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Merchantability and the Statute of Limitations

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MERCHANTABILITY AND THE STATUTE OF LIMITATIONS

I. Introduction

The warranty provisions of the Uniform Commercial Code[1] prescribe the conditions under which a seller will be liable for defects in the goods he sells. Absent modification or an effective disclaimer,[2] liability may be imposed upon the seller by operation of law through Uniform Commercial Code § 2-314's implied warranty of merchantability. If a purchaser can prove that the goods were defective at the time of the sale, this section entitles him to bring an action against the seller for breach of the implied warranty of merchantability. But because of the implicit characterization of an implied warranty as a present warranty in § 2-725,[3] the purchaser is effectively precluded from any recovery upon this warranty if the defective nature of the goods is not discovered within the statutory period of four years from delivery.

Historically, the courts have distinguished between present warranties upon which the statute of limitations begins to run from the time of sale and future warranties upon which the statute of limitations can begin to run from the discovery of a defect in the future.[4] Various pre-Code cases held that either the nature of the goods[5] or the custom in an industry[6] was sufficient justification for a finding that a particular warranty *impliedly* extended to the future discovery of defects (hereinafter referred to as an implied future warranty).

The Code similarly distinguishes between warranties upon which the statute of limitations begins to run immediately (hereinafter referred to as present warranties) and warranties upon which the statute of limitations begins to run only when the purchaser discovered or should have discovered the defective nature of the goods (hereinafter referred to as warranties of future performance). To find a warranty of future performance, § 2-725 requires an "explicit" extension to the future. This requirement of § 2-275 effectively precludes any possibility

1 UNIFORM COMMERCIAL CODE §§ 2-313 through 2-315 [hereinafter cited as UCC].
2 UCC §§ 2-314, 2-316.
3 Section 2-725. Statute of Limitations in Contracts for Sale
(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.
4 *See generally* Annot., 75 A.L.R. 1086 (1931).
5 *See, e.g.*, Ingalls v. Angell, 76 Wash. 692, 137 P. 309 (1913).
6 *See, e.g.*, J. Kennard & Sons Carpet Co. v. Dornan, 64 Mo. App. 17 (1895).

of an implied future warranty and is inherently inconsistent with § 2-314 (implied warranty of merchantability) which makes the seller's liability contingent upon the nature of the goods and the usage of the trade.

This note will discuss the courts' interpretation of § 2-725's distinction between present warranties and warranties of future performance and examine its effect on implied warranties of merchantability. But an examination of various pre-Code cases relative to our present concept of merchantability is also necessary for an understanding of the courts' response under the Code.

II. Present Warranties v. Warranties of Future Performance

A. *Generally*

Pre-Code case law differentiated between present and future warranties, that is, those that extended to the future performance of the goods.[7] The statute of limitations upon a present warranty ran from the time when the defective goods were sold or delivered.[8] If the warranty extended to future performance, the breach could occur and the statute of limitations could begin to run from the discovery of the defect.[9]

The majority of the pre-Code cases interpreted all warranties as present warranties unless they contained a specific reference to a future time.[10] But a significant minority of the courts were able to find that the facts of particular cases created *implied* future warranties notwithstanding the absence of a specific reference to a future time.[11] These decisions were justified on grounds strikingly similar to two of the statutory criteria by which merchantability is judged: 1) the nature of the goods and 2) the customs in the industry.

B. *Nature of the Goods*

The early fruit tree cases,[12] frequently cited in Code jurisdictions, are indicative of the varying willingness of courts to find an implied future warranty, that is, a warranty that *impliedly* extends to future performance. In *Allan v. Todd*,[13] the defendant sold one hundred trees, warranting that they were of the twenty-ounce apple variety. When the trees first bore fruit six years after the sale, the purchaser brought an action for breach of warranty, alleging that the apples were not of the twenty-ounce apple variety. Despite plaintiff's inability to ascertain this defect before the trees bore fruit, the court held that the cause of action had accrued at the time of the sale and that it was now barred because the statute of limitations had run. The court noted the apparent injustice of requiring a plaintiff to bring an action before he knew there had been a breach,

