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Are Employees “A” O.K.?: An Analysis of Jurisdictions Extending or Denying Warranty Coverage to a Purchaser’s Employees Under Uniform Commercial Code Section 2-318, Alternative A

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ARE EMPLOYEES "A" O.K.?: AN ANALYSIS OF JURISDICTIONS EXTENDING OR DENYING WARRANTY COVERAGE TO A PURCHASER'S EMPLOYEES UNDER UNIFORM COMMERCIAL CODE SECTION 2-318, ALTERNATIVE A

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I. INTRODUCTION

Horizontal “privity”¹ in a breach of warranty lawsuit refers to non-purchasing plaintiffs who are outside the chain of distribution between the original seller and ultimate purchaser.² Section 2-318 of the Uniform Commercial Code (“U.C.C.”) extends warranty coverage on the sale of goods to such non-purchasing plaintiffs and permits them to sue as third-party benefi-

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1. See generally BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* ¶ 10.01 (1984) (defining privity as “a direct contractual relationship between plaintiff and defendant, and reflects the fact that warranty is at least partly based upon notions of contract”).

2. *Id.* at ¶ 10.01[1].

ciaries to a purchaser's warranties.³ Titled "Third Party Beneficiaries of Warranties Express or Implied," section 2-318 provides three alternatives for states to adopt and gives plaintiffs standing in a breach of warranty action.⁴ Most jurisdictions have adopted Alternative A,⁵ which limits the extension of a "seller's warranty whether express or implied . . . to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods."⁶ Since most Alternative A jurisdictions only extend warranty protection to the class of persons specifically mentioned in section 2-318, employees are generally denied beneficiary standing, because they are not among the protected class of a seller's warranties.⁷ However, the ambiguous language of Official Comment 3 to section 2-318 allows the state's judiciary to expand warranty protection beyond the enumerated list.⁸ Since Official Comment 3 to section 2-318 literally states that the section is "neutral" beyond providing warranty protection to the enumerated class, and since it permits the courts to decide emerging issues of privity, courts interpreting the section as "neutral" to extending warranty coverage beyond the pur-

3. U.C.C. § 2-318 (2001).

4. *Id.* Section 2-318 of the U.C.C. provides:

Alternative A

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

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

Id.

5. 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-318:2 (2001). Alternative A has been adopted in . . . Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin.

Id.

6. § 2-318.

7. Diane L. Schmauder, Annotation, *Third-Party Beneficiaries of Warranties Under UCC § 2-318*, 50 A.L.R.5th 327, 349 (1997).

8. John F. Kamin, Note, *The Extension of Implied Warranty Protection to Employees of a Purchaser*; Whitaker v. Lian Feng Machine Co., 156 Ill. App. 3d 316 509 N.E.2d 591 (1st Dist. 1987), 14 S. ILL. U. L.J. 123, 125 (1989).

chaser's family, household, and houseguests afford third-party beneficiary standing to employees.⁹

Out of all jurisdictions that have adopted Alternative A, only Florida has expanded the list of third-party beneficiaries by amending section 672.318 of the *Florida Statutes* to expressly extend warranty coverage to an "employee, servant or agent of his or her buyer."¹⁰ Since jurisdictions are split regarding whether employees should receive warranty protection under Alternative A, this article will survey and analyze various jurisdictions that afford or deny employees standing as third-party beneficiaries to their employer's warranties. Part II of this article will provide an overview of section 2-318. Part III will analyze section 2-318, Alternative A and evaluate the class of potential plaintiffs who can recover against a seller for breach of warranty. Further, Part IV will analyze section 672.318 of the *Florida Statutes*. Part V will explore the case law of jurisdictions that deny warranty coverage to employees under section 2-318, Alternative A. Part VI will present case law of jurisdictions allowing employees to recover against a seller for breach of warranties. Finally, Part VII will evaluate whether employees should be considered third-party beneficiaries under Alternative A and offer solutions to bring uniformity among the jurisdictions.

