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The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties

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The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties

Because consumer protection is an important aspect of the economics of production and distribution, it is hardly surprising that significant changes throughout the years in our system of marketing have been accompanied by corresponding developments in our law of products liability. Traditionally, the most common form of redress for an injury caused by a defective product has been a suit against the seller of the offending merchandise for breach of warranty. A warranty action originally sounded in tort; however, a warranty itself—a seller's express or implied representation concerning the quality of his goods—soon took on the character of an element of the contract under which a product was sold. This development accounts for the existence of those features which today distinguish suits for breach of warranty from actions based on negligence or fraud.[1] Modern warranty recovery is not premised on a warrantor's subjective fault, but rather on his absolute liability for a breach of promise—the implied promise to his buyer that the quality of particular goods would be as represented.[2] Therefore, an injured party suing on a warranty theory is spared the often difficult task of proving the seller's negligence. On the other hand, the contractual nature of a warranty injects into an action for breach of warranty the age-old complexities of contract law, with the result that many obstacles dot the injured purchaser's path to recovery. On balance, however, the history of the law of warranty has been one of continual progress away from the concept of *caveat emptor* toward that of greater consumer protection.[3] This transition is largely attributable to the willingness of courts to modify or circumvent the traditional applications of a number of contract-law principles in an effort to develop a warranty theory adapted to the needs of a commercial community where a buyer frequently cannot inspect the goods that he purchases (or, if he can examine them, does not have the specialized knowledge necessary to detect their defects) and where a product may pass through the hands of several persons before it reaches an ultimate user, who may or may not be a purchaser.

As might have been expected, the courts have not confined their efforts in updating the law of products liability to fostering innova-

1. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936).
2. 1 WILLISTON, SALES § 237 (1948 ed.).
3. "The nineteenth-century policy of protecting young manufacturers is now giving way to one of protecting innocent consumers from unexpected injuries or losses due to defective products over which they have no control." Picker X-ray Corp. v. General Motors Corp., 185 A.2d 919, 921 (D.C. Munic. Ct. App. 1962); see Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493, 494-503 (1962). For a comparison with the development of civil law, see Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262 (1964).

tions in that segment dealing with warranties. The struggle to impose strict tort liability upon a manufacturer for harm caused by his defective products has made significant advances and is continuing.[4] However, the citadel has yet to be taken. Indeed, even the California Supreme Court, which may be considered the leading proponent of this strict tort theory, has limited its availability so that only those seeking redress for harm to person or property may invoke the doctrine; thus, a plaintiff hoping to recover for a purely economic loss is restricted to an action for breach of warranty.[5] It thus appears that the warranty theory will continue to play a major role in consumer protection. This Comment will treat some of the more recent developments relating to the warranty theory, of which perhaps the most significant are the changes wrought by the Uniform Commercial Code, which has been adopted by the legislatures in an overwhelming majority of American jurisdictions.[6]

I. Types of Warranties

A warranty is often formally defined as

> a statement or representation made by the seller of goods contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he represents them.[7]

Warranties are generally classified as either express (those based

4. Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne L. Rev. 1 (1963); Prosser, *The Assault Upon the Citadel: Strict Liability to the Consumer*, 69 Yale L.J. 1099 (1960).

5. See Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965), where Chief Justice Traynor remarked: "The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the Sales Act or the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries." 45 Cal. Rptr. at 21, 403 P.2d at 149. *But see* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

6. The Uniform Commercial Code [hereinafter cited as U.C.C.] provisions concerned with sales warranties are §§ 2-312 to -318, 2-715, -718, -719. Each Code section is followed by an official comment, written by someone associated with the drafting of that provision, apparently designed to clarify the draftsmen's intent. Section 1-102(f) of the 1952 edition of the Code stated that these comments were to be consulted by courts construing and applying the act, but no similar provision appears in later editions. The comments do not represent the law; however, since a legislature should be presumed to have been aware of their existence when it enacted the Code, they may be considered to have the weight of legislative history. See Farnsworth & Honnold, Commercial Law 7-10 (1965).

7. 77 C.J.S. *Sales* § 301, at 1115 (1952), quoted with approval in Mitchell v. Rudasill, 332 S.W.2d 91, 94-95 (Mo. App. 1960); see Jaeger, *Products Liability: The Constructive Warranty*, 39 Notre Dame Law. 501, 506 (1964).

upon actual representations made by a seller) or implied (those attributable to representations arising by operation of law from the nature of a particular transaction).

A. *Express Warranties*

The Uniform Sales Act,[8] the basic statutory guide to the law of the marketplace before the advent of the Uniform Commercial Code, defined an express warranty as "any affirmation of fact or any promise by the seller relating to the goods . . . if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and the buyer purchases the goods relying thereon."[9]

Section 2-313(1)(a), the corresponding provision of the Code, defines an express warranty in a similar manner: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Section 2-313(1)(b) provides that "any description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description," and section 2-313 (1)(c) states that "any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

The Code requirement that in order to create an express warranty, an affirmation or promise must be part of the basis of a bargain—a phrase which has been said to mean that a particular representation could reasonably have induced a buyer to act[10]—seems to have been intended to be largely equivalent to the Sales Act principle that in order to give rise to an express warranty, a representation must have had a natural tendency to induce a buyer to purchase. However, by not explicitly requiring a plaintiff-buyer to show that he relied upon a particular allegedly inaccurate representation, the draftsmen of the Code may have intended to place upon the seller the burden of demonstrating that the affirmation or the promise was not part of a particular agreement.[11] Under the Sales Act, the burden theoretically rested on a buyer to establish that he had relied on a seller's representations.[12] Nevertheless, in practice it was often suffi-

8. The Uniform Sales Act [hereinafter cited as U.S.A.] was drafted in 1906 and was largely the work of Professor Samuel Williston. In many of its sections the Uniform Sales Act followed very closely the British Sale of Goods Act of 1893. Although it is rapidly being replaced by the Uniform Commercial Code, the Uniform Sales Act was once the law of thirty American jurisdictions. FARNSWORTH & HONNOLD, *op. cit. supra* note 6, at 5.

9. U.S.A. § 12.

10. HAWKLAND, TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 58 (1964).

11. See U.C.C. § 2-313, comment 3.

12. Pedroli v. Russell, 157 Cal. App. 2d 281, 320 P.2d 873 (1958); Midland Loan

cient for a buyer to show only that the representations were of a kind which naturally would have induced him to purchase and that he did purchase goods concerning which the representations had been made.[13] Thus, despite its change in language, the Code appears to effect little change in the law.

Code section 2-209(1) provides that once a contract has been made, it may be modified by agreement of the parties, even though no additional consideration passes between them. Relying upon this provision, the writers of the official explanatory comment to section 2-313 stated that the "precise time when words of description or affirmation are made or samples are shown is not material,"[14] and thereby left the impression that express warranties may arise out of statements which become known to a purchaser only after a transaction has been completed. For example, a buyer may purchase a factory-packaged drill bit in a transaction in which no express warranties were created at the time of sale, and then, upon opening the box in his home and reading the enclosed instructions, discovers that they clearly indicate that the bit will cut through concrete. The comment to section 2-313 suggests that if the tool will not in fact make a hole in concrete, he could recover damages for breach of an express warranty, although the statement inside the package did not in any way induce him to buy the bit. However, this result would be impossible to reconcile with the requirement in section 2-313(1) that language creating an express warranty must be a part of the basis of a bargain. If, on the other hand, the purchaser of the drill bit had extracted an additional *promise* from his seller after the sale that the bit would cut through concrete, section 2-209(1) would probably operate to effect a modification of the contract by agreement to include an obligation on the part of the seller similar to that which would have arisen had the seller expressly warranted the product's capability prior to the sale. In any event, a buyer's post-sale discovery of a statement inside a package may have some legal significance. If the buyer relied on the representation in using the product and was injured because the statement proved to have been untrue, the seller could be liable on a tort theory of misrepresentation.[15]

Section 2-313(2) codifies a common-law concept by providing that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."[16] This idea is probably already

Fin. Co. v. Madsen, 217 Minn. 267, 14 N.W.2d 475 (1944); Lewitus v. Brown & Seccomb, 228 App. Div. 146, 239 N.Y. Supp. 261 (1930).

13. Steiner v. Jarrett, 130 Cal. Super. 869, 280 P.2d 235 (Super. Ct. 1955); 1 WILLISTON, SALES 534-35 (1948 ed.).

14. U.C.C. § 2-313, comment 7.

15. See PROSSER, TORTS 729 (1964).

16. U.S.A. § 12 provided: "No affirmation of the value of the goods, nor any state-

inherent in the requirement of section 2-313(1) that a statement must be part of the basis of a bargain to create an express warranty, because statements of the kind mentioned in section 2-313(2), commonly characterized as "puffing" or "dealer's talk," would not usually induce a reasonable buyer to act. Of course, even if a particular representation does not create an express warranty, it may form the basis for an action for fraud or misrepresentation.[17]

A major change effected by section 2-313(1) relates to warranties of "description" and "sample." A warranty of description arises under the Code, as it did under the Sales Act, when a sale is made on the basis of a seller's description of particular goods; the warranty is breached if the merchandise does not conform to that description. Under the Sales Act, a warranty of this type was designated an implied warranty.[18] Often, however, the descriptive words upon which a warranty of description was founded could also be taken as affirmations of the kind creating an express warranty, thereby providing a disappointed buyer with a choice of warranty theories upon which to seek relief. Although there appears to have been no reason why express and implied warranties should have been treated as mutually exclusive, courts persisted in attempting to fit particular descriptive words into one category or the other.[19] Classifying descriptive words either as affirmations of fact creating an express warranty or as simple words of description giving rise to an implied warranty was often difficult under the Sales Act; however, such a determination was rarely important. Proper categorization could have affected the outcome of a case only when the sale leading to the litigation had been one in which the seller had successfully disclaimed the existence of all implied warranties but had not effectively protected himself from the express warranty liability created by the descriptive words.[20] The Code resolves any dispute which may arise concerning the proper classification of descriptive words in favor of the express warranty label; consequently, any attempt to disclaim the existence of warranties of description will probably prove ineffective because section 2-316(1) invalidates a purported disclaimer in so far as it is inconsistent with the terms of any express warranty.[21]

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ment purporting to be a statement of the seller's opinion only shall be construed as a warranty." See Shay v. Joseph, 219 Md. 279, 149 A.2d 3 (1959); Brown v. Globe Labs., Inc., 165 Neb. 138, 84 N.W.2d 151 (1957); 1 WILLISTON, SALES § 202 (1948 ed.).

17. See generally Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1351-55 (1966).

18. U.S.A. § 14.

19. HAWKLAND, *op. cit. supra* note 10, at 60.

20. See Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir. 1951).

21. See U.C.C. § 2-313, comment 4. U.C.C. § 2-316(1) provides: "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable." See text accompanying note 126 *infra*.