7 *See generally* Annot., 75 A.L.R. 1086 (1931).
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *See, e.g.*, Allan v. Todd, 6 Lans. 222 (N.Y. Sup. Ct. 1872); Ingalls v. Angell, 76 Wash. 692, 137 P. 309 (1913).
13 6 Lans. 222 (N.Y. Sup. Ct. 1872).

but reasoned nevertheless that a buyer's inability to ascertain the quality or characteristics warranted at the time of a sale had never before been found sufficient to extend the applicable statute of limitations.[14]

Although most cases are in accord[15] with *Allan*, the more cogent opinions have interpreted warranties as implied future warranties under similar circumstances.[16] *Ingalls v. Angell*[17] is an early example. The plaintiff bought trees from the defendant who warranted them to be Carman peach trees. Although the breach of warranty action was brought after the applicable statute of limitations had run the court held that the warranty was prospective because of its implicit dependence on a future time, that is, the time the trees first bore fruit. Thus the action was timely because the statute of limitations began to run only after the trees bore fruit.[18] The court recognized that a majority of jurisdictions followed *Allan v. Todd*.[19] Although this warranty lacked a specific reference to a future time, the court declined to follow that case because

> [a] construction of the language to the effect that the trees were to be Carman and yet there was no warranty that, if they produced fruit, it would be of that particular variety, would be to magnify form and minimize substance.[20]

The very nature of the goods, that is, trees that would not bear fruit until the statutory period on present warranties had run, explains the court's finding of an implied future warranty. This concept (nature of the goods) is also used in determining the content of an implied warranty of merchantability under § 2-314,[21] but a similar finding of an implied future warranty under the Code requires an "explicit" extension to the future. Instead of blind adherence to the general rule that the statute of limitations on a breach of warranty cause of action commences to run upon delivery, this court reasonably held that the warranty (by description of the trees)[22] *impliedly* extended to the future point at which the trees first bore fruit. Indeed, a contrary holding would have had the inequitable result of barring the plaintiff's breach of warranty cause of action before he could have learned of the existence of the breach.

The most progressive pre-Code case finding an implied future warranty was *Puretex Lemon Juice v. S. Riekes & Sons of Dallas, Inc.*[23] The plaintiff juice bottler bought bottle caps from the defendant manufacturer and later sued for breach of implied warranty because the caps had rusted and ruined the juice. The trial court held that the plaintiff's cause of action was barred because the

14 *Id.* at 224.
15 *See, e.g.*, Brackett v. Martens, 4 Cal. App. 249, 87 P. 410 (1906).
16 *See, e.g.*, Firth v. Richter, 49 Cal. App. 545, 19 P. 277 (1920); Woodward v. Rice Bros., 110 Misc. 158, 179 N.Y.S. 722 (Sup. Ct. 1920), *aff'd mem.*, 193 App. Div. 971, 184 N.Y.S. 958 (1920), *aff'd mem.*, 233 N.Y. 577, 135 N.E. 925 (1922).
17 76 Wash. 692, 137 P. 309 (1913).
18 Compare the court's reasoning here with that in Perry v. Augustine, 37 Pa. D. & C.2d 416 (C. P. Mercer County 1965). *See* text accompanying notes 59-61 *infra*.
19 6 Lans. 222 (N.Y. Sup. Ct. 1972).
20 76 Wash. at 697, 137 P. at 310 (1913).
21 *See* UCC § 2-314, Comment 3. *See also* § 2-314(2)(a).
22 *Compare* UCC § 2-313(1)(b).
23 351 S.W.2d 119 (Tex. Civ. App. 1961).

limitation period ran from the time of the sale. The appellate court reversed and held that there was an implied warranty claim upon which no action had accrued, and that the statute did not run until the purchaser discovered or should have discovered the breach.[24] The court acknowledged the contrary decisions holding that implied warranties are breached, if at all, at the time of the sale, but noted that its decision "avoids the needless situation of a wronged person's loss of an action before he was injured and before he learned or could have learned of the wrong."[25] This "discovered or should have been discovered" test becomes applicable under the Code only when the warranty explicitly extends to future performance. This court takes an extreme position and adopts as its general rule that which is the exception under the Code.