II. OVERVIEW OF U.C.C. SECTION 2-318

The original version of section 2-318 was enacted in 1952 and provided warranty protection for the buyer's family, household, and house guests.¹¹ The purpose of the U.C.C. was "to make uniform the law among the various jurisdictions."¹² However, the states viewed this version as a limitation on the realm of potential plaintiffs who could sue a seller for breach of warranties.¹³ As a result, many states adopted their own versions and variations of section 2-318.¹⁴ In response to the states' rampant opposition and changes to section 2-318, the drafters of the section amended section 2-318 in 1966 to offer the states three alternatives.¹⁵ The 1952 version became Alternative A, Alternative B was added to extend the class of potential plaintiffs beyond the enumerated class in Alternative A, and Alternative C was added for an even more liberal approach to allow non-privity plaintiffs to sue as third-party

9. § 2-318 cmt. 3.

10. FLA. STAT. § 672.318 (2004).

11. CLARK & SMITH, *supra* note 1, at ¶ 10.01[2][b].

12. 1 HAWKLAND, *supra* note 5, at § 2-318:1.

13. *Id.*

14. *Id.*

15. § 2-318.

beneficiaries of warranties.¹⁶ Official Comment 2 to section 2-318 was added to illustrate the drafter's intent and stated:

The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty¹⁷ under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose.¹⁸ Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.¹⁹

Although code commentaries are not authoritative law for courts to apply, they are both helpful and compelling when construing the provisions.²⁰ Official Comment 3 to section 2-318 addresses the privity issue by stating:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to

16. *Id.*

17. U.C.C. section 2-314 provides:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind
- (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.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-314.

18. U.C.C. section 2-315 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 [section 2-316] an implied warranty that the goods shall be fit for such purpose.

§ 2-315.

19. § 2-318 cmt. 2.

20. Kamin, *supra* note 8.

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.²¹ The second alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A . . . in extending the rule beyond injuries to the person.²²

Alternative A limits the class of persons who can be in "horizontal privity"²³ but leaves issues of "vertical privity"²⁴ for the courts to determine on a case-by-case basis.²⁵ Alternative B eliminates both horizontal and vertical privity in regard to "natural person[s] who may reasonably be expected to use, consume or be affected by the goods and who [are] injured in person by breach of the warranty."²⁶ Alternative C takes an even more liberal approach by affording warranty protection to "any person who may reasonably be expected to use, consume or be affected by the goods" and allowing recovery for pure economic loss.²⁷ In adopting one of the alternatives provided by section 2-318, a state's legislature has established its sphere of horizontal privity.²⁸

III. ANALYSIS OF ALTERNATIVE A

Recall that Alternative A states:

21. See § 2-103. The term "distributive chain" is not defined in § 2-103. *Id.* Therefore, it is unclear whether "distributive chain" refers to those who are in vertical or horizontal privity with the buyer. William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215, 1258 (1993).

22. § 2-318 cmt. 3 (1999).

23. 3A LARY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE, 324 (3d ed. 2002). "'Horizontal privity' addresses the issue as to whether a seller is liable to persons, other than the buyer, who use the goods." *Id.*

24. 63 AM. JUR. 2D *Products Liability* § 742 (1996). Vertical privity "includes all parties in the distributive chain from the initial supplier of the product to the ultimate purchaser." *Id.*

25. 3A LAWRENCE, *supra* note 23. See generally *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987).

26. § 2-318, Alternative B.

27. § 2-318, Alternative C. "[I]n a products-liability suit, economic loss includes the cost of repair or replacement of defective property, as well as commercial loss for the property's inadequate value and consequent loss of profits or use." BLACK'S LAW DICTIONARY 228 (2d Pocket ed. 2001).