Under the Sales Act, when a seller displayed a sample or a model purporting to depict the nature and quality of certain goods, and a buyer then purchased merchandise in reliance upon what he had seen, there arose an implied warranty "of sample" that the goods would correspond to the representations.[22] This type of warranty also exists under the Code, but is classified as an express warranty; therefore, if a seller shows a sample which becomes the basis of a bargain between him and his customer, the result could be the same as if he had expressly stated that the goods which the sample supposedly represented would conform to it. The existence of a warranty "of sample" in a Code jurisdiction is premised upon the fact that a sample or a model was intended to represent, or to be of the character of, the goods on sale. However, occasionally an article shown to a buyer may be meant merely to suggest the character of the merchandise. In this case, the sample or model would probably not be the basis of any resulting bargain and thus would not normally give rise to an express warranty.[23] A similar outcome would have followed from the law as it developed in most Sales Act jurisdictions.[24]

Under the Code, an express warranty is supposed to be the result of "dickering" between a buyer and a seller.[25] However, the official comment to section 2-313 suggests that the Code's draftsmen felt that no specific intention on the part of a seller to make an express warranty should be necessary in order for his conduct to give rise to one.[26] The widespread enactment of the Code should therefore encourage courts to rely upon those cases in which sellers have been held liable to purchasers on an express warranty theory when merchandise did not measure up to the claims, even those that did not rise to the level of descriptions, made for it in advertisements and sales literature and on product labels.[27]

B. *Implied Warranties*

1. *Merchantability*

The most significant implied warranty arising from a sale of goods is that of merchantability. Section 15(2) of the Sales Act stated that "where the goods are bought by description from a seller who

22. U.S.A. § 16.

23. See U.C.C. § 2-313, comment 6.

24. See Somerville Container Sales v. General Metal Corp., 39 N.J. Super. 348, 120 A.2d 866 (App. Div.), *modified*, 39 N.J. Super. 562, 121 A.2d 746 (App. Div. 1956).

25. See U.C.C. § 2-313, comment 1.

26. U.C.C. § 2-313, comment 3.

27. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); Smith v. Gates Rubber Co., 47 Cal. Rptr. 307 (Dist. Ct. App. 1965); Randy Knitwear Inc. v. American Cyanamide Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). For the effect of the Code on the question of privity, see text accompanying note 108 *infra*.

deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." When it was drafted, this provision was declaratory of the law in all states except those in which courts drew a distinction between sellers who were also manufacturers and those who were simply dealers and held that only transactions involving the former type of merchant gave rise to implied warranties of merchantability.[28]

While an implied warranty of merchantability arose under the Sales Act only if a seller dealt in merchandise similar to that actually sold, in a Code jurisdiction such a warranty grows out of a sale if the seller is a "merchant" with respect to the goods involved. It might seem that section 2-314 is more inclusive than its Sales Act counterpart, since section 2-104(1) defines a merchant as a person who deals in goods of a particular kind *or* otherwise holds himself out as someone having "knowledge or skill peculiar to the [commercial] practices or goods" involved in a given transaction. However, the comment to section 2-314, the provision specifically dealing with the warranty of merchantability, suggests that the term "merchant" as used in this section was intended to have a slightly more restricted meaning; the comment indicates that no warranty of this type arises when a person makes an "isolated sale of goods."[29] It would thus appear that no warranty of merchantability would grow out of a transaction such as a sale by an automobile mechanic of his own car, despite the fact that he possesses "knowledge or skill peculiar to the . . . goods." This result would be entirely reasonable, because a mechanic does not have an adequate knowledge of sales law to be competent to appreciate the extent of an obligation imposed by a warranty of merchantability and to protect himself by effectively disclaiming warranty liability. Moreover, he would be unable to distribute among a host of customers the financial burden which would be imposed if he breached such an obligation.[30] Of course, even an individual making an isolated sale has a duty to deal in good faith and must therefore disclose to his buyer the existence of any material but hidden defect of which the seller is aware.[31]

Code section 2-314 contains some important advances over section 15(2) of the Sales Act. The older provision did not define the term "merchantable quality," but most courts held that a product met this description if it was "fit for the general purpose for which

28. See Myers v. Land, 314 Ky. 514, 517, 235 S.W.2d 988, 990 (1951); Boeheck Constr. Equip. Corp. v. H. Fuller & Sons, Inc., 19 Wis. 2d 658, 662, 121 N.W.2d 303, 306 (1963). For cases making a distinction between a dealer and a manufacturer-seller, see 1 WILLISTON, SALES § 232 (1948 ed.).

29. U.C.C. § 2-314, comment 3.

30. HAWKLAND, *op. cit. supra* note 10, at 70.

31. U.C.C. § 1-203.

[it was] manufactured and sold,"[32] or was "suitable for the ordinary use for which [it was] sold."[33] A few courts simply said that a product was unmerchantable if it was "unsalable."[34] On the other hand, section 2-314(2) provides a comprehensive but nonexclusive definition of the word "merchantable,"[35] the most important aspect of which, from the consumer purchaser's point of view, is the codification of the rule followed by those courts that took the position that particular goods were merchantable if they were fit for the purposes for which they were ordinarily used.[36] The Code further states in section 2-314(2)(a), however, that goods are merchantable only if they would "pass without objection in the trade."[37] If this language was intended to mean that a warranty of merchantability is breached whenever a buyer objects to the quality of merchandise sold to him, it would suggest a greatly expanded concept of the nature of the protection afforded by this type of warranty.[38] Apparently no cases have yet interpreted this phrase, and the official comment to section 2-314 is of little help in discovering the draftsmen's intent, beyond a suggestion that the words in question are to be read together with section 2-314(2)(b), a provision indicating that fungible goods are merchantable only if they are of "fair average quality."[39] Because fungible goods are usually associated with transactions between commercial parties, the comment raises the possibility that the "pass without objection in the trade" test was designed to be applicable only in the context of commercial dealings and that it has no relevance in the setting of consumer sales. On the other hand, perhaps the troublesome language will eventually be construed to mean

32. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 370, 161 A.2d 69, 76 (1960).

33. Vincent v. Nicholas E. Tsiknas Co., 337 Mass. 726, 729, 151 N.E.2d 263, 265 (1958); Mead v. Coca-Cola Bottling Co., 329 Mass. 440, 442, 108 N.E.2d 757, 758 (1953).

34. Moore v. Hubbard & Johnson Lumber Co., 149 Cal. App. 2d 236, 241, 308 P.2d 794, 797 (Dist. Ct. App. 1957).

35. U.C.C. § 2-314 provides:

> (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.

The accompanying explanatory comment suggests that these tests were not meant to be all-inclusive. U.C.C. § 2-314, comment 6.

36. U.C.C. § 2-314(2)(c), set out in note 35 *supra*.

37. U.C.C. § 2-314(2)(a), set out in note 35 *supra*.

38. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales*, 8 U.C.L.A.L. REV. 281, 293 (1951).

39. U.C.C. § 2-314, comment 7. Fungible goods are defined by the U.C.C. as those "of which any unit is, by nature or usage of trade, the equivalent of any other like unit." U.C.C. § 1-201(17).

nothing more than that the testimony of one who has dealt with merchandise of the type giving rise to a dispute will be admissible, as it traditionally has been, to aid in determining whether a particular product would have been acceptable for resale "in the trade."[40]

The Code makes an important addition to the standard of merchantability by requiring that goods must "conform to [any] . . . promises or affirmations of fact made on the container or label."[41] This provision would seem to afford increased consumer protection by rejecting the "adoption rule," which shielded a retailer from liability for having sold a product not measuring up to the manufacturer's claims printed on the package unless the dealer, by conduct other than simply stocking the merchandise, had "adopted" such claims as his own representations.[42] However, this provision may have less significance at present than it would have had a few years ago, because the trend among courts today is toward allowing a consumer purchaser to sue a manufacturer for breach of an express warranty created by statements on a container of a factory-packaged product, despite a lack of privity of contract between the plaintiff and the producer.[43]

Under the Sales Act, a sale must have been "by description" in order for an implied warranty of merchantability to arise. Although the term "by description" was not defined in the act, courts regularly held that there had been no sale by description, and therefore no warranty of merchantability accompanying the transfer of title, if a buyer had selected specific goods.[44] Where the Code is in effect, the "description rule" no longer exists; the only general requirement which must be met in order for an implied warranty of merchantability to grow out of a sale of goods is that the seller be "a merchant with respect to goods of that kind."[45] The Code's rejection of the old principle should have the effect of extending the benefit of the warranty of merchantability to more consumer buyers, who usually choose specific goods from a shelf, as opposed to commercial or industrial purchasers, who are inclined to order merchandise by general description or, at most, by trade name.[46] Neverthe-

40. See generally 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.02[1] (1965).

41. U.C.C. § 2-314(2)(f).

42. HAWKLAND, *op. cit. supra* note 10, at 69-70. See generally Cochran v. McDonald, 23 Wash. 2d 348, 161 P.2d 305 (1945).

43. See text accompanying note 102 *infra*.

44. 1 WILLISTON, SALES § 230 (1948 ed.).

45. U.C.C. § 2-314(1).

46. Even before the advent of the Code, some courts had already expanded the scope of "sale by description" to include specific goods. See Kohn v. Ball, 36 Tenn. App. 281, 286, 254 S.W.2d 755, 758 (1953): "The term sale by description strictly means an executory sale where the article is not present, but the term has been broadened to include all sales, whether or not the goods are present, where there is no adequate opportunity for inspection."

less, even in a Code jurisdiction, a buyer of specific goods may make himself ineligible for the protection of the implied warranty of merchantability. Section 2-316(3)(b) states that "when the buyer before entering into the contract [of sale] has examined the goods . . . or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." However, the official comment to this section suggests that a consumer purchaser is given some protection by the fact that a "particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded [from the scope of the warranty coverage] by the examination."[47]

2. *Implied Warranty of Fitness for Particular Purpose*

Sales of goods often give rise to a second type of implied warranty, that of fitness for a particular purpose. In language expressive of the common law in the early twentieth century,[48] the Sales Act stated in sections 15(1) and (4):

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. . . . In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

Section 2-315 of the Code provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The most significant change effected by this Code section is the rejection of the "patent or trade name" rule, codified by the Sales Act, by which no warranty of fitness for a particular purpose attached to the sale of merchandise requested by its brand name. Apparently, it was presumed as a matter of law that a buyer who knew enough about a product to ask for it by its trade name was not relying on a seller's judgment to select goods capable of fulfilling a special

47. U.C.C. § 2-316, comment 8; see text accompanying note 137 *infra*.

48. See McNabb v. Central Ky. Natural Gas Co., 272 Ky. 112, 113 S.W.2d 470 (1938); Child's Dining Hall Co. v. Swingler, 173 Md. 490, 197 Atl. 105 (1938).

need.[49] In a Code jurisdiction, the existence of a warranty of fitness for a particular purpose is always a question of fact and depends only upon a finding, from all the circumstances surrounding a given sale, both that the seller of the goods in question had reason to know the buyer's intended use for them (although the seller need not have had actual knowledge) and also that the buyer did in fact rely upon the seller's judgment in choosing a product to fulfill that purpose. A purchaser's asking for a product by its brand name is no longer conclusive evidence that no warranty of this type accompanied a sale, but merely serves as some indication that he did not rely upon the seller's judgment.[50] In an attempt to mitigate the harshness of the "trade name rule," a few courts applied a similar principle in Sales Act cases in which, after a seller had recommended a particular brand of merchandise to fulfill a special purpose, a buyer ordered it by its trade name.[51] The Code approach is certainly reasonable in an age when many products are regularly identified by trade name and when a plaintiff may have been induced to ask for a brand-name item by a defendant's own assurances in his advertising that it would serve a particular purpose.