Most pre-Code courts were unwilling to recognize implied future warranties running from the time when a defect was "discovered or should have been discovered." In a recent New York case, *Citizens Utilities Co. v. American Locomotive Co.*,[26] the plaintiff utility company sued the defendant generator manufacturer in 1955 for breaches of express and implied warranties which provided that the generating sets "would be and would continue to be capable of continuous operation at full rated capacity for a full normal machine life span of at least 30 years."[27] The company's allegation was that these warranties were breached when the generators ceased to operate effectively 6½ years after delivery. In view of the specific reference to thirty years hence, one would expect a conclusion that the warranty extended to the prospective performance of the goods and that a breach would not occur until a problem arose after delivery. But the appellate court agreed with the lower court holding that the warranty actions were barred by the six-year statute of limitations which commenced to run at the time of delivery. Notwithstanding the explicit reference to a future time, the court held:

> [A] warranty express or implied that a machine is so built that it should last 30 years is a warranty of present characteristics, design and condition and should not be stretched by implication into a specific promise enforceable at the end of 30 years.[28]

If there was unfairness in requiring a purchaser to sue within six years after purchase to enforce an agreement that the article which was the subject of the sale would last for thirty years, the court reasoned that it was the same kind of unfairness occasionally resulting from any statute of limitations.[29]

The dissenting Justice Fuld[30] objected that the holding effectively reduced a thirty-year warranty to one of only six years. Consequently, Justice Fuld would have allowed the plaintiff to prove that because of trade usage and cus-

24 *Id.* at 122. *Compare* S. C. CODE ANN. 10.2-725(2) '(1962):
> A cause of action accrues for breach of warranty when the breach is or should have been discovered.

25 *Id.* at 121.
26 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).
27 *Id.* at 416, 184 N.E.2d at 174, 230 N.Y.S.2d at 198.
28 11 N.Y.2d at 417, 184 N.E.2d at 174, 230 N.Y.S.2d at 198.
29 11 N.Y.2d at 417, 184 N.E.2d at 175, 230 N.Y.S.2d at 198 (1962).
30 11 N.Y.2d at 418, 184 N.E.2d at 175, 230 N.Y.S.2d at 199.

tom,[31] warranties of merchantability and fitness directed an implied future performance.[32]

These pre-Code cases illustrate the lack of uniform willingness among courts to find implied future warranties. One decision found a future warranty implied by the nature and characteristics of goods[33] while another found only a present warranty, even though there existed a specific reference to a future time.[34]

C. *Custom in the Industry*

Custom and trade usage, like the nature and character of goods, are factors now considered under § 2-314 in determining the seller's obligation. An early Missouri case[35] used custom and trade usage[36] to justify the finding that an implied warranty extended to the future performance of the goods. Custom and trade usage were the decisive factors in the court's holding that the implied warranty extended to the future performance of the goods because it acknowledged and approved of the general rule that the statute of limitations on express or implied warranties runs from the time of the sale.[37] It was standard practice in the carpet industry for manufacturer-sellers to compensate the buyer of any carpet which, after being laid, showed grease spots or discoloration due to the manufacturing process. The court held that this practice created an implied future warranty upon which the statute of limitations did not begin to run until spots and discoloration became apparent.[38] Therefore, notwithstanding the fact that the five-year limitation period had expired since delivery of the carpet, the purchaser's cause of action was found timely because less than five years had passed since discovery of the breach.

III. Merchantability and UCC § 2-725

Under the Code, if a seller is a merchant with respect to the goods sold[39] and if the implied warranty of merchantability is not excluded or modified,[40] an action for breach of the implied warranty of merchantability may be brought

31 *Compare* J. Kennard & Sons Carpet Co. v. Dornan, 64 Mo. App. 17 (1895). *See also* U.C.C. § 2-314(3).

32 Compare a California case where carpet was warranted to last for a period of six to eight years following installation. The court said that the warranty extended to the future performance of the goods and that the statute did not begin to run until the purchaser discovered or should have discovered the breach: "If it should be held that the statute began to run at the date of the sale of the carpet and not when it had been ascertained and established as a fact that the warranty had been breached, not only would appellant be deprived of its rights to present its cause of action on the merits but respondent would be invited to continue the making of similar warranties to others secure in the knowledge that it would not be required to answer in damages for their breach." Southern California Enterprises, Inc. v. D.N. & E. Walter & Co., 78 Cal. App. 750, 752, 178 P.2d 785, 786 (1947).