28. See *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981).

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.²⁹

Alternative A limits the class of potential plaintiffs in five ways.³⁰ First, the section only extends warranty protection to "natural persons."³¹ This means that corporations, partnerships, and businesses cannot recover under Alternative A.³² Second, the section only allows recovery if the plaintiff sustains a personal injury.³³ Therefore, non-purchasing plaintiffs cannot recover under Alternative A if they only sustained an economic loss. Third, the language of Alternative A limits the class of non-privity plaintiffs to those who are in the buyer's family, household, or guests in his home.³⁴ In adopting Alternative A, a state's legislature indicates an intention to only extend warranty coverage to the limited classes included in the statute.³⁵ Therefore, a buyer's employees are not likely to recover in an Alternative A jurisdiction since they are not among the third-party beneficiaries contemplated by the drafters of the Code. Fourth, Alternative A limits the class of defendants to direct sellers by expressly stating that the seller's warranty extends to any natural person "of his buyer."³⁶ However, Official Comment 3 has been interpreted to give courts the discretion to resolve issues of vertical privity and expand the potential class of defendants.³⁷ Further, the last sentence of Alternative A, stating that "[a] seller may not exclude or limit the operation of this section,"³⁸ forbids the "exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section."³⁹ Finally, Alternative A narrows the class of potential plaintiffs by only allowing the enumerated class to recover if it is

29. § 2-318, Alternative A.

30. 1 HAWKLAND, *supra* note 5, at 2-318:1, 2-318:2.

31. *Id.* at § 2-318:1.

32. *Id.* at § 2-318:2.

33. *Id.*

34. *Id.*

35. AM. LAW OF PROD. LIAB. 3d § 21:12 (1987).

36. § 2-318, Alternative A.

37. *See Groppe Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 57-58 (Mo. Ct. App. 1981).

38. § 2-318, Alternative A.

39. § 2-318 cmt. 1.

"reasonable to expect that such person may use, consume or be affected by the goods."⁴⁰

A prevalent discrepancy among Alternative A jurisdictions is whether warranty coverage should expand beyond the list of persons expressly included in the text of Alternative A.⁴¹ A compelling justification for this discrepancy is found in the ambiguous language of Official Comment 3.⁴² The problematic language of Official Comment 3 that leads courts to different interpretations is as follows:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form 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.⁴³

Jurisdictions that take a strict construction approach to interpreting section 2-318 only extend warranty protection to the purchaser's family, household, and guests since "adoption of Alternative A by the legislature indicates a conscious decision to limit the seller's liability for breach of warranty to the specific classes enumerated therein."⁴⁴ These jurisdictions interpret Official Comment 3 "as an exhaustive list of the non[-]purchasers whom the drafters have freed from the privity requirement."⁴⁵ Therefore, in giving such a narrow reading of the section, these jurisdictions have held that neither employees⁴⁶ nor innocent bystanders⁴⁷ can recover as third-party beneficiaries to a seller's warranty.

40. § 2-318, Alternative A. See *McBurnette v. Playground Equip. Corp.*, 137 So. 2d 563, 566-67 (Fla. 1962) (holding that a minor who was injured on playground equipment purchased by his father was "a naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law" since the father purchased the equipment for the son's use).

41. Stallworth, *supra* note 21, at 1257.

42. *Id.*

43. § 2-318 cmt. 3.

44. 63 AM. JUR. 2D *Products Liability* § 751 (1996).

45. Stallworth, *supra* note 21, at 1257.

46. 3A LAWRENCE, *supra* note 23, at 344. Employees are protected under both Alternative B and Alternative C if it is reasonable to expect the employee to "use, consume or be affected by the goods" since Alternative B extends this coverage to any natural person and Alternative C extends such coverage to anyone. *Id.* at 324. Therefore, privity of contract between the employer and those in vertical distribution is irrelevant in jurisdictions adopting Alternatives B or C, and employees are generally deemed third-party beneficiaries. *Id.* at 326.