It appears that both a warranty of merchantability and one of fitness for a particular purpose may grow out of the same sale.[52] For example, a purchaser buying an automobile with the special intention of entering a stock car race might reasonably anticipate that the car will also be suitable as a means of ordinary transportation. Since the latter is the ordinary purpose for which automobiles are sold, his expectation in this regard is protected by an implied warranty of merchantability.[53] In addition, if the seller knew of the buyer's special intended use and if the purchaser relied upon the seller to furnish a vehicle fit for that use, an implied warranty of fitness for a particular purpose would also arise.

Some courts have even reasoned that a warranty of fitness for a particular purpose is created automatically by the mere sale of an article which has only one ordinary use.[54] For example, in *Kirk v. Stineway Drug Store Co.*,[55] where plaintiff had been injured while climbing a stepladder, the court found an implied warranty of fitness for a particular purpose accompanying the sale of the ladder,

49. 1 WILLISTON, SALES § 236a (1948 ed.).

50. See U.C.C. § 2-315, comments 1 and 5.

51. See Buchanan v. Ducan, 82 A.2d 911 (D.C. Munic. Ct. 1951); Green Mountain Mushroom Co. v. Brown, 117 Vt. 509, 95 A.2d 679 (1953).

52. See U.C.C. § 2-315, comment 2; HAWKLAND, *op. cit. supra* note 10, at 68.

53. See text accompanying note 36 *supra*.

54. Brown v. Chapman, 304 F.2d 149, 152 (9th Cir. 1962) (hula skirts); Kirk v. Stineway Drug Store Co., 38 Ill. App. 2d 415, 422, 187 N.E.2d 307, 310 (1963) (stepladder); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 612, 187 A.2d 575, 576-77 (1963) (soda water).

55. 38 Ill. App. 2d 415, 187 N.E.2d 307 (1963) (decided under the Sales Act).

although the purchaser had not made known to the seller the exact use for which the article was desired. The court reasoned that since a stepladder is invariably purchased in order that a buyer may elevate himself, this purpose is impliedly made known to a seller by the very nature of the article sold.[56] However, because the term "particular purpose" envisages a specific use peculiar to a certain buyer,[57] it would have been better for the court to speak in terms of a warranty of merchantability rather than finding an implied warranty of fitness for a particular purpose just because the product had only one ordinary use.[58]

The distinction between these two kinds of implied warranties becomes important under the Code only in determining the consequences of a seller's attempt to disclaim the existence of either or both types in connection with a particular sale. In some circumstances section 2-316 requires that disclaimer of liability on a warranty of merchantability, in order to be effective, must mention the term "merchantability." On the other hand, a disclaimer of a warranty of fitness for a particular purpose need not be cast in special language to be valid, although it must be in writing and conspicuous.[59]

3. *Title*

Section 13 of the Uniform Sales Act provided that every sale of goods, as well as all contracts to sell goods, gave rise to three implied warranties of title: (1) that the vendor had a right to sell the goods, (2) that the buyer would enjoy quiet possession of them, and (3) that they were, or at the time of the sale would be, free from any charge or incumbrance in favor of third persons.

The Code has abolished the concept of a specific warranty of quiet possession. An interference with a buyer's peaceful enjoyment of purchased goods is apparently intended under the Code to serve merely as evidence establishing a breach of a vendor's basic warranty—that he had passed good title in connection with the sale.[60] More significant, while under the Sales Act the statute of limitations on a cause of action for breach of a warranty of quiet possession began to run only when a buyer's possession was actually disturbed,[61] the Code provides that a right to sue for a breach of any warranty relating to a seller's obligation to convey good title accrues

56. *Id.* at 422, 187 N.E.2d at 310; *accord*, Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963) (recovery denied because of lack of privity).

57. Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F.2d 63, 67 (8th Cir. 1930); 1 WILLISTON, SALES § 235 (1948 ed.). See also U.C.C. § 2-315, comment 2.

58. Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 464, 162 A.2d 513, 515 (1960). The court in *Kirk* found there had been no warranty of merchantability because the plaintiff had had an opportunity to inspect the ladder.

59. See note 128 *infra* and accompanying text.

60. U.C.C. § 2-312, comment 1.

61. 1 WILLISTON, SALES § 221 (1948 ed.).

upon tender of delivery of merchandise, regardless of whether the aggrieved party then knew of the breach.[62] Coupled with the fact that the applicable statute of limitations may be reduced to a period as short as one year by agreement of the parties,[63] this rule will certainly promote finality in dealings involving commercial purchasers, the type of transactions with which the Code is primarily concerned.[64] Nevertheless, it may prove unduly harsh to a consumer buyer who discovers too late that he has received stolen merchandise.

While it retains the concept of a specific warranty against incumbrances, the Code, in section 2-312(3), also provides that a seller impliedly warrants that his goods will be taken free of any third person's rightful claim for "infringement." However, this additional guarantee should be of little concern to an average consumer, because it apparently has reference to outstanding patent or trademark claims which could prevent a buyer from reselling merchandise.[65]

II. The Concept of Privity

A warranty is essentially a representation, either express or implied, regarding the quality of, or title to, particular merchandise. It becomes a part of a sales agreement either because the parties to the transaction choose to incorporate it or because the law automatically reads it into their contract.[66] Since a warranty is thus an element of a contract, the prevailing rule is that a person may recover for its breach only if he is actually privy to the agreement.[67] Therefore, a consumer purchasing from a retailer, who in turn received the goods from their manufacturer, would be unable to sue the manufacturer for breach of any warranty, express or implied, arising out of the manufacturer's sale to the retailer. Nevertheless, many times a plaintiff wishes to sue a manufacturer or some member of a distributive chain besides his immediate seller, in order to reach the party most financially capable of compensating him for the losses he suffered by reason of a defect in a product.

Before the industrial revolution, the privity concept was of little significance in the warranty context because a consumer usually bought a product directly from its manufacturer and was therefore in actual privity with the only party conceivably responsible for any injuries attributable to defective merchandise.[68] In those relatively few instances where a buyer purchased goods through a dealer,

62. U.C.C. § 2-725(2); see U.C.C. § 2-312, comment 1.
63. U.C.C. § 2-725(1).
64. See generally U.C.C. § 1-102.
65. See U.C.C. § 2-312, comment 3.
66. Dunn v. Texas Coca-Cola Bottling Co., 84 S.W.2d 545, 549 (Tex. Civ. App. 1935).
67. See 1 Corbin, Contracts § 124 (1963 ed.); 1 Williston, Sales § 244 (1948 ed.).
68. Ezer, *supra* note 38, at 322.

the latter was probably more affluent than the manufacturer and thus better able to bear any loss occasioned by a defective product.[69] However, when the marketing structure was revolutionized during the last century, it became increasingly necessary for a buyer injured by substandard merchandise to look beyond his immediate seller (normally the neighborhood retailer) in order to find someone capable of adequately compensating him; the privity rule hindered his effort. Apart from traditional considerations of contract law and a desire to protect infant industries,[70] an important rationale for the continued vitality of the privity rule in breach of warranty actions was the feeling that a manufacturer who had made a representation to *his* buyer—a distributor or a retailer—had undertaken an obligation to indemnify only that purchaser in case goods were not as represented. It was believed that a producer should not have the scope of his responsibility for such a representation enlarged, contrary to his wishes and expectations, to include a duty to compensate either injured subpurchasers of his buyer or other persons who might have been harmed by his merchandise.[71] While this reasoning was based on the presumed intent of a contracting seller, it is difficult to reconcile with the fact that it has long been a common practice to impose warranties upon vendors by operation of law regardless of their wishes.[72] Furthermore, today's manufacturer often expects that his goods will pass through a number of hands before reaching an ultimate consumer, and thus has reason to anticipate that persons other than his immediate buyer could be injured by defective merchandise.

A trend toward relaxation of the privity rule in actions for breach of warranty is apparent from a study of recent cases. Courts in increasing numbers are allowing an injured consumer to go beyond his immediate seller and to recover damages from the manufacturer or other persons in the distributive chain through which the offending merchandise passed.

Apart from the bond of actual privity of contract existing between a buyer of goods and his immediate seller, there are three other possible categories of relationships between or among potential parties to a products liability suit. For convenience these may be denoted by the terms vertical, horizontal, and diagonal privity, although frequently the individuals whose interrelation is desig-

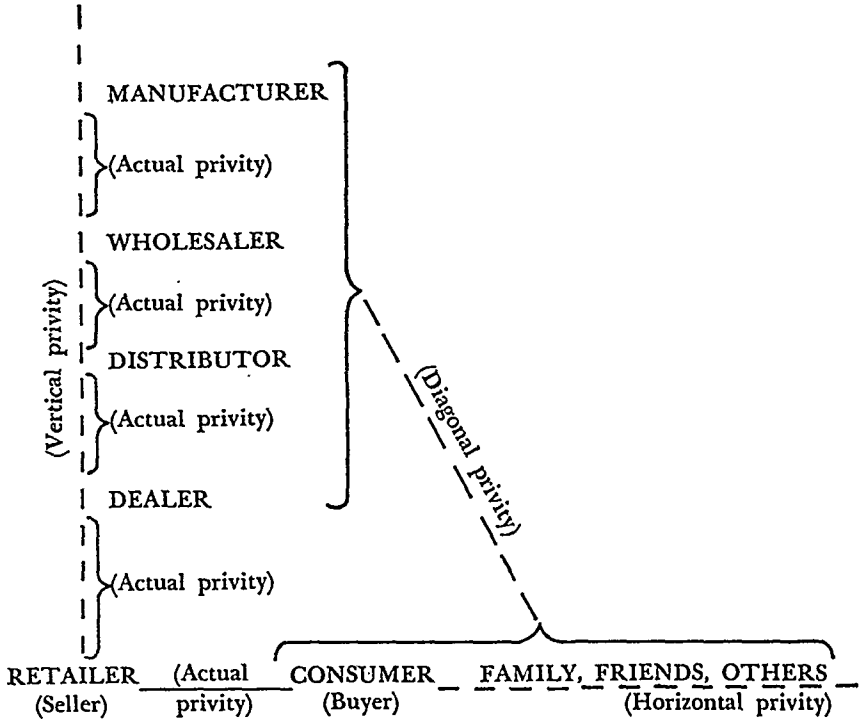
69. *Ibid.*

70. See note 2 *supra.*

71. 1 WILLISTON, SALES § 244 (1948 ed.).

72. Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960); Hawkins v. Pemberton, 51 N.Y. 198, 10 Am. Rep. 595 (1872); Nielson v. Hermansen, 109 Utah 180, 166 P.2d 536 (1946). *But see* Wallace v. McCampbell, 178 Tenn. 224, 156 S.W.2d 442 (1941). U.C.C. § 2-313(2) provides that a seller need not have a "specific intention to make a warranty."

nated by the use of one of these labels are in no semblance of actual privity with each other. The following chart illustrates the application of these terms:[73]



A. *Vertical Privity*

The concept of vertical privity deals with the relationship between parties to a transaction occurring in the course of product distribution prior to a sale to an ultimate purchaser and is therefore not important in the context of a discussion of consumer protection.[74] Indeed, privity is not a significant issue in most cases brought by one member of the distributive chain against another, because the litigants are normally in actual privity. This situation may be attributable to the fact that transactions before a final sale are regularly completed on the basis of contracts providing adequate relief for an immediate buyer in case a warranty is breached by his immediate seller. In any event, it appears that the current disposition toward relaxing the traditional application of the privity rule has carried over into litigation involving parties in the distributive process.

73. This chart is a modified version of the one appearing in Ezer, *supra* note 38, at 323.

74. See, *e.g.*, Southwest Ice & Dairy Prods. Co. v. Faulkenberry, 278 Okla. 278, 220 P.2d 257 (1950).

In *Free v. Sluss*,[75] for example, a retailer was allowed to recover from the manufacturer of a quantity of unmarketable soap for breach of an express warranty, although the goods had been sold to the plaintiff by an intermediate dealer. The court held that the manufacturer's quality guarantee printed on each package of soap had been addressed to anyone who would deal with the product in the "usual channels of trade."[76] In this regard, an explanatory comment to one Code provision suggests that the draftsmen were neutral on the question of abrogating the requirement of actual privity in cases between parties in a vertical relationship.[77]

B. *Horizontal Privity*

Code section 2-318 deals with the concept of horizontal privity, for it relates to the situation where a non-purchaser injured by the defective product seeks compensation from the final seller of the product:

> 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 a 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.

This provision makes specified persons—members of a buyer's family and household, as well as guests in his home—third-party beneficiaries of all warranties running from a final seller to his purchaser, unless it can be shown that the vendor could not have anticipated that these persons would be affected by a particular product. Of course, whether the enactment of section 2-318 in a given state has meant the expansion of a vendor's liability depends upon the status of the pre-Code authority in the jurisdiction. While the law of many states did allow members of a buyer's family and household to reap the benefit of a seller's warranty to an actual purchaser, this liberality was generally manifested only in cases where a plaintiff's injury had been caused by impure food or by a defect in an "imminently dangerous" product.[78] By making section 2-318 applicable in actions arising from injuries caused by almost any type of defective merchandise, the Code has afforded greater consumer protection in these jurisdictions. On the other hand, where the privity rule appears to have been abolished or where recovery for product-related

75. 87 Cal. App. 2d 933, 197 P.2d 854 (App. Dep't, Super. Ct. 1948).

76. *Id.* at 937, 197 P.2d at 856; *accord*, U.S. Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 108 S.W.2d 432, *cert. denied*, 302 U.S. 749 (1937).

77. U.C.C. § 2-318, comment 3.

78. Torpey v. Red Owl Stores, 228 F.2d 117 (8th Cir. 1955); 1 WILLISTON, SALES § 244 (1948 ed.); see Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

injuries can be based on a theory of strict liability in tort, this provision is of less significance.[79]

Because many products are bought at least partially for the use or enjoyment of the persons described in section 2-318, there is good reason to confer upon them the advantages of a buyer's warranty protection. However, a purchaser often buys a product for the benefit of others standing in special relationships to him. These individuals, including a buyer's employees and guests in his automobile, are not explicitly protected by the Code, with the result that its draftsmen may well be criticized for their somewhat arbitrary stipulation in this provision of the classes of persons who are deemed to stand in the shoes of a buyer. The problem which section 2-318 in its present form fails to solve is perhaps best illustrated by the situation in which a purchaser's employee is injured by defective merchandise bought for the employee's occupational use. The California Supreme Court, in the pre-Code case of *Peterson v. Lamb Rubber Co.*,[80] held that such an employee stood in the shoes of his employer and thus could recover on a warranty theory from his employer's seller, despite the lack of privity between plaintiff and defendant. The court suggested in dicta that its decision might have been the same had section 2-318 been in effect at the time of the accident, for the workman could be termed a member of his employer's "industrial family" and thus made one of the third-party beneficiaries expressly protected by this provision.[81] However, a court in Pennsylvania, the first state to adopt the Code, specifically refused to construe section 2-318 to include a purchaser's employee.[82] Unless it can fairly be said that injured employees are adequately protected by workmen's compensation legislation, there seems to be no reason to discriminate against them as the Code thus appears to do.[83]

79. Section 2-318 was omitted entirely from the version of the Uniform Commercial Code enacted in California. It is interesting to note that the California Supreme Court has adopted the theory of a seller's strict liability for injuries caused by a defective product. See generally Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966).

80. 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

81. *Id.* at 347, 5 Cal. Rptr. at 869, 353 P.2d at 581. After *Peterson*, the Uniform Commercial Code, with § 2-318 deleted, was adopted in California. See generally note 79 *supra* and accompanying text. In Jakubowski v. Minnesota Mining & Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964), on facts very similar to those in *Peterson* the court assumed that an employee of the purchaser could maintain an action for breach of implied warranty, but the trial court's dismissal was affirmed because of a lack of evidence showing that the product in question had been defective.

82. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963). A recent case suggests a change in attitude on the part of the Pennsylvania courts. Nederostek v. Endicott-Johnson Shoe Co., 415 Pa. 136, 202 A.2d 72 (1964) (employee not necessarily excluded from warranty protection where "supplied" with shoes purchased by his employer).

83. Two pre-Code cases which have allowed the employee the benefit of a warranty made to his employer are: Hart v. Goodyear Tire & Rubber Co., 214 F. Supp. 817 (N.D. Ind. 1963); Thomas v. Leary, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (1963). "There is no doubt that the doctrine of privity will be extended, sooner or later, to

Actually, section 2-318 represents a retreat from the position espoused by the authors of the 1949 draft of the Code in which they promulgated a version of this provision which would have extended the benefit of a seller's warranty to anyone "whose relationship to [a buyer] is such as to make it reasonable to expect that such person may use, consume, or be affected by the goods purchased,"[84] and thus would have displaced the privity requirement in a warranty action. The Colorado and Wyoming legislatures decided that a requirement of privity would serve no useful purpose in their states, and, therefore, in enacting the Code substituted for section 2-318 a provision extending a seller's warranty to "any person who may reasonably be expected to use, consume or be affected by the goods."[85] In Virginia, section 2-318 has been supplanted by an "anti-privity" statute containing language equivalent to that of the Colorado and Wyoming provisions.[86]

In fairness to the draftsmen of the current version of the Code, it should be noted that the explanatory comment accompanying section 2-318 suggests that this provision was intended to be neutral on the question of the application and extension of that pre-Code case law by which the benefit of a seller's warranty had been conferred upon persons who are not specifically covered by this section.[87] However, when by enacting the Code in its present form a legislature has said that a warranty recovery may be had by members of a consumer's family and household and guests in his home, a court may rely on the principle *expressio unius est exclusio alterius* and be reluctant to take its cue from the comment and to extend warranty protection further.[88]

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include employees of a purchaser. There is no good reason why it should not be so extended now." *Id.* at 441, 225 N.Y.S.2d at 140. *But see* Barlow v. DeVilbiss Co., 214 F. Supp. 540 (E.D. Wis. 1963); Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963).

84. U.C.C. § 2-318 (1949 Draft). In 1950, a proposal was made to amend the official comment to section 2-318 of the 1949 Draft to make it clear that the section extended a buyer's warranty protection to his employees. However, in order to minimize objection to enactment of the Code not only was this suggestion rejected; but section 2-318 was amended to its present form. U.C.C. § 2-318, comment 3 (Proposed Final Draft 1950).

85. WYO. STAT. ANN. § 34-2-318 (Supp. 1965); Colo. Laws. 1965, § 155-2-318.

86. VA. CODE ANN. § 8.2-318 (1965); see Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 814 (1965). Alabama has deleted the words "who is in the family or household of the buyer or who is a guest in his home" from its version of § 2-318 which will be effective January 1, 1967. UNIFORM LAWS ANN., UNIFORM COMMERCIAL CODE § 2-318 (Supp. 1965, at 61). California and Utah deleted § 2-318 entirely. CAL. COMM. CODE § 2-318; UTAH CODE ANN. tit. 70A (1953).

87. U.C.C. § 2-318, comment 3 states: "This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

88. See Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961) (not extended to

An interesting problem of interpretation is presented by the use of the word "family" in section 2-318 without explanation or qualification. The employment of this term in conjunction with the word "household" and the phrase "guest in [the buyer's] home" suggests that it may have been intended to connote an immediate family group, including only relatives living in the same household. A Pennsylvania court in *Miller v. Preitz*[89] seemed to sanction this interpretation when it denied the benefit of section 2-318 to a buyer's nephew living next door. On the other hand, as noted above, the California Supreme Court has indicated a willingness to construe the word "family" broadly enough to include employees of a purchaser, on the ground that they are members of his "industrial" family.[90]

Until recently, courts which even before the enactment of section 2-318 freely extended warranty coverage horizontally to include members of the family of a buyer of a defective product, his guests, and even his employees, refused to go so far as to give similar protection to persons more remotely associated with a purchaser—so-called bystanders.[91] Early in 1963, however, a Connecticut court in *Connolly v. Hagi*[92] allowed a gasoline station attendant to bring a warranty action against the manufacturer of an automobile which had rolled over the plaintiff while he was servicing it. Pointing out that the attendant had alleged that he had undertaken to work upon the car in reliance upon defendant's extensive advertising claims that the vehicle was safe, the court decided that it would be "unrealistic to protect the wife of the purchaser, his guest in the car, but not the mechanic to whom he brings the car for purposes of service

guest in buyer's automobile); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963) (not extended to employee of purchaser); Miller v. Preitz, 14 Bucks Co. L.R. 1 (Pa. C.P. 1964) (not extended to purchaser's nephew living next door). *But see* Delta Oxygen Co. v. Scott, 383 S.W.2d 885 (Ark. 1964) where, after pointing out that in certain instances the defense of privity of contract had been abolished by section 2-318, the court said that it could see "no sound reason why the employee or servant of a purchaser using the product in the course of employment as directed, should be barred from suing on the warranty because of any shield of privity." 383 S.W.2d at 893. The version of § 2-318 found in the Texas Code provides:

> This Article does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.