33 Ingalls v. Angell, 76 Wash. 692, 137 P. 309 (1913).

34 Citizens Util. Co. v. Am. Locomotive Co., 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).

35 J. Kennard & Sons Carpet Co. v. Dornan, 64 Mo. App. 17 (1895).

36 *Compare* U.C.C. § 2-314(3).

37 64 Mo. App. at 25 (1895).

38 *Id.* at 24.

39 UCC § 2-314(1).

40 UCC §§ 2-314(1), 2-316.

within four years of delivery.[41] If a purchaser can prove the existence of a latent defect *at the time of the sale,* however, it should not make any difference on a merchantability claim whether discovery of the defect takes place three years or five years after delivery. Nevertheless, UCC § 2-725 bars the cause of action brought five years after delivery.

The Code outlines six attributes of merchantability in § 2-314.[42] The pertinent requirements of merchantability are that the goods be fit for the ordinary purposes for which such goods are used and that they be capable of passing in the trade without objection under their contract description. In order to prove a breach of an implied warranty of merchantability, a plaintiff must prove: (1) that a merchant sold goods which were unmerchantable at the time of their sale; (2) that damage or injury was proximately caused by the defective nature of the goods; and (3) that notice of such injury was given to the seller.[43]

The Code requirement that the plaintiff must prove that the goods were unmerchantable at the time of the sale assumes that implied warranties are basically *present* in nature. But the fact that evidence of actual performance of the goods is usually necessary to prove a lack of merchantability illustrates how the practical application of § 2-314 requires reference to the *future performance* of the goods subsequent to delivery. In this sense, all implied warranties extend to the future performance of the goods.[44]

Since the measure of the seller's liability with reference to an implied warranty of merchantability is related to and dependent upon the nature and quality of the goods,[45] the issue for the court should not be whether a statute of limitations has run, but whether the product should be considered merchantable if a latent defect prematurely limits the utility of the product.[46] This obligation depends upon the customs in the industry and the nature of the goods, and not solely upon the length of time that has expired since delivery. The courts' failure to recognize this is exemplified in their decisions that an implied warranty cannot extend to the future.

In *Binkley Company v. Teledyne Mid-America Corporation,*[47] the court saw no possibility of an implied warranty fitting within the exception to the

41 UCC § 2-725.

42 UCC § 2-314 provides in subsection (2):

> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.

43 J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6 at 286 (1972) [hereinafter cited as WHITE & SUMMERS].

44 *Id.* at 341.

45 *See* UCC § 2-314, Comment 3.

46 The test of whether the goods pass without objection in the trade is applied after the default is known. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 76 at 234 n. 65 (1970) [hereinafter cited as NORDSTROM].

47 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd,* 460 F.2d 276 (8th Cir. 1972).

breach at delivery rule. Binkley Company paid to the defendant a sum in excess of $48,000 as the purchase price for certain welding equipment. The welder came with express and implied warranties that it would be capable of welding a minimum of one thousand feet per fifty-minute hour. It was delivered to the plaintiff on September 8, 1966, but it was not installed until October 24, 1966. Since the machine performed only at a rate of between four hundred and five hundred feet per 50-minute hour at the time of installation, the plaintiff notified the defendant who thereafter made numerous unsuccessful attempts at repairing the machine. Because it never operated as warranted, Binkley filed suit on September 14, 1970, four years and six days after the welder was delivered. In addition to holding that the statute of limitations had not tolled because of the seller's efforts at repair,[48] the district court held that § 2-725 barred the cause of action because the complaint had been filed more than four years after delivery.[49] Supporting its decision that the warranty did not extend to future performance, the court agreed with the *Citizens Utilities* case.[50]

Although the decision is technically correct,[51] its discussion of implied future warranties is nevertheless disturbing.[52] The court effectively ruled out any possibility of an implied future warranty by adopting both a negative and a positive definition of the term "explicit": (1) "[*n*]*ot implied merely or conveyed by implication*"[53] and (2) "that which is so clearly stated or distinctly set forth that there is no doubt as to its meaning."[54]

In an earlier Code case, *Hempfield Area Joint School Board Authority v. Tectum Corp.*,[55] the court found a means to grant legal redress to a plaintiff even though the four-year statute of limitations had run. In *Hempfield,* the warranties related to the sale and installation in 1956 of certain roof-decking material, and the plaintiff alleged that the defects in the material were not discovered until 1961. The court recognized the inequities of the statutory mandate that the limitations period runs at the time of the sale "regardless of the

48 *Id.* at 1187. *See also* UCC § 2-725(4).