47. See *Crews v. W.A. Brown & Son, Inc.*, 416 S.E.2d 924, 930-31 (N.C. Ct. App. 1992) (holding a church member, who was injured while trapped inside a freezer in the church, was

In contrast to the strict construction approach, jurisdictions relying on the phrase “[b]eyond this, the section in this form is neutral” of Official Comment 3⁴⁸ have held “the coverage of UCC [section] 2-318 may be expanded beyond that adopted by the legislature.”⁴⁹ Since the phrase “[b]eyond this” could be interpreted to refer to the purchaser’s family, household, and guests, the “neutral” clause could mean the Code is impartial to expanding the class of plaintiffs who can qualify for warranty protection further than the enumerated list.⁵⁰ Therefore, Official Comment 3 could be interpreted to mean the buyer’s family members, household, and houseguests are the minimum class of non-privy plaintiffs who are afforded warranty protection, but developments in case law will not limit the expansion of horizontal privity.⁵¹ Additionally, the Code’s failure to define the term “distributive chain” in section 2-103⁵² creates an ambiguity as to whether the section is “neutral” in expanding vertical or horizontal privity.⁵³ Employees have also been denied standing in a warranty action if their injuries were covered by worker’s compensation⁵⁴ or if the court dismissed their action because they could recover under the theories of negligence or strict tort liability.⁵⁵

not entitled to maintain a breach of implied warranty cause of action because plaintiff was neither a member of the church’s “family,” “household,” or a guest in the church’s home since a church is not considered a home and does not have a “family” or “household”).

48. § 2-318 cmt. 3.

49. 63 AM. JUR. 2D *Products Liability* § 752 (1996). See *Quadrini v. Sikorsky Aircraft Div.*, 505 F. Supp. 1049, 1052 (D. Conn. 1981). The *Quadrini* panel stated: “This court is not persuaded that the adoption of Alternative A . . . evinces a clear legislative intent to preclude all other persons but those in the family, household, or a guest from seeking warranty coverage.” *Id.* This holding was especially accurate in light of an amendment to U.C.C. section 2-318 when the court stated “[t]his section is neutral with respect to case law or statutory law extending warranties for personal injuries to other persons.” *Id.* (citing CONN. GEN. STAT. § 42a-2-318 (1996)).

50. Walter K. Swartzkopf, Note, *Products Liability: Employees and the Uniform Commercial Code, Section 2-318*, 68 DICK. L. REV. 444, 451 (1964).

51. *Id.*

52. § 2-103 (1999).

53. Stallworth, *supra* note 21, at 1258.

54. See *Sutton v. Major Prods. Co.*, 372 S.E.2d 897, 899 (N.C. Ct. App. 1988).

55. See *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975). Strict tort liability in a products liability action is governed by RESTATEMENT (SECOND) OF TORTS § 402A, which provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

IV. ANALYSIS OF SECTION 672.318 OF THE *FLORIDA STATUTES*

Out of the twenty-nine jurisdictions that have adopted Alternative A, only Florida has expressly expanded the enumerated class of Alternative A to include employees in section 672.318 of the *Florida Statutes*.⁵⁶ Section 672.318 provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his or her buyer, who is a guest in his or her home or who is an employee, servant or agent of his or her buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude nor limit the operation of this section.⁵⁷

Although section 672.318 extends warranty coverage beyond the buyer's family, household, or houseguests, issues of privity regarding plaintiffs who are not expressly included in the statute are still decided on "a case by case basis after a thorough analysis of the facts and considering what would be a natural expansion of the law in this area."⁵⁸ Like other jurisdictions that have adopted Alternative A, Florida courts rely on the Official Code Comments of section 2-318 in considering whether privity should be extended beyond the enumerated class.⁵⁹ Just as Alternative A only provides warranty coverage to natural persons who have sustained a personal injury, section 672.318 also denies corporations, businesses, or partnerships who have suffered an economic loss the ability to sue as third-party beneficiaries of contracts.⁶⁰ Finally, the non-purchasing plaintiff must be a foreseeable

-
- (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

56. FLA. STAT. § 672.318 (2004); *See generally* STATE U.C.C. VARIATIONS, U.C.C. REP. SERV. (West 1998).

57. § 672.318.

58. *Barry v. Ivarson Inc.*, 249 So. 2d 44, 46 (Fla. 2d Dist. Ct. App. 1971) (holding lessees of a residence who were injured by a table in that residence purchased by the lessors from the defendant were not third-party beneficiaries since lessees were "not within the category of third-party beneficiaries as contemplated in [Florida Statutes] § 672.318" and "there [was] a question of foreseeability").

