.

Massachusetts should follow the lead of Maine and South Carolina and abolish the notice requirement in personal injury cases. It is a contract defense that is being used to defeat a liability that is imposed, not as a matter of contract law, but as a matter of public policy. It is a requirement that is not imposed in strict product liability cases in an overwhelming majority of states.³⁸⁹ If the main purpose of the notice requirement in cases such as these is to prevent prejudice to the defendant by reason of the loss of potential evidence, that purpose can be served in a way that is fair to both parties by the doctrine of spoliation. Spoliation would apply to all of the plaintiff’s theories consistently. If the prejudice resulting from the spoliation were serious enough to warrant the dismissal of the case, the entire case would be dismissed.³⁹⁰ If, on the other hand, the degree of prejudice were less than that, the plaintiff’s case would proceed on all theories, hampered by such sanctions as the court imposed. There would no longer be an automatic all-or-nothing result.³⁹¹ The doctrine of spoliation adequately protects the interests of both plaintiffs and defendants.

It is time to defuse this “nuclear bomb” and disassemble the “booby-trap.”³⁹²

³⁸⁶ MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

³⁸⁷ *Sacramona*, 106 F.3d at 449.

³⁸⁸ *Id.*

³⁸⁹ *See supra* note 3 and accompanying text.

³⁹⁰ NOLAN, *supra* note 351, at § 26.6.

³⁹¹ This is consistent with the approach taken in the 2003 version of Article 2. U.C.C. § 2-607(3)(a) (Proposed Official Draft 2003) (“(3) If a tender has been accepted: (a) the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller, but failure to give timely notice bars the buyer from a remedy *only to the extent that the seller is prejudiced by the failure . . .*” (emphasis added)). That is essentially the same result that would be obtained under the doctrine of spoliation.

³⁹² *See supra* notes 224 and 229 and accompanying text.

4. Other Notice Problems Caused by Section 2-318

The inclusion of a notice provision in section 2-318 creates problems of interpretation similar to those regarding the statute of limitations.

Under section 2-318, a defendant may prevail on the notice defense only upon a showing of prejudice.³⁹³ That is not the case under section 2-607. The rule of section 2-607 is absolute: A buyer who does not give the seller proper notice of breach will “be barred from any remedy.”³⁹⁴ No showing of prejudice is necessary.

It seems to be established now that section 2-318 does not apply to commercial contract-warranty cases.³⁹⁵ Privity is still required in these cases, and a merchant buyer claiming breach of warranty must notify the seller in order to succeed.³⁹⁶ The standard applied in a case such as this would be the normal section 2-607 one, which does not require a showing of prejudice.

Similarly, it is clear that a buyer who has suffered personal injury or property damage as a result of a breach of warranty by his immediate seller is required to give the seller notice under section 2-607.³⁹⁷ Does the prejudice requirement of section 2-318 apply to a case like this?

Section 2-318 says that the failure to give notice will not bar recovery “under this section” unless the defendant proves prejudice.³⁹⁸ The case of the buyer suing the immediate seller is not, strictly speaking, brought “under this section.”

The criteria for notice under section 2-607 are different for merchant buyers and for consumers. The official comments contemplate cutting the consumer some slack.³⁹⁹ Nevertheless, there is

³⁹³ See MASS. GEN. LAWS ch. 106, § 2-318 (2010).

³⁹⁴ *Id.* § 2-607.

³⁹⁵ See *supra* Part III.B.

³⁹⁶ MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

³⁹⁷ See Part III.C.3.

³⁹⁸ MASS. GEN. LAWS ch. 106, § 2-318 (2010).

³⁹⁹ See *Nugent v. Popular Markets, Inc.*, 228 N.E.2d 91, 93–94 (Mass. 1967); U.C.C. § 2-607, cmt. 4 (2011) (“The time of notification is to be determined by applying commercial standards to a merchant buyer. ‘A reasonable time’ for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.”); *Id.* § 2-607, cmt. 5 (2011) (“What is said above, with regard to the

no express requirement of prejudice under section 2-607. The court would probably apply the prejudice standard of section 2-318 on the ground that that represented the presumed legislative intent that all tort-warranty claims be governed by section 2-318. To do that, however, would again be to do violence to the actual language of section 2-318, which speaks of barring recovery “under this section.”

In the *Jacobs* case, the court allowed a consumer buyer to sue a remote seller directly under section 2-318.⁴⁰⁰ The issue in *Jacobs* was privity.⁴⁰¹ As discussed earlier, it is not certain what the applicable statute of limitations would be—the three-year limitation of section 2-318 applicable to cases brought “under this section” or the four-year limitation period of section 2-725 applicable to ordinary contract-warranty cases.

The same issue arises with respect to the notice requirement. Assume that a consumer buyer wishes to sue a manufacturer (a remote seller) for a breach of warranty that caused economic loss. According to the *Jacobs* case, the buyer may do this under section 2-318. The buyer, let us assume, is required to give notice to the remote seller. The buyer has the right to sue the manufacturer directly under section 2-318. The buyer’s action is therefore brought under that section. Does the prejudice requirement of section 2-318 apply to this case?

Add to the facts. Assume that the consumer buyer is asserting the same contract-warranty claim against both the retailer, his immediate seller, and the manufacturer, a remote seller. Assume, too, that the buyer sends a notice to both, but the notice is sent unreasonably late. Or, for that matter, assume that the buyer sends no notice at all. But in neither case does prejudice result.