49 333 F. Supp. at 1186.

50 Citizens Util. Co. v. Am. Locomotive Co., 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962).

51 Even if one assumes that all implied warranties explicitly extend to the future performance of the goods within the meaning of § 2-725(2), the cause of action will still accrue and the statute begin to run when the buyer discovers or should have discovered the breach. If one assumes further that the machinery could have been installed promptly upon delivery, the conclusion is inescapable that the Binkley Company would have noted the noncomformity at that time. A court could decide that the company's lack of diligence in installation should be imputed against it with the ultimate result that the company should have discovered the breach just shortly after delivery.

52 Most of the decisions merely assume without discussion that an implied warranty cannot extend to the future performance of the goods. The courts assume that the breach of an implied warranty can never take place subsequent to delivery. *See, e.g.,* Constable v. Colonie Truck Sales Inc., 37 App. Div. 1011, 325 N.Y.S.2d 601 (1971), *aff'g* 65 Misc. 136, 317 N.Y.S.2d 590 (Sup. Ct. 1970). In holding that an implied warranty cause of action (alleging personal injuries caused by a latent defect in a tractor-truck) was barred, the court noted that "the Uniform Commercial Code specifically expresses a four year statute of limitations in breach of warranty cases expressed [*sic*] or implied, and the critical date of measurement to compute the four years is the sale on delivery of the merchandise which is the subject of the breach." 65 Misc. at 137, 317 N.Y.S.2d at 591.

53 333 F. Supp. at 1186 (emphasis added).

54 *Id.*

55 2 UCC Rep. Serv. 518 (Pa. C.P. Westmorland County, 1964).

aggrieved party's lack of knowledge of the breach,"[56] and accordingly held that the plaintiff should be allowed the opportunity to prove that the warranties extended to the future performance of the goods. But the court cautioned that the defendant would be given an opportunity to show that the plaintiff should have discovered the defects earlier.[57]

While the courts have hesitated to find that an implied warranty can be breached at some time other than tender of delivery, they have found that various *express* warranties "explicitly" extend to the future performance of the goods.[58] There is an interesting rationale for such a finding in the early Pennsylvania Code case, *Perry v. Augustine*.[59] The plaintiff sued to recover the cost of installing a heating system in the defendant's home in June or July of 1961. The defendant counterclaimed on July 14, 1965, alleging the breach of an express warranty which provided that the heating system would "be able to heat at 75° inside at a -20° outside temp."[60] His allegation was that the system did not operate as warranted when it was first turned on in October of 1961. The court's decision that this warranty was within the exception in § 2-725(2) was justified on the grounds that discovery of the breach would have to wait until winter.

One writer has pointed out the faulty reasoning of the court:

> Whether this warranty in fact extended to the future performance of the goods is unclear. The court's rationale is that *discovery* of breach would have to await the future performance of the goods, and therefore the warranty was explicitly prospective. The reasoning is not persuasive. The same could be said of all warranties, and in the *Perry* case the temperature might never reach -20°.[61]

Under the *Citizens*[62] rationale, a "lifetime warranty" could always be subject to an interpretation that it is merely a warranty of present quality, kind or condition and should not be stretched by implication into a specific promise enforceable at any such time that there is a defect. But in *Rempe v. General Electric Company*,[63] the court held that such a warranty explicitly extended to the future performance of the goods within the meaning of § 2-725(2). The cause of action did not accrue and the statute of limitations did not begin to run until the breach was or should have been discovered.[64]

56 UCC § 2-725(2).

57 Even when the warranty does "explicitly extend to the future performance of the goods," the statute of limitations can bar the action if not commenced within four years of the discovery of the breach. *See, e.g.*, Bobo v. Page Eng'r Co., 285 F. Supp. 664 (W.D. Pa. 1967).

58 But there should be no difference between express and implied warranties in their relation to the statute of limitations. "Once a court has found that a warranty exists, the liability of the seller is not diminished just because the breach pertains to an implied warranty." NORDSTROM, *supra* note 46, at § 74 (footnotes omitted).