2 Texas General & Special Laws 1965, ch. 721, at 26 (effective June 30, 1966).

89. 14 Bucks Co. L.R. 1 (Pa. C.P. 1964).

90. Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960). See text accompanying note 81 *supra*.

91. Rodriguez v. Shell's City, Inc., 141 So. 2d 590 (Fla. App. 1962); Hahn v. Ford Motor Co., 256 Iowa 27, 126 N.W.2d 350 (1964); Berzon v. Don Allen Motors, 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (1965).

92. 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963). Since this case involved a suit by a bystander against a manufacturer, it is also relevant to a discussion of diagonal privity.

in connection with its operation."[93] Nevertheless, even in this jurisdiction there is some limitation on a warrantor's responsibility. In *Kuschy v. Norris*,[94] decided a year later, another Connecticut court denied a warranty recovery against a used-car dealer who had sold an automobile which had collided with plaintiff's car on a public highway, allegedly because of defective brakes. As the court observed, the plaintiff was merely a member of the general public and not "a person who, in the contemplation of the parties to the contract, might be expected to use, occupy or service the used automobile."[95] It should be noted that the courts in both *Hagi* and *Norris* determined that the right to warranty recovery depended upon the nature of a plaintiff's association with an injurious product rather than upon his relation to its buyer—the factor apparently considered more significant by the authors of Code section 2-318.

The recent Michigan case of *Piercefield v. Remington Arms Company*[96] seems to have made a new departure under the Sales Act by extending implied warranty protection to a person no more closely connected with a purchaser of offending merchandise than was the plaintiff in *Norris*. The plaintiff in *Piercefield* was injured when the barrel of a shotgun fired by his brother exploded, apparently because of a defective shell. Although the ammunition had been purchased by the victim's brother, the court held that the plaintiff could maintain a warranty action against the retailer, wholesaler, and manufacturer of the cartridge. Without defining the possible limits of warranty coverage, the court merely said that, upon proof of an injury-causing defect attributable to the manufacturer of the product, recovery could not be defeated by a defense of lack of privity.[97] Actually, since the purchaser in *Piercefield* could probably be considered a member of plaintiff's "family" within the meaning of section 2-318, plaintiff might have been a third-party beneficiary under that section had the Code been in effect at the time of the accident.[98] However, the court indicated that the plaintiff had not pleaded his relationship to the buyer and made it clear

93. *Id.* at 206, 188 A.2d at 887. The court relied on the New Jersey case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), as authority for the proposition that a guest in the buyer's automobile may recover in a breach of warranty action. The U.C.C. does not expresssly adopt this view. See generally text following note 79 *supra*.

94. 25 Conn. Supp. 383, 206 A.2d 275 (Super. Ct. 1964).

95. *Id.* at 385, 206 A.2d at 276.

96. 375 Mich. 85, 133 N.W.2d 129 (1965).

97. *Id.* at 99, 133 N.W.2d at 135.

98. See generally text following note 88 *supra*. The Uniform Commercial Code went into effect in Michigan on January 1, 1964; however, the events from which *Piercefield* arose occurred before that date and were therefore governed by the Uniform Sales Act then in effect.

that it would have extended the benefit of the seller's warranty regardless of the latter's relation to the ultimate purchaser.[99]

The Colorado, Virginia, and Wyoming anti-privity statutes mentioned above would appear to be authority in those states for expanding warranty coverage to include many bystanders.[100] Unlike section 2-318, these statutes make no mention of a plaintiff's relation to an ultimate purchaser as a basis for recovery, but require only that a victim be one who may reasonably have been expected to use, consume, or be affected by the goods. Although the construction of these provisions has not yet been settled, their language would seem to encompass the service station attendant in *Hagi*, the plaintiff in *Piercefield*, and possibly even the motorist on the public highway who was denied relief in *Norris*.

C. *Diagonal Privity*

The question whether a party can recover on a warranty theory from one with whom his relationship can be characterized by the term "diagonal privity" is crucial when a plaintiff (usually a buyer) injured by a defective product seeks compensation from the manufacturer or from someone else in the distributive chain ahead of the final seller.

Courts have invoked a number of fictions in order to avoid the sometimes harsh effect which would have resulted from the traditional application of the privity rule in diagonal privity cases.[101] Some have held a manufacturer liable on an express warranty theory on the basis of representations found in his consumer-oriented advertising or on his product labels, just as if the statements conveyed through these media had been made by him to an ultimate consumer in a face-to-face transaction.[102] Others have allowed a plaintiff to by-pass a retailer and sue a manufacturer of a defective product on the theory that the retailer was either an agent of the manufacturer or a mere conduit for the goods.[103] Other courts allow a person on the consumer level to recover on the basis of implied warranties arising from transactions between parties in the distributive chain. Some have done this by making exceptions to the strict application of the privity requirement on behalf of persons injured by unwholesome food, drugs, and, in some cases, defects in so-called imminently dangerous products.[104] A few courts, such as those which

99. 375 Mich. 85, 99, 133 N.W.2d 129, 135 (1965).

100. See text accompanying notes 85 and 86 *supra*.

101. See Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-54 (1957); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1, 56-63 (1963).

102. See cases cited note 27 *supra*.

103. Rogers v. U.S. Rubber Co., 91 N.H. 398, 20 A.2d 626 (1941); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

104. 1 WILLISTON, SALES § 244 (1948 ed.).

decided *Hagi* and *Piercefield,* have gone so far as to say that a buyer no longer need be in actual privity with a defendant in the distributive chain in order to recover for the breach of a warranty accompanying the sale of any kind of merchandise.[105]

The *Second Restatement of Torts* suggests that in cases where the exceptions have swallowed the rule to the extent described above, the theory has changed from one of contractual warranty to one of strict liability in tort.[106] However, the important issue is not what theory should be used to explain the demise of the privity requirement, but rather the extent to which liability should be imposed on the seller of defective merchandise.

Since the language of Code section 2-318 deals with a seller's liability to persons in certain relationships to *his* buyer, it appears that this provision is, by its terms, of assistance to those persons only when they sue a buyer's immediate seller—in the usual situation, a retailer. Therefore, this provision is relevant only in an action between parties whose relationship can best be described by the term "horizontal privity." However, the explanatory comment to section 2-318 suggests that the Code's authors did not intend the provision either to enlarge or to restrict the developing case law with respect to diagonal privity.[107] Nevertheless, another Code section actually appears to have the effect of preventing a court from finding fictional privity in a suit by an ultimate consumer against a manufacturer on the basis of representations appearing in his advertising. Section 2-313(1)(a) states that an express warranty arises

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105. See text following notes 92 and 96 *supra.* See also Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930 (5th Cir. 1965), where the court observed: "We now conclude that under Florida law a manufacturer, as distinguished from the retailer of a product, may be held liable for breach of the implied warranty that the product manufactured is reasonably fit for the purposes intended without regard to whether the plaintiff is in privity of contract." *Id.* at 931.

It is interesting to note that most of the recent decisions doing away with the requirement of privity in warranty actions have been made by federal courts on the basis of "Erie-educated" guesses regarding the status of the law in a particular state. See Vandercook & Son, Inc. v. Thorpe, *supra* (Florida); Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965) (Indiana); Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) (Texas); Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) (Vermont); Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd,* 304 F.2d 149 (9th Cir. 1962) (Hawaii).

106. 2 RESTATEMENT (SECOND), TORTS § 402A, comment *m* (1965); see Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability,* 64 MICH. L. REV. 1350, 1369 (1966). See also Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 910 (1963) (Traynor, J.):

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products makes clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

107. U.C.C. § 2-318, comment 3.

from an affirmation of fact made *by the seller to the buyer*, and thereby suggests that a consumer may not have the benefit of a manufacturer's express warranty unless the consumer purchased from the manufacturer. Nevertheless, the comment to section 2-313 also indicates that the quoted language was "not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to the direct parties to such a contract."[108] Thus interpreted, section 2-313 would appear not to reduce the warranty protection available under the Sales Act, which authorized a court to find an express warranty in *any* affirmative statement made by a seller concerning his goods.[109]

III. Disclaimers

Although the general trend in recent years has been toward affording the protection of a manufacturer's or other seller's warranty to an increasing number of persons, it has nonetheless remained possible for a warrantor to limit the nature and the extent of his warranty obligation.[110] The policy favoring the practice of giving effect to a clause modifying the terms of a warranty or altogether disclaiming any warranty liability which might otherwise be imposed has traditionally been based on the concept of freedom of contract—the right of parties to set the terms of their bargain as they see fit and to have their agreement upheld in court.[111] Recently, however, a growing number of courts have come to recognize that, in our contemporary marketing system, a writing which evidences a sale and purports to contain a valid disclaimer or modification clause is often not the result of actual bargaining between the parties. Thus, in the leading case of *Henningsen v. Bloomfield Motors, Inc.*,[112] the New Jersey Supreme Court refused to recognize the validity of a disclaimer provision found in the then standard automotive sales contract, on the ground that the "grossly disproportionate bargaining power" of the automobile manufacturer, acting through its local dealer, gave the ordinary buyer no real choice but to accept any limitations on liability laid down by the seller.[113]

108. U.C.C. § 2-313, comment 2.

109. U.S.A. § 12.

110. See Duesenberg, *Manufacturer's Last Stand: The Disclaimer*, 20 Bus. Law. 159 (1964); 77 Harv. L. Rev. 318 (1963). U.S.A. § 71 provided: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

111. Payne v. Valley Motor Sales, Inc., 124 S.W.2d 622, 628 (W. Va. 1962).

112. 32 N.J. 358, 404, 161 A.2d 69, 96 (1960). For a criticism of the case, see Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. Ind. & Com. L. Rev. 285, 305-06 (1963).