The claim against the retailer is a straightforward Article 2 claim. The parties are in privity; the buyer’s notice obligations are found in section 2-607. The failure to give proper notice “within a reasonable time” bars the buyer from any remedy.⁴⁰² The claim against the manufacturer is a non-privity claim, made viable by section 2-318, as interpreted by *Jacobs*. Section 2-318 has an express provision relating

extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.”).

⁴⁰⁰ *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 761 (Mass. 1995).

⁴⁰¹ *Id.* at 763.

⁴⁰² MASS. GEN. LAWS ch. 106, § 2-607(3)(a) (2010).

to notice.⁴⁰³ The failure to give notice under that section bars the buyer from any remedy if the defendant proves prejudice.⁴⁰⁴

In the *Bay State-Spray* case, the court stated:

We would also reject any suggestion that the statute of limitation of § 2-318 would apply to an original purchaser's contract-based claim for economic loss as well. To so rule would mean that the insertion of the statute of limitation in § 2-318 impliedly amended, almost to extinction, the statute of limitation of § 2-725. In such a view, the statute of limitation of § 2-725 would have significance only as to an action brought in the fourth year after the sale. The conclusion that there was an almost total implied repeal of the statute of limitation of § 2-725 by the amendment of § 2-318 is not easily acceptable.⁴⁰⁵

Similarly, the legislature obviously intended the notice provision of section 2-318 to be different from that of section 2-607. Under section 2-318, there is an express prejudice requirement.⁴⁰⁶ Under section 2-607, there is no prejudice requirement. Section 2-318 puts the burden of proving a lack of prejudice on the defendant.⁴⁰⁷ Under section 2-607, the plaintiff has the burden of proving proper notice.⁴⁰⁸

The court would probably apply the section 2-607 rules to both claims on the ground that they are contract-warranty claims, not tort-warranty claims. To do otherwise would produce an anomalous result.

In the *Jacobs* case, the court ruled as it did to implement the purposes of section 2-318.⁴⁰⁹ In the hypothetical under consideration, the claim against the manufacturer is viable because of section 2-318. The irony is that one of the express purposes of that section is to require prejudice as a condition of establishing the notice defense and to put the burden of showing no prejudice on the defendant. Applying the notice rules that normally apply to contract-warranty cases is contrary to the latter purpose, a conundrum that could have been

⁴⁰³ *Id.* § 2-318.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350,1355 n.8. (Mass. 1989).

⁴⁰⁶ MASS. GEN. LAWS ch. 106, § 2-318 (2010).

⁴⁰⁷ *See* note 241 and accompanying text.

⁴⁰⁸ *E.g.*, *Monroe Auto Equip. Co. v. Bloom*, 93 N.E.2d 231, 233 (Mass. 1950) (Sales Act); 17 RICHARD W. BISHOP, *PRIMA FACIE CASE* § 13.12 (5th ed. 2012).

⁴⁰⁹ *Jacobs*, 649 N.E.2d at 763.

avoided, had Massachusetts acted like a normal state and recognized strict tort liability in the product area.

IV. CONCLUSION

Much of Massachusetts product liability law conforms to the law of other states, but the way that law developed has brought about anomalies in our law. One of the greatest anomalies is the restriction of a “strict tort” liability to warranty law. This has created gaps in the law. A manufacturer can introduce a product into the stream of commerce, and that product, if defectively made, can injure a person. The injured person would have a strict tort claim against the manufacturer in an overwhelming majority of jurisdictions. In Massachusetts, however, the plaintiff would not have a “strict tort” case unless there were a sale or lease that gave rise to a warranty. And if the manufacturer had not been negligent, the plaintiff might not have a case at all.

This problem is the result of the product liability amendments or, at least, the court’s interpretation of the intent behind those amendments. The court should rethink its interpretation of the legislative intent in passing the product liability amendments. Those well-intended amendments should not be construed as precluding the court from imposing strict product liability in cases that do not fall under Article 2 or 2A because the underlying transaction did not give rise to a warranty.

It would not be the first time that the court has, at least implicitly, refined its interpretation of Massachusetts product liability law. Failing that, the legislature should act to fill the gap that it had, perhaps inadvertently, created when it enacted the product liability amendments. Those amendments have also created problems of interpretation with regard to the statute of limitations and, perhaps more important, the notice requirement.

If the notice provision in section 2-318 is intended to impose a duty on non-buyer warranty beneficiaries, the legislature has imposed an obstacle to recovery that most states do not impose. That is certainly an ironic result of amendments that were intended to expand the remedies available to persons injured by defective products who were not in privity with the seller or manufacturer.

Apart from the question of a third-party warranty beneficiary’s obligation *vel non* to notify a seller, the product liability amendments, as interpreted by the SJC, have prevented the court from recognizing strict tort liability. Plaintiffs, therefore, are limited to warranty claims

under the Code and are thus still bound by a notice requirement that plaintiffs in practically every other jurisdiction do not have to satisfy in strict product liability cases. Plaintiffs in those states can simply bring a strict tort action. That option is not available to Massachusetts plaintiffs. The notice requirement should be abolished in personal injury actions.

Massachusetts product liability law, in very many respects, is within the mainstream of American law. But, because of the way Massachusetts law has developed, there are still some anomalies and quirks that we could easily do without. Life would have been so much easier if Massachusetts had simply adopted strict tort liability in the first place.