59 37 Pa. D. & C.2d 416 (C.P. Mercer County 1965).

60 *Id.*

61 WHITE & SUMMERS, *supra* note 43, at 342.

62 *See* Citizens Util. Co. v. Am. Locomotive Co., 11 N.Y.2d at 416, 184 N.E.2d at 174, 230 N.Y.S.2d at 198 (1962).

63 28 Conn. Supp. 160 (Super. Ct.), 254 A.2d 577 (1969).

64 The word "lifetime" was undefined. It apparently referred to that of the disposal unit itself. But the court said that the seller should have the opportunity to prove that the warranty meant something other than the plaintiff's life and that it had expired more than four years prior to commencement of the action.

While most courts rigidly adhere to this breach at delivery rule, they are not oblivious to the plight of a plaintiff who finds that his cause of action upon an implied warranty has been barred, perhaps even before he learned of the existence of a breach. Therefore, courts often find the facts pleaded in a suit for breach of an implied warranty sufficient to state an additional cause of action in negligence.[65] Thus, the courts permit the plaintiff barred from suit upon the warranty to avail himself of the statute of limitations applicable to torts which, though traditionally shorter, runs from the time of injury as opposed to the time of the sale.

Judicial recognition of the problem is also apparent in the positions taken by the courts when the breach of an implied warranty cause of action includes an allegation of personal injury.[66] A few courts apply a personal injury statute of limitations which runs from the time of the injury to bar the action,[67] even though timely under § 2-725. But since this limitation period begins to run only from the time of the injury, the courts could use it to save an implied warranty claim barred under § 2-725. Other courts save the implied warranty cause of action through application of strict tort liability.[68] And in most jurisdictions, personal injury claims by nonprivity plaintiffs can be pleaded under strict tort liability with application of the corresponding tort statute of limitations.[69]

But the courts are extremely hesitant, and rightly so, to extend strict tort liability to cases involving only commercial loss as opposed to personal injury.[70] If an implied warranty of merchantability does not extend to the future, then § 2-314 is insufficient protection to a purchaser whose goods contain a latent

65 *See, e.g.*, Moody v. Sears, Roebuck & Co., 324 F. Supp. 844 (S.D. Ga. 1971); Matlack, Inc. v. Butler Mfg. Co., 253 F. Supp. 972 (E.D. Pa. 1966); Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425 (1973); Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968); State v. Campbell, 250 Ore. 262, 492 P.2d 215 (1968).

66 *See generally* Annot., 4 A.L.R.3d 821 (1965); Annot., 37 A.L.R.2d 703 (1954).

67 *See, e.g.*, Tyler v. R.R. St. & Co., 322 F. Supp. 541 (E.D. Va. 1971); Abate v. Barkers of Wallingford, Inc., 27 Conn.Supp. 46 (C.P. New Haven County), 229 A.2d 336 (1967); Heavner v. Uniroyal Inc., 118 N.J.Super. 116, 286 A.2d 718 (1972).

68 An analysis of the various theories of products liability is beyond the scope of this article. But for an analysis of the overlap between the Uniform Commercial Code and Strict Liability Tort, *see generally* Rapson, *Products Liability Under Parallel Doctrines: Contracts Between the Uniform Commercial Code and Strict Liability in Tort,* 19 RUTGERS L. REV. 692, 698-704 (1965) (a defect within the meaning of the implied warranty provisions of the Code is also a defect for purposes of application of strict liability tort); Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule,* 33 U. PITT. L. REV. 391 (1972); Thus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code,* 22 STAN. L. REV. 713 (1970).

69 WHITE & SUMMERS, *supra* note 43, § 11-3. *But see* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969) where the court held that strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action. The court applied a limitation period that from the time of the sale of the defective product and barred the plaintiff's cause of action. This case, however, was held to be no longer viable in Riviera v. Berkeley Super Wash. Inc., 44 App. Div. 316, 354 N.Y.S.2d 654 (1974).

70 For a discussion of the policy questions involved in strict liability cases, *see* Seely v. White Motor Co., 63 Cal.2d 1, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). *Contra* Santor v. A.&M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). *See generally* Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule,* 33 U. PITT. L. REV. 391 (1972); Speidel, *Products Liability, Economic Loss and the UCC,* 40 TENN. L. REV. 309(1973).

defect which does not manifest itself until the statutory term of four years has run from the date of delivery.