113. 32 N.J. at 374, 161 A.2d at 78; *accord*, State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Jarnot v. Ford Motor

Similar, albeit often unexpressed, concern with the imbalance inherent in other transactions was no doubt responsible for the many pre-Code cases indicating a judicial willingness to scrutinize disclaimer and modification clauses closely and to construe them strictly.[114] In several such cases, a carefully drafted contract provision was found ineffective on the ground that its language was insufficient to accomplish its intended purpose,[115] because it had been "unfairly procured,"[116] or, in the case of a disclaimer, because the result of enforcing it would have amounted to a failure of the consideration supporting the sales contract of which it was a part.[117]

While the authors of the Uniform Commercial Code endorsed the long-standing policy favoring freedom of contract, they at the same time approved that case law holding invalid unconscionable contract terms.[118] Section 2-302 states:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

This provision, apparently designed to prevent "oppression and unfair surprise,"[119] might have been considered a sufficient limitation on a seller's power to incorporate a disclaimer or modification clause into a sales agreement. However, because the unconscionability test is a vague guideline at best, the Code's draftsmen felt that the standards to be applied in determining the validity of such a contract term should be expressly set out, as they are in section 2-316.[120] According to the accompanying comment, the purpose of

Co., 191 Pa. Super. 422, 156 A.2d 568 (1959). See generally Ehrenzweig, *Adhesion Contracts in the Conflicts of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

114. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 385-406, 161 A.2d 69, 84-96 (1960).

115. See Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951); McPeak v. Boker, 236 Minn. 420, 53 N.W.2d 130 (1952); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

116. See International Harvester Co. v. Beam, 159 Ky. 842, 169 S.W. 549 (Ct. App. 1914); Davis Motors, Dodge & Plymouth Co. v. Avett, 294 S.W.2d 882 (Tex. Civ. App. 1956).

117. See Myers v. Land, 314 Ky. 514, 235 S.W.2d 988 (1950).

118. As long ago as Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870), the Court observed that "if a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."

119. See U.C.C. § 2-302, comment 1. See also Comment, 109 U. PA. L. REV. 401, 421 (1961): "Section 2-302 evidences a realization that a contract is not a signature affixed to a long printed form but rather a mutual understanding reached through a process of bargaining."

120. "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so

this provision, like that of section 2-302, is not to prevent a seller from employing a disclaimer or a modification clause, but rather to protect a buyer from unexpected and unbargained-for provisions.[121] In regard to a seller's attempt to vary the terms of an express warranty or to disclaim express warranty liability, section 2-316(1) provides that "words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable."

Since the original proposed draft of this subsection had said simply that "if the sales agreement creates an express warranty, words disclaiming it are inoperative,"[122] the change to the present version has been criticized for diluting consumer protection.[123] Actually, the current language is rooted in the case law which developed while the Sales Act was in effect. Some courts regularly held that if an attempted disclaimer of express warranty liability produced a conflict between two terms of a sales contract, the conflict should be resolved by refusing to enforce the disclaimer and by giving full effect to the term creating the warranty.[124] Furthermore, if, as the accompanying explanatory comment suggests, the presence of a disclaimer or modification clause may be evidence concerning the existence, nature, and extent of an express warranty, the present language of section 2-316(1) merely gives vitality to the principle that express warranties rest on the "dickered" aspects of an individual bargain.[125]

Once an affirmation of fact or a promise has been made, and is of a type normally creating an express warranty, it is very difficult, even under the present section 2-316(1), for the warrantor to restrict the effect of his representation. If the language of a disclaimer or modification cannot be reconciled with the terms of the warranty, the disclaimer or modification will be rejected. Furthermore, because the Code has made the warranty of description an express warranty, a general disclaimer of all warranty liability is impossible; if such a disclaimer could be fully effective in the face of representations describing the merchandise which became the subject matter

one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302, comment 1.

121. U.C.C. § 2-316, comment 1.

122. U.C.C. § 2-316(1) (1952 ed.).

123. Cudahy, *Limitations of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 131 (1963); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales*, 8 U.C.L.A.L. REV. 281, 310 (1961).

124. See, *e.g.*, Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir. 1951).

125. Hawkland, *Limitations of Warranty Under the Uniform Commercial Code*, 11 HOWARD L.J. 28 (1965). See generally U.C.C. § 2-313, comment 1.

of a bargain, the seller would be under no obligation to deliver conforming goods.[126]

With careful planning, a seller can protect himself to some extent from undesired express warranty liability by employing a written contract intended by the parties to be a final expression of their agreement. In this way, he can preclude the admission of evidence showing that an express warranty arose from representations not contained in the contract.[127] However, it is often impractical to reduce a sales agreement to writing and frequently difficult to convince a court sympathetic to a buyer that a purchaser actually intended even a written contract to contain all the terms of a bargain when some of a seller's affirmations or promises were not included in the document. Therefore, it is advisable for a seller to make no representations in his advertising and sales talk that he is unwilling to warrant as true.

Liability arising from implied warranties of merchantability and fitness for a particular purpose can be disclaimed, and the ordinary terms of these warranties can be varied, by a seller who complies with the provisions of Code section 2-316(2):

> Subject to subsection (3) [discussed below], to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous.[128]

Section 2-316(2) is an expression of the Code's liberal policy of allowing a seller to define the nature and scope of any obligation which he plans to assume, so long as his buyer is aware of the extent of the seller's intended responsibility.[129] By providing that all written disclaimer and modification clauses must be conspicuous in order to be effective, this section prevents a seller from disclaiming warranty liability and from varying the terms of a warranty by adding a "fine print" clause at the bottom of a contract. The Code defines a "conspicuous" contract term as one which "is so written that a reasonable person against whom it is to operate ought to have noticed it," and, more specifically, indicates that language in the body of a form is "conspicuous" only if it appears in a type style or a color causing it to stand out from other printed matter.[130] The requirement that written disclaimers or modification provisions

126. See U.C.C. § 2-313, comment 4; text accompanying note 21 *supra.*

127. See U.C.C. § 2-316, comment 2; Duesenberg, *supra* note 110, at 163.

128. This section is said to have been drafted on the assumption that the implied warranties exist unless excluded or modified. See U.C.C. § 2-316, comment 5.

129. HAWKLAND, TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 76 (1964).

130. U.C.C. § 1-201(10).

must be conspicuous should be of significant aid to the average consumer, who has neither the interest to read nor the sophistication to understand a sometimes lengthy and technical sales contract.

With the exception of section 2-318, the Code does not expressly deal with the case where a party brings a warranty action against a member of a distributive chain with whom he is not in actual privity of contract.[131] An interesting question is whether a manufacturer who included an operative warranty disclaimer or modification clause in a contract with his immediate buyer, such as a wholesaler, is liable to a subpurchaser, user, or bystander with whom he is not in privity where, but for the potential effect of the clause, he would clearly be responsible under local law on a warranty theory irrespective of the lack of privity. It could be argued that if the privity rule is inapplicable in a particular instance, disclaimers as well as warranties extend beyond the immediate parties to the sale. This is the theory apparently intended to be employed in connection with section 2-318, which makes a buyer's family, household, and guests third-party beneficiaries of a warranty received by the buyer from his immediate seller. These beneficiaries are said to be bound by the same disclaimers and modifications as is the buyer himself.[132] However, allowing a disclaimer to be binding on all subpurchasers, users, and bystanders raises the specter that a manufacturer could insulate himself from all warranty liability simply by establishing a corporation to serve as a distributor and then effectively disclaiming warranty responsibility in connection with each sale to the subsidiary. If a manufacturer could thus disclaim warranty liability to all subpurchasers and users of his product, an important reason for relaxing the privity requirement in warranty actions—finding a more financially responsible defendant—would be lost.[133] For this reason, it is doubtful that many courts will be inclined to reach a strictly logical result when called upon to determine the validity of a manufacturer's disclaimer in a diagonal privity context. It should be noted, however, that section 2-316 does not require even a written disclaimer or a modification to be set out in a formal contract, and thus suggests the possibility that a manufacturer may disclaim warranty liability both to his immediate buyer and to other subpurchasers by means of statements on the labels of his merchandise or on the packages containing his goods.

Section 2-316(3) provides basically that, irrespective of a seller's use of particular words, an implied warranty is automatically ex-

131. U.C.C. § 2-318, comment 3. Section 2-318 is discussed in the text accompanying notes 78-90 *supra*.

132. U.C.C. § 2-318, comment 1.

133. See text accompanying note 69 *supra*.

cluded from a sales agreement, or modified with respect to its terms, where the circumstances of a transaction would lead a reasonable buyer to expect such an exclusion or modification. By way of illustration, the Code suggests that a vendor's use of an expression like "as is" or "with all faults" is sufficient to disclaim all implied warranty liability unless the circumstances indicate otherwise.[134] However, since these expressions are supposed to "call the buyer's attention" to the fact that no implied warranties exist, it seems that if they are in writing, they, too, must be conspicuous.[135] It would also appear that unawareness on the part of a particular buyer, such as a consumer, of the intended significance of an expression would be a circumstance indicating that a seller's use of the words was ineffective to disclaim liability. Furthermore, when a buyer has examined goods prior to sale, or when he has refused to take advantage of the opportunity to inspect them, there is no implied warranty against the presence in the merchandise of defects which ought to have been discovered during the course of an examination undertaken by one in the buyer's position.[136] Because the draftsmen apparently intended that a purchaser's knowledge and commercial experience as well as the circumstances of the sale should be taken into account in considering the effect of his inspection or failure to inspect, it is unlikely that a consumer buyer will often lose the benefit of an implied warranty by virtue of his having had an opportunity to examine merchandise.[137]

Section 2-719, allowing parties to modify the ordinary remedies for breach of contract, permits any conscionable limitation of consequential damages arising from a breach of warranty, but states that a limitation on consequential damages for personal injury is prima facie unconscionable.[138] It has thus been suggested that the absence of any reference to the notion of conscionability in section 2-316 may imply that by incorporating an effective disclaimer, a seller can automatically preclude liability for personal injury.[139] However, this

134. U.C.C. § 2-316(3)(a); Schneider v. Swaney Motor Car Co., 136 N.W.2d 338 (Iowa 1965) (no warranty where used cars were purchased on "as is" and "where is" basis); see Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964) (language used to disclaim held ineffective); Yanish v. Fernandiz, 397 P.2d 881 (Colo. 1965); Lafayette Highway Equip. Sales & Serv. v. Dixie Truck & Equip. Serv., 179 So. 2d 479 (La. App. 1965) (language effective); James Talcott, Inc. v. Finley, 389 P.2d 988 (Okla. 1964). "To be effective . . . the disclaimer must call to the attention of the buyer by clear announcement that the manufacturer and seller reject the implied warranty which the law raises as an incident to the contract of sale. In effect, it must make plain that there is no warranty that their product is reasonably suited for use as an automobile." Willman v. American Motor Sales Co., 44 Erie Co. L.J. 51, 56 (Pa. C.P. 1961).