59. *Id.*

60. *See Downriver Internists v. Harris Corp.*, 929 F.2d 1147, 1150 (6th Cir. 1991) (holding a partnership was not a third-party beneficiary of contracts under Florida law and could not recover economic damages for breach of warranty).

user of the product to recover as a third-party beneficiary to a seller's warranties.⁶¹

V. CASE LAW: JURISDICTIONS DENYING EMPLOYEES WARRANTY COVERAGE

Not only are jurisdictions split regarding the issue of whether a purchaser's employees should qualify as third-party beneficiaries to their seller's warranties, but the courts differ regarding why this issue should be answered in the negative. In *Teel v. American Steel Foundries*,⁶² the court, in applying Missouri law, used a strict construction approach to Missouri's Alternative A statute and held that an employee was neither in privity with the employer's seller, nor within the class of enumerated persons the statute intended as a third-party beneficiary.⁶³ The court in *Hester v. Purex Corp.*⁶⁴ used legislative intent for adopting Alternative A instead of Alternatives B or C, which bars issues of horizontal privity altogether, and denied employees standing as third-party beneficiaries to their employers' warranties.⁶⁵ The *Hester* court further held that employees are not without a remedy and could recover under the theories of negligence or strict tort liability.⁶⁶ Further, the court in *Sutton v. Major Products Co.*⁶⁷ held that a grocery store employee was barred from bringing a breach of warranty suit against a manufacturer because she was covered under worker's compensation insurance.⁶⁸

A. *Teel v. American Steel Foundries*

The court in *Teel* faced an issue of first impression—specifically, whether horizontal privity can be expanded beyond the buyer's family members, household, or houseguests, in Missouri.⁶⁹ The plaintiff in *Teel* was injured when a defective wheel on the tractor he was operating disengaged the trailer from the tractor, causing him to lose control and crash.⁷⁰ Consequently, he sued to recover as a third-party beneficiary to the contracts between his employer and the seller of the tractor containing the defective wheel, and be-

61. *McCarthy v. Fla. Ladder Co.*, 295 So. 2d 707, 709 (Fla. 2d Dist. Ct. App. 1974).

62. 529 F. Supp. 337 (E.D. Mo. 1981).

63. *Id.* at 345–46.

64. 534 P.2d 1306 (Okla. 1975).

65. *Id.* at 1308.

66. *Id.*

67. 372 S.E.2d 897 (N.C. Ct. App. 1988).

68. *Id.* at 899.

69. *Teel*, 529 F. Supp at 345.

70. *Id.* at 340.

tween his employer and the manufacturer of the wheel.⁷¹ The defendants moved to dismiss due to lack of privity.⁷²

Missouri's Legislature has adopted Alternative A verbatim in creating section 400.2-318 of the Missouri Statutes, which "allows recovery to a very limited class of non-privity parties."⁷³ The plaintiff insisted that the court ignore the privity issue and follow the decision in *Groppel Co. v. United States Gypsum Co.*,⁷⁴ where a remote purchaser was able to recover against a manufacturer based on implied warranties.⁷⁵ The plaintiff in *Groppel Co.* sued the manufacturer of a fireproofing material and a company that inspected and approved the product in their published bulletin for economic losses resulting from extra time and costs spent on re-applying the material to a building.⁷⁶ After reasoning that Official Comment 3 of section 2-318 allows the courts to make an exception to the privity requirement, the court in *Groppel Co.* noted that other jurisdictions interpreting Alternative A have held:

[T]he statute speaks only about "horizontal privity" (who, besides the purchaser, has a right of action against the manufacturer or seller of a defective product), and is silent on the question of "vertical privity" (who, besides the immediate seller, is liable to the consumer for damages caused by the defective product) . . . [t]here thus is nothing to prevent this court from joining in the growing number of jurisdictions which, although bound by the code, have nevertheless abolished vertical privity in breach of warranty cases.⁷⁷

Based upon such reasoning, the court in *Groppel Co.* held that implied warranties could extend to remote purchasers.⁷⁸

Since *Groppel Co.* decided an issue of vertical privity in extending warranty protection to remote purchasers, and not an issue of horizontal privity, the court in *Teel* ignored the plaintiff's contention and held that *Groppel Co.* was not authoritative in deciding whether a seller's warranties should extend

71. *Id.* at 344.