IV. Merchantability and Future Performance

A cause of action in breach of warranty should not begin to run at delivery if it is impossible to discover the breach at that time.[71] However, this is the result under the Code unless a court finds that the particular warranty explicitly extends to the future performance of the goods within the meaning of § 2-725. And in the absence of legislative modification,[72] such a finding will continue to be difficult for the courts to make.

Will the plaintiff always be precluded from bringing an action for breach of an implied warranty alleging commercial loss if more than four years have passed since delivery? Various decisions[73] have held that merchantability itself may be sufficient to bring the implied warranty within the statutory exception allowing for a future breach. In his dissent in *Citizens,* for example, Justice Fuld thought that the plaintiff should have been allowed to prove that the implied warranties extended to the future performance of the goods. He reasoned that "merchantability" may have required that the $250,000 generators have an operating life span of thirty years.[74]

Recent cases show an awareness that the implied warranty of merchantability may in itself require a sufficient future performance to justify a holding that the warranty explicitly extends to the future and thus the cause of action does not accrue and the statute of limitations does not begin to run until the plaintiff discovered or should have discovered the breach.

In *Klondike Helicopters, Ltd. v. Fairchild Hiller Corp.,*[75] the plaintiff purchased a helicopter from the defendant in 1964. In 1970, six years after the purchase, the plaintiff brought suit for a crash which occurred in 1967. One of the counts alleged that the defendant had breached a continuing contract to supply certain information relative to the servicing of the aircraft, and another count alleged the breach of express and implied warranties relating to the merchantability of the helicopter.[76] Because of the continuing duty involved in the first count, the court held that it explicitly extended to future performance within the meaning of § 2-725(2) and thus was not barred.[77] The court reasoned that the warranty count was timely because helicopters should operate effectively for a period exceeding the statutory limit of four years.[78] While the

71 *See* L. FRUMER & M. FRIEDMAN, *Products Liability,* Vol. 3, § 40.01[2] (Mathew Bender 1973).

72 *See* state statutes cited in note 93 *infra. See also* Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties,* 8 U.C.L.A. L. Rev. 281, 334 (1961) where the writer suggests that the legislature delete the word "explicit" from § 2-725(2) in order to avoid any inference that an implied warranty cannot be prospective.

73 *See, e.g.,* Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890 (N.D. Ill. 1971); Mittasch v. Seal Lock Burial Vault, Inc., 42 App. Div. 573, 344 N.Y.S.2d 101 (1973).

74 11 N.Y.2d at 417, 184 N.E.2d at 175, 230 N.Y.S.2d at 199 (1962).

75 334 F. Supp. 890 (N.D. Ill. 1971).

76 *Id.* at 893.

77 *Id.*

78 *Id.*

contract provision requiring a continuing duty undoubtedly influenced the court, the decisive factor was the nature of the goods. The court stated:

> [T]hese warranties relate to the merchantability of the aircraft. *It seems reasonable to expect a warranty of this nature to continue beyond the tender of delivery and extend for the life of the product.* For this reason, the alleged warranties extended to future performance within the meaning of Section 2-725(2). The four year period began to run from the date of discovery of alleged breach—1967[79] (emphasis added).

Dictum in *Mittasch v. Seal Lock Burial Vault, Inc.*[80] is similar. Mrs. Mittasch had purchased a casket and burial vault in 1958 to inter her husband. The accompanying warranty expressly provided that the vault was free from material defects or faulty workmanship and that it would give "satisfactory service at all times."[81] Twelve years after the sale, when plaintiff sought to move her husband's body to a different cemetery, she discovered that water, vermin and other material had leaked into the casket. Within six months of this discovery, she commenced a breach of warranty action. The court held that the cause of action did not accrue until discovery of the breach and stressed (1) that the very nature of the product itself *implied* performance over an extended period of time[82] and (2) that an express warranty of "satisfactory service at all times" explicitly extended to the future performance of the goods.[83] Although this case involved an express warranty, the plain inference from the court's decision is that the implied warranty of merchantability brought the case within the exception to § 2-725(2) so that the statute of limitations ran from discovery of the breach.