135. See U.C.C. § 2-316(3)(a).

136. U.C.C. § 2-316(3)(b).

137. See U.C.C. § 2-316, comment 8.

138. U.C.C. § 2-719(3). See text accompanying note 146 *infra*.

139. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under*

argument ignores the fact that section 2-302, dealing with unconscionable contract terms, is not limited in application to questions arising under those Code sections in which it is specifically mentioned, but may be used to void any unconscionable contract clause. Furthermore, by declaring that a limitation on consequential damages for personal injury is prima facie unconscionable, section 2-719 should give content to section 2-302 when the latter provision is used to test the validity of a warranty disclaimer.

IV. Limitation of Remedy

Code section 2-714(1), treating in a general way the remedies for any breach of contract for the sale of goods where the breach is discovered after merchandise has been accepted by a buyer, provides that a purchaser may recover damages for all losses resulting in the ordinary course of events from the infraction. Section 2-714(2) specifies that the basic measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods in the condition in which they were accepted and the value that they would have had if they had been as warranted. More important, section 2-714(3) provides that compensation for incidental and consequential damage may also be recovered;[140] consequential damage includes "injuries to persons or property proximately resulting from any breach of warranty."[141] These Code provisions were derived without significant change from the Uniform Sales Act.[142]

On the other hand, Code section 2-316(4) states that where warranty liability has not been disclaimed, the remedies for breach of an express or an implied warranty may be limited by agreement of the contracting parties in accordance with sections 2-718 and 2-719. Section 2-718 allows the parties to establish a provision in a sales agreement for reasonable liquidated damages, so long as the amount payable upon breach is not so large as to constitute a penalty. The reasonableness of a sum stipulated as liquidated damages is determined in the light of either the harm which could have been antici-

the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 282 (1963).

140. The elements of incidental and consequential damages are described in U.C.C. § 2-715.

141. U.C.C. § 2-715(2)(b). The term "proximately resulting" is not defined in the Code. However, according to an official comment, if a buyer has discovered a defect or used a product without making a reasonable inspection, a product-related injury could be said not to have proximately resulted from a breach of warranty. U.C.C. § 2-715, comment 5.

142. See generally U.S.A. §§ 69(6)-(7). Other remedies for breach of a sales contract are found in U.C.C. §§ 2-711, -713, -717. See Hawkland, *op. cit. supra* note 129, at 229-309. For criticism of the contract remedies provided by the U.C.C., including those for breach of warranty, see Peters, *supra* note 139.

pated, at the time of contracting, to result from a breach, or the harm which did in fact occur. Other factors to be taken into consideration by a court are the difficulty of proving the amount of the loss and the inconvenience of obtaining an adequate remedy if the liquidated-damage clause is not enforced.[143] These are essentially the same factors that have always been taken into account by courts in ruling on the validity of liquidated-damage clauses, although in the past some courts were reluctant to consider the actual loss attributable to a breach of contract.[144] By expressly providing that a court may consider the actual-harm factor as well as the possibility that a particular stipulated damage clause is void as unconscionable under section 2-302, the Code's draftsmen sought to ensure that section 2-718 would not be used to sanction a liquidated damage clause which unfairly favored either party.

By virtue of section 2-719, the parties to a sale may agree upon warranty remedies in addition to, or in place of, those specifically provided by the Code. Similarly, they may alter the normal measure of damages for a breach of warranty. Thus, they may agree that a seller can satisfy any warranty liability to a buyer by repairing or replacing defective merchandise.[145] Section 2-719 also permits any conscionable limitation or exclusion of consequential damages arising from a breach of warranty but, as noted earlier, explicitly states that the "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable."[146]

A possible anomaly in the application of sections 2-718(3) and 2-719 arises from the fact that neither provision indicates that a written contract clause modifying or limiting a remedy need be conspicuous, as must its counterpart disclaiming warranty liability or modifying the terms of a warranty.[147] Thus, these provisions do not seem to go as far as would be desirable in protecting a buyer, particularly a consumer, from unexpected limitations upon a seller's liability. Of course, any potential unfairness which may result from the draftsmen's failure to incorporate the requirement of conspicuousness into these two sections can be avoided by resort to section

143. U.C.C. § 2-718(1).

144. Keeble v. Keeble, 85 Ala. 552, 5 So. 149 (1888); Dunlap Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd., [1915] A.C. 79. See generally WILLISTON, CONTRACTS §§ 783-84 (3d ed. 1961); Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 499-513 (1962). For cases that did not consider the actual-harm factor, see United States v. Bethlehem Steel Co., 205 U.S. 105 (1907); Berger v. Shanahan, 142 Conn. 726, 118 A.2d 311 (1955); Mead v. Anton, 33 Wash. 2d 741, 207 P.2d 227 (1949).

145. U.C.C. § 2-719(1)(a).

146. It is not clear whether the conscionability requirement also applies to clauses totally disclaiming warranty liability. See text accompanying note 138 *supra*.

147. See U.C.C. § 2-316; text accompanying note 130 *supra*.

2-302, which authorizes a court to void any unconscionable contract provision.[148]

One of the more unfortunate aspects of the warranty law established by the Code is that it was in no way designed to meet the problem of inequality of bargaining position. Often a product which is a virtual necessity to modern living is presented to a consumer on a take-it-as-offered-or-leave-it basis, with the result that any subsequent sale can hardly be said to be the result of actual bargaining.[149] It has been argued on the basis of section 2-302 that a buyer's lack of a meaningful option in such situations may render ineffectual an otherwise enforceable contract clause disclaiming or modifying warranty liability or varying the terms of a warranty.[150] However, the explanatory comment to section 2-302 states that the purpose of the provision is "not the disturbance of allocation of risks" attributable to the superior bargaining power of one of the parties.[151] Therefore, it would appear that if a disclaimer or modification clause is otherwise effective, it is enforceable despite the fact that, because of the absence of a feasible alternative, a buyer is forced to accept a disproportionate share of the risk.[152]

A classic example of the type of "adhesion contract" which a buyer is often forced to sign in order to do business with a dominant seller is the standard automobile sales agreement, by virtue of which the extent of a manufacturer's warranty liability is purportedly limited to repairing or replacing defective parts. Furthermore, even this restricted responsibility is frequently assumed only for a limited period of time. Traditionally, such limitation provisions have been valid; for example, a plaintiff whose automobile had been destroyed by a fire caused by a defective part was regularly denied recovery because the manufacturer's liability had been limited to replacement of defective parts or because the applicable warranty had expired before the fire.[153]

There is an indication of a recent change in attitude on the part of some courts toward the standard automobile sales agreement. In *Jarnot v. Ford Motor Co.*,[154] a Pennsylvania court held that a warranty providing for the replacement of defective parts did not pre-

148. *Cf.* U.C.C. § 2-719, comment 1: "[A]ny clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion . . . ."

149. See Kessler, *supra* note 113.

150. Comment, 109 U. PA. L. REV. 401, 420 (1961).

151. U.C.C. § 2-302, comment 1.

152. Boshkoff, *supra* note 112, at 303; Cudahy, *supra* note 123, at 129; Hawkland, *supra* note 125, at 37.

153. Shafer v. Reo Motors, 108 F. Supp. 659 (W.D. Pa. 1952); Hall v. Everett Motors, 340 Mass. 430, 165 N.E.2d 107 (1960); Norway v. Root, 58 Wash. 2d 96, 361 P.2d 162 (1961).

154. 191 Pa. Super. 422, 156 A.2d 568 (1959).

clude the existence of a distinct warranty of merchantability upon which the plaintiff could rely to recover damages attributable to a faulty steering mechanism in a truck produced by the defendant. In an action against another automobile manufacturer and his dealer to recover for personal injuries sustained while driving an allegedly defective car, the New Jersey Supreme Court, noting the defendant's "grossly disproportionate bargaining power," declared that the manufacturer's "attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity."[155] Nevertheless, although there are strong policy arguments in favor of voiding disclaimer, modification, and limitation clauses forced upon a buyer by a seller in a vastly superior bargaining position, most courts have enforced these provisions.[156]

Perhaps the problems posed by adhesion contracts could best be solved by legislation declaring disclaimer and limitation clauses ineffective or prima facie unconscionable in particular settings. In this respect, the North Dakota legislature has enacted a statute providing:

> [A]ny person purchasing any gas or oil burning tractor . . . for his own use shall have a reasonable time after delivery for inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased, the purchaser may rescind the sale. . . . [A]ny provision in any written order or contract of sale . . . which is contrary to the provisions of this section, hereby is declared to be against public policy.[157]

This provision gives some measure of protection to farmers, who, as a class, are in a weak bargaining position in doing business with farm equipment dealers.[158]

V. Warranties in Non-Sale Transactions

Implied warranties of quality are generally considered to arise only from sales or contracts to sell. There are, however, other kinds of transactions in which, as in sales, it is possible for defective prod-

155. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960). Although the U.C.C. had not yet been enacted in New Jersey, the court cited "section 202." It seems apparent from the context that it actually meant to refer to § 2-302. It is not clear, however, that the draftsmen of the Code intended § 2-302 to be used merely because one party to a contract was in an extremely favorable bargaining position. See text accompanying note 152 *supra*. Cases in accord with *Henningsen* include State Farm Mut. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); General Motors Co. v. Dotson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

156. See cases cited note 153 *supra*.

157. N.D. Cent. Code § 51-07-07 (1960).

158. See Boe v. Thorburn Herseth, Inc., 134 N.W.2d 33 (N.D. 1965).

ucts capable of causing personal injury, property damage, or economic loss to change hands. These types of transactions should reasonably be expected to give rise to warranties similar to those normally associated with sales.

A. *Bailments for Hire*

In the absence of a statutory provision to the contrary, a landlord does not impliedly warrant that the premises will be fit for the lessee's intended use.[159] On the other hand, it is well settled that a lease of goods gives rise to a warranty that the wares are reasonably suited to the lessee's intended use if the lessor is aware of use contemplated.[160] The reason for imposing such a warranty was suggested in the recent New Jersey case of *Cintrone v. Hertz Truck Loading & Rental Service*,[161] where the court stated that no warranty is implied by law simply because a particular kind of transaction takes place, but rather for the reason that one party "is in a better position than the other to know and control the condition of the chattel transferred and to distribute the losses which may occur because of a dangerous condition the chattel possesses."[162] *Cintrone* involved a long-term truck lease under which the lessor had been obligated to keep the vehicle in repair. However, the court stated that the existence of an implied warranty that the rented vehicle was fit for the lessee's purpose and that it would remain so was not dependent upon this service obligation. The court indicated that its reasoning would be equally appropriate in a case involving the more common short-term chattel lease.[163]

With respect to some kinds of goods, renting is almost as commonplace as selling.[164] Although Article 2 of the Uniform Commercial Code applies only to actual sales of personal property, its draftsmen appear to have seen no reason why warranties may not arise in connection with other types of transactions, such as bailments for hire.[165] Like a retailer, a bailor for hire offers articles to the consuming public;[166] indeed, there may be more justification for holding that implied warranties of quality arise from leases than there is for

159. 51 C.J.S. *Landlord & Tenant* § 304 (1947).

160. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 657 (1957); see Annot., 68 A.L.R.2d 850, 854 (1959). *But cf.* Brookshire v. Florida Bendix Co., 153 So. 2d 55 (Fla. Ct. App. 1963) (liability of manufacturer on implied warranty of fitness does not extend to lessee or bailee).

161. 45 N.J. 434, 212 A.2d 769 (1965).

162. *Id.* at 445, 212 A.2d at 775.

163. *Id.* at 434, 450, 212 A.2d 769, 778 (1965).

164. "We may take judicial notice of the growth of renting motor vehicles, trucks and pleasure cars." *Id.* at 448, 212 A.2d at 776.

165. See U.C.C. § 2-313, comment 2.

166. See Cintrone v. Hertz Truck Loading & Rental Serv., 45 N.J. 434, 448, 212 A.2d 769, 777 (1965).

saying that they arise from sales, since a lessee, especially a short-term lessee, is more likely than a buyer to rely upon a person with whom he deals to provide him with a safe product.[167]

B. *Contracts for Service*

Under the Sales Act, no "sale" occurred when the ownership of goods was transferred pursuant to a service contract and as a necessary incident to the performance of the service.[168] This rule appears to remain unchanged under the Code. For example, in *Epstein v. Giannattesio*[169] a Connecticut court held that no warranties arise under the Code with respect to the materials used in giving a beauty treatment because a beautician renders a service and does not "sell" goods.[170] However, Code section 2-314(1) expressly designates the serving of food and drink as a sale for the purpose of implying a warranty of merchantability.[171] Even before the advent of the Code, the great majority of American jurisdictions had already rejected the dictum-become-law of *Parker v. Flint*[172] that an innkeeper or restaurateur "utters," rather than sells, the food on his menu and consequently is not bound by the law of implied warranty.[173]

In the leading case of *Perlmutter v. Beth David Hospital*,[174] a New York court held that a hospital's furnishing blood to a patient was not a transaction giving rise to implied warranties. The rule of this much criticized decision has apparently been followed by every court which has had the opportunity to consider the issue[175] and has become the basis of legislation in several states.[176] On the other hand,

167. *Id.* at 456, 212 A.2d at 781; see Farnsworth, *supra* note 160, at 665.

168. See Foley Corp. v. Dove, 101 A.2d 841 (D.C. Munic. App. 1954) (construction of wall); Sam White Oldsmobile Co. v. Jones Apothecary, Inc., 337 S.W.2d 834 (Tex. Civ. App. 1960) (repair of automobile); 1 WILLISTON, SALES § 9(b) (1948 ed.).

169. 25 Conn. Supp. 109, 197 A.2d 342 (County C.P. 1963).

170. *But see* Garthwait v. Burgio, 216 A.2d 189 (Conn. Sup. Ct. Err. 1965), where on facts identical to those in *Epstein*, the court held that plaintiff had stated a cause of action for breach of warranty even though the transaction did not constitute a sale.

171. U.C.C. § 2-314(1); see Ray v. Deas, 112 Geo. App. 191, 144 S.E.2d 468 (1965).

172. 12 Mod. 254, 88 Eng. Rep. 1303 (K.B. 1699). See generally 38 NOTRE DAME LAW. 92 (1962).

173. Prosser indicates that only six states—Alabama, Delaware, Georgia, Maryland, New Hampshire, and Tennessee—have adhered to *Parker v. Flint* in recent times. PROSSER, TORTS § 95, at 655 (3d ed. 1964); see Farnsworth, *supra* note 160, at 660-62.

174. 308 N.Y. 100, 123 N.E.2d 792 (1954).

175. For criticism of the rule, see 69 HARV. L. REV. 391 (1955); 103 U. PA. L. REV. 833 (1955). The rule has been followed in the following cases: Whitehurst v. American Nat'l Red Cross, 402 P.2d 584 (Ariz. Ct. App. 1965); Balkowitsch v. Minneapolis War Memorial Blood Bank, 132 N.W.2d 805 (Minn. Super. 1965); Krom v. Sharpe & Dohme, Inc., 7 App. Div. 2d 761, 180 N.Y.S.2d 792 (1958); Dibblee v. Dr. R. W. Groves Latter Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961).

It is clear that an *express* warranty can accompany a blood transfusion. See Napoli v. St. Peter's Hosp., 213 N.Y.S.2d 6 (Sup. Ct. 1961).

176. ARIZ. REV. STAT. ANN. § 36-1151 (1965); MASS. GEN. LAWS ch. 106, § 2-316(5) (1963) (incorporated into the U.C.C. as enacted in Massachusetts); CAL. HEALTH & SAFETY CODE § 1623.

warranties have been held to attach to the administration of defective drugs. In the California case of *Gottsdanker v. Cutter Laboratories*,[177] two children contracted poliomyelitis shortly after they had been inoculated with Salk vaccine manufactured by the defendant and administered by their physician. Although the court found that there had been no "sale" at the time of the inoculation, it held the manufacturer liable for breach of the implied warranty that had arisen when the defendant sold the vaccine to its distributor.[178] While there may be a sufficient distinction between the dispensation of vaccine and of blood to justify calling only the former a sale, it is probably a public policy favoring hospitals over drug manufacturers which leads to the anomalous dichotomy.

It has been suggested that in dealing with cases involving goods transferred as part of the performance of a service, it would be better to reason by analogy to sales law rather than calling the passage of title a sale.[179] In this respect it should be noted that section 2-314 of the Code, which defines the implied warranty of merchantability, does not make the serving of food a sale of goods for all purposes, but provides only that "*under this section* the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."[180]

Even if the particular transaction in which an injured consumer received defective goods is not treated as a sale giving rise to a warranty, recovery may nevertheless be based, as it was in *Gottsdanker*, on a warranty created at the time of some prior transaction, which actually was a sale, involving the same goods. Of course, this result is possible only in a jurisdiction where a plaintiff is not barred by the privity rule from bringing a breach of warranty action against someone in the distributive chain other than the person who transferred the defective product to the plaintiff. For example, in *Putman v. Erie City Manufacturing Co.*,[181] a federal court, declaring that the privity rule no longer existed in Texas, held that an injured plaintiff could maintain an action against the manufacturer of a defective wheel chair, although the victim had rented the device from a local drugstore.

VI. Conclusion

Warranty theory has long stood out among the legal doctrines pertinent to a discussion of products liability as the one providing

177. 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

178. *But see* Berry v. American Cyanamide, 341 F.2d 14 (6th Cir. 1965), where the court, applying Tennessee law, denied recovery on similar facts because of a lack of privity between the plaintiff and the defendant manufacturer.

179. Farnsworth, *supra* note 160, at 667.

180. U.C.C. § 2-314(1). (Emphasis added.)

181. 338 F.2d 911 (5th Cir. 1964).

the greatest opportunity for a buyer and a seller to allocate freely among themselves the potential risk of loss attributable to personal injury, property damage, or economic harm caused by substandard merchandise. In order to make the law of warranty compatible with modern social policy favoring broad consumer protection, the draftsmen of the Uniform Commercial Code restricted to a considerable extent this freedom to apportion. On balance, however, even under the Code it remains possible for manufacturers and other sellers to pass a significant portion of the risk on to their customers. Indeed, the Code demonstrates only a feeble attempt to come to grips with the dominant feature in so many situations in which the major share of the risk is allotted to the purchaser—the disproportionate bargaining positions of the parties. However, recent cases show that the courts have been attempting to alleviate this problem, and much attention has been focused upon the result of their efforts—the emerging doctrine that a producer or distributor can be strictly liable in tort for much of the harm caused by defective products.[182]

Nevertheless, in several ways the warranty provisions of the Code may be a more desirable basis of recovery than the strict tort theory. A plaintiff may recover for breach of a warranty of merchantability if a product is merely unfit for the ordinary purpose for which goods of that type are used, whereas he is entitled to relief on the strict tort theory only if a product was "defective"—a term meaning unreasonably dangerous to persons or property.[183] This definition of a defect not only presents problems of proof, but also precludes a strict tort recovery on behalf of a plaintiff who suffers a financial loss unaccompanied by personal injury or property damage.[184]

Even one injured by a product which was defective in the strict tort sense may prefer to frame his case against his seller in terms of breach of warranty in order to take advantage of a longer statute of limitations.[185] Code section 2-725 establishes a four-year statute of limitations on a cause of action for breach of contract[186]—a period considerably longer than the typical one- to two-year interval within which a tort suit for personal injuries must be commenced.[187] How-

182. See generally Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966).

183. 2 RESTATEMENT (SECOND), TORTS § 402A (1965).

184. *Id.*, comment *d*; see Seely v. White Motor Co., 45 Cal. Rptr. 8, 403 P.2d 145 (1965); Price v. Gatlin, 405 P.2d 502 (Ore. 1965). *But see* Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965) (consumer recovered against manufacturer for defective rug).

185. *E.g.*, George v. Douglas Aircraft Co., 332 F.2d 78 (2d Cir. 1964).

186. Before the enactment of the Code, most states had equally long or longer statutes of limitations on contract actions. See Freedman, *Products Liability Under the Uniform Commercial Code in New York and Other States*, 19 FOOD DRUG COSM. L.J. 178, 191 n.38 (1964). Section 2-725 also provides that the period may be shortened to a period as short as one year by agreement, but may not be extended.

187. See Annot., 4 A.L.R.3d 821 (1965).

ever, this provision cuts both ways, for while the Code provides a comparatively long period for bringing contract claims, it also stipulates that this period commences when a breach occurs, which, in the case of a typical warranty, is at the time of tender of delivery.[188] If a buyer is injured after the statute has run, he is barred from maintaining a warranty action regardless of whether he knew before the expiration of the statute that a breach of warranty had occurred.[189] On the other hand, the statute of limitations on a tort action begins to run at the time of the injury.[190] In reality, it is unlikely that a defect in a product at the time of sale would not be discovered within four years. Furthermore, in the case of a warranty relating to future performance of a product, the Code provides that a cause of action accrues when a breach should have been discovered.[191]

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188. U.C.C. § 2-725(2); see McMeekin v. Gimbel Bros., Inc., 223 F. Supp. 896, 899 (W.D. Pa. 1963).

189. U.C.C. § 2-725(2).

190. Annot., 4 A.L.R.3d 821 (1965).

191. U.C.C. § 2-725(2). An example of a warranty of this type is one relating to the germination of seeds. see, *e.g.*, Bell v. Menzies, 110 Ga. App. 432, 138 S.E.2d 731 (1964); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales*, 8 U.C.L.A.L. REV. 281, 333 (1961).