72. *Id.* at 343.

73. *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 344 (E.D. Mo. 1981) (referring to family members, household members and houseguests of the buyer).

74. 616 S.W.2d 49 (Mo. Ct. App. 1981).

75. *Id.* at 58.

76. *Id.* at 53-54.

77. *Id.* at 57-58 (quoting *Kassab v. Cent. Soya*, 246 A.2d 848, 855 (Pa. 1968)).

78. *Id.* at 58.

to non-purchasers who are not enumerated in Alternative A.⁷⁹ Since “Missouri courts have never specifically interpreted section 2-318 with regard to the class of persons who may be considered in horizontal privity with the seller,” there was no established case law addressing whether a purchaser’s employee can recover as a third-party beneficiary under section 2-318, Alternative A.⁸⁰ Without governing case law, the court looked to other factors indicating legislative intent to resolve the issue.⁸¹

Based upon the express language of section 400.2–318 extending warranty protection to the buyer’s family, household members, or guests in his home, the court found “nothing in the express wording of this section to indicate that an employee of a buyer may benefit from the seller’s warranty.”⁸² The court then looked to the Official Comment of section 400.2–318⁸³ and found it “clearly expresses a legislative intent to limit the class of third party beneficiaries of the seller’s warranty to the class of persons specifically enumerated in the statute.”⁸⁴ Further, the court held “the very fact that the Missouri legislature enacted Alternative A, rather than the more expansive Alternatives B or C provides further indicia of this intent.”⁸⁵ Finally, the court looked to other jurisdictions that adopted Alternative A to prevent employees from recovering for injuries caused by a product purchased by their employer.⁸⁶ Ultimately, the court held “the express wording of § 400.2–318 and the legislative intent implied by the comments to the statute must control. Had the Missouri legislature intended broader coverage by the UCC they

79. *Groppe Co.*, 616 S.W.2d at 58; *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981).

80. *Teel*, 529 F. Supp. at 345.

81. *Id.*

82. *Id.*

83. *Id.* The Comment states: “Missouri courts have required privity in warranty cases which involve goods other than food and drink. The food and drink decisions are distinguished on the basis of the nature of the product and do not depend upon a family or household relationship between the injured person and the purchaser.” *Id.* (quoting MO. REV. STAT. ANN. § 400.2–318 (1965)).

84. *Teel v. Am. Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981)

85. *Id.*

86. *Id.* (citing *Weaver v. Ralston Motor Hotel, Inc.*, 218 S.E.2d 260, 262–263 (Ga. Ct. App. 1975); *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975); *Colvin v. FMC Corp.*, 604 P.2d 157, 160 (Or. Ct. App. 1979)). The court also quoted the Supreme Court of New Jersey’s interpretation of § 2–318, Alternative A, which stated:

[I]t is not the duty of the courts to amend the statute where the Legislature has spoken. Therefore, under New Jersey law the statutory breach of warranty claims would not be available to [defendant] or to any party other than the contract purchaser, or the limited class set forth in § 2–318.

Teel, 529 F. Supp. at 345 (quoting *Monsanto Co. v. Alden Leeds, Inc.*, 326 A.2d 90, 95 (N.J. Super. Ct. Law Div. 1974)).

could have enacted either Alternative B or C to § 2-318.⁸⁷ The plaintiff was held to not be in privity with the defendants and was deprived of the ability to bring a breach of warranty action.⁸⁸