Both *Klondike* and *Mittasch* demonstrate a novel approach to the problems associated with an implied warranty claim ostensibly barred by the statute of limitations in § 2-725. While this approach appears more consonant with commercial standards of fair dealing in the trade,[84] it is in direct conflict with the definitions of "explicit" in *Binkley*.[85]

Administrative repose and efficient record keeping[86] are certainly desirable, but they are insufficient justification for allowing a seller to escape liability whenever his goods cause injury more than four years subsequent to delivery.[87]

79 *Id.;* while the warranty claims passed under § 2-725(2), an Illinois borrowing law dictated application of California law which ultimately barred the warranty claims on a two-year statute of limitations.

80 42 App. Div.2d 573, 334 N.Y.S.2d 101 (1973).

81 *Id.*

82 *Id.* at 575, 344 N.Y.S.2d at 103 (1973).

83 *Id.*

84 *See* U.C.C. § 1-203, Comment 1.

85 Binkley v. Mid. Am. Teledyne Corp., 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd,* 460 F.2d 276 (8th Cir. 1972).

86 UCC § 2-725, Comment 1.

87 *See* NORDSTROM, *supra* note 46, § 185. *See also* Uniform Commercial Code § 2-719, Comment 1:

> [I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.

What about the buyer of goods with a latent defect which does not become manifest until sometime subsequent to four years from delivery? If the purchaser's only remedy rested upon an implied warranty, could he argue by analogy to § 2-719?

V. Conclusion

State legislatures have failed to recognize the inherent inconsistency between an implied warranty of merchantability and the Code's statute of limitations. Dependent as it is upon the nature of the goods[88] and the trade usage in the industry,[89] an implied warranty of merchantability may impliedly extend to the future performance of the goods. But the general existence of this implied warranty is effectively nullified by § 2-725's requirement that a future warranty explicitly extend to future performance.

The *Binkley*[90] court considered it impossible for an implied warranty to be a future warranty, that is, for an *implied* warranty to *explicitly* extend to future performance. But the *Klondike*[91] and *Mittasch*[92] cases indicate that an implied warranty of merchantability may be a future warranty within the *meaning* of UCC § 2-725 even though not within a literal interpretation of the words. Based on the nature of the goods and the usage of trade, an implied warranty of merchantability may guarantee future performance sufficient to require the finding of an implied future warranty.

While such a position would not be at variance with § 2-314, it is doubtful whether the courts would adopt such an approach in view of the inconsistency found in § 2-725. *Klondike* and *Mittasch* are evidence that ad hoc judicial exceptions only increase uncertainty. This uncertainty and inconsistency can be alleviated only by affirmative legislative action[93] in one of two directions: (1) deletion of the word "explicit" from § 2-725. This would give courts the freedom, in appropriate cases, to hold that an implied warranty of merchantability is a future warranty, thereby allowing for a breach at a time other than at delivery; or (2) redefinition of an implied warranty of merchantability so that it explicitly extends to the future performance of the goods.

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88 UCC § 2-314, Comment 3.

89 UCC § 2-314(3).

90 Binkley v. Mid. Am. Teledyne Corp., 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972).

91 Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890 (N.D. Ill. 1971).

92 Mittasch v. Seal Lock Burial Vault, Inc., 42 App. Div.2d 573, 344 N.Y.S.2d 101 (1973).

93 As to when the statute of limitations begins to run on an implied warranty cause of action, consider the following state statutes:

Alabama: Adds at end of subsec. (2):

> however, a cause of action for damages for injury to the person in the case of consumer goods shall accrue when the injury occurs. ALA. CODE tit. 7A, § 2-725(2) (1966).

Maine: Adds following paragraph in subsec. (2):

> A cause of action for personal injuries arising under this Article for breach of warranty occurs when the injury takes place and is governed by the limitation of action period under title 14, section 752. ME. REV. STAT. ANN. tit. 11, § 2-725(2) (Supp. 1974), *amending* ME. REV. STAT. ANN. tit. 11, § 2-725(2) (1964).

South Carolina: Subsec. (2) reads as follows:

> A cause of action accrues for breach of warranty when the breach is or should have been discovered. S.C. CODE ANN. § 10.2-725(2) (1962).