B. Hester v. Purex Corp.

In *Hester v. Purex Corp.*, the appellant sustained permanent injuries to his central nervous system after inhaling fumes of a cleaning solvent during the course of his employment.⁸⁹ Due to his injuries, the appellant sued the manufacturer of the solvent that sold the product to his employer.⁹⁰ The appellant maintained that the manufacturer breached the implied warranty of merchantability because the cleaning solvent was not fit and safe for its intended purpose of cleaning.⁹¹ The trial court granted defendant's motion to dismiss and plaintiff appealed.⁹² The issue on appeal was whether warranty protection extends to the purchaser's employees.⁹³ The appellant sought to magnify the language of Official Comment 3 to section 2-318, which states: "the section is neutral and is not intended to enlarge or restrict the developing case law."⁹⁴ Based on the Official Comment, the appellant's position was that "section 2-318 should be construed liberally so as to include any foreseeable or intended users such as employees of the buyer."⁹⁵ To support his contention, he argued "that an employee is a member of the 'business family or household'"⁹⁶ as established in *Speed Fasteners, Inc. v. Newsom*.⁹⁷

In *Newsom*, the jury awarded the appellee-plaintiff damages for injuries sustained from an industrial incident when the shank of a stud being attached to wood by a fellow workman ricocheted through the wood and hit the plaintiff in the head while he was working as a carpenter foreman.⁹⁸ The plaintiff brought suit against the manufacturer of the stud on the theories of breach of express and implied warranties.⁹⁹ There was no privity issue regarding the

87. *Teel*, 529 F. Supp. at 345.

88. *Id.* at 345-46.

89. *Hester v. Purex Corp.*, 534 P.2d 1306, 1307 (Okla. 1973).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Hester*, 534 P.2d at 1308 (quoting 12A O.S. 1971 § 2-318 cmt. 3) (current version at OKLA. STAT. tit. 12A, § 2-318 (2004)).

95. *Id.*

96. *Id.*

97. 382 F.2d 395 (10th Cir. 1967).

98. *Id.* at 396.

99. *Id.*

breach of express warranty since the plaintiff had read pamphlets describing the studs, and therefore representations regarding the studs were made directly to him.¹⁰⁰ However, the express warranty claim was dismissed because the plaintiff did not buy the studs, and there is nothing in the record proving the employer “relied on any statement in the pamphlet” when purchasing the studs.¹⁰¹ As to the breach of implied warranty claim, the court in *Newsom* held an “employee stands in the shoes of his employer and that his cause of action based on implied warranty is not barred by the shield of privity.”¹⁰² The court reasoned that manufacturers are aware of the fact that purchaser’s employees will use the product since most business activities are performed by employees.¹⁰³ Without an Oklahoma case proving otherwise, the court was “satisfied that the employee may sue on the theory of implied warranty.”¹⁰⁴ The court relied on expert testimony proving the separation of the head from the shank of the stud was due to a manufacturing defect¹⁰⁵ causing that stud to become weaker.¹⁰⁶ The court found enough evidence to find the manufacturer liable based on the theory of manufacturer’s liability.¹⁰⁷

Since *Newsom* was decided on a theory of products liability, the court in *Hester* dismissed the appellant’s contention because “[t]he UCC has to do with commercial transactions and presupposes a buyer in privity with a seller, the concept being extended only as provided by the Legislature.”¹⁰⁸ Since Oklahoma has adopted Alternative A, and has not adopted Alternatives B or C to expand the realm of warranty coverage, the court held a purchaser’s employees were not protected under section 2-318 until the legislature changes the statute.¹⁰⁹ However, the court reasoned that injured employees could still maintain a cause of action and recover under the theories of negligence and strict products liability.¹¹⁰

100. *Id.* at 397.

101. *Id.*

102. *Newsom*, 382 F.2d at 398.

103. *Id.*

104. *Id.*

105. *Id.* at 399. A manufacturing defect is “[a]n imperfection in a product that departs from its intended design even though all possible care was exercised in its assembly and marketing.” BLACK’S LAW DICTIONARY 450 (8th ed. 2004).

106. *Newsom*, 382 F.2d at 399.

107. *Id.*

108. *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975) (quoting *Moss v. Polyco, Inc.*, 522 P.2d 622, 625 (Okla. 1974)).

109. *Id.*

110. *Id.* See generally *Kirkland v. G.M. Corp.*, 521 P.2d 1353 (Okla. 1974).

C. Sutton v. Major Products Co.

In *Sutton v. Major Products Co.*,¹¹¹ a grocery store employee appealed a summary judgment entered in favor of a manufacturer and distributors of a potato whitener containing sodium bisulfate.¹¹² Plaintiff brought a cause of action alleging breach of implied warranty of merchantability against both the manufacturer and distributors of the potato whitener for injuries sustained from inhaling the noxious fumes of the whitener.¹¹³ However, section 99B-2(b) of the General Statutes of North Carolina lists as a claimant for a breach of implied warranty of merchantability "a buyer, a member or guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer not covered by worker's compensation insurance."¹¹⁴ Therefore, the potential class of plaintiffs who can sue a manufacturer for breach of implied warranty of merchantability is limited.¹¹⁵ The court interpreted the statute to restrict the class of potential plaintiffs in a products liability action against those in the vertical chain of distribution for breach of implied warranties.¹¹⁶ Here, the plaintiff's employer purchased the product for use in the store; the plaintiff used the whitener during the course of her employment; and the plaintiff's injury was covered under the Worker's Compensation Act.¹¹⁷ Therefore, she was barred from bringing a breach of implied warranty action against the defendants, and the court upheld the summary judgment in favor of the manufacturer.¹¹⁸

VI. CASE LAW: JURISDICTIONS EXTENDING WARRANTY PROTECTION TO EMPLOYEES

Just as jurisdictions deny employees warranty coverage under section 2-318, Alternative A for various reasons, jurisdictions are also split concerning why employees should have standing to sue as third-party beneficiaries to a seller's warranties.¹¹⁹ In *Whitaker v. Lian Feng Machine Co.*,¹²⁰ the court

111. 372 S.E.2d 897 (N.C. Ct. App. 1988).

112. *Id.* at 898.

113. *Id.*

114. N.C. GEN. STAT. § 99B-2(b) (2003); *Sutton*, 372 S.E.2d at 899.

115. *See Sutton*, 372 S.E.2d at 899.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See e.g.*, *Carlson v. Armstrong World Indus., Inc.*, 693 F. Supp. 1073 (S.D. Fla. 1987); *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973).

120. 509 N.E.2d 591 (Ill. App. Ct. 1987).

interpreted Official Comment 3 to allow the judiciary to decide issues of horizontal privity and extend warranty coverage beyond the enumerated class of Alternative A.¹²¹ However, the court conditioned its extension of privity by only extending third-party beneficiary standing to a purchaser's employees if the employee's safety in using the goods formed part of the basis of the bargain between the employer and seller.¹²² In *McNally v. Nicholson Manufacturing Co.*,¹²³ the Supreme Court of Maine interpreted the Official Comment to section 2-313 and analyzed section 2-318 to establish that courts have the power to resolve issues of horizontal privity and extend warranty protection beyond the enumerated class of Alternative A.¹²⁴ Further, the court reasoned that employees of a corporate purchaser qualify as members of the corporate "family," thus allowing them to fall within the protected class of warranty beneficiaries.¹²⁵ In *Carlson v. Armstrong World Industries, Inc.*,¹²⁶ an employee was able to bring a breach of warranty action against a manufacturer because the language of section 672.318 of the *Florida Statutes* expressly includes employees within the enumerated class of intended third-party beneficiaries.¹²⁷

A. *Whitaker v. Lian Feng Machine Co.*

In *Whitaker*, an employee brought suit to recover for injuries sustained during the course of his employment while working with a bandsaw that was purchased by his employer.¹²⁸ The plaintiff sought to recover against the manufacturer, importer, and seller of the bandsaw for breach of implied warranties of merchantability and fitness for a particular purpose.¹²⁹ The plaintiff's complaint alleged that the defendants knew his employer bought the bandsaw to cut bar stock.¹³⁰ After the trial court granted both the importer's and seller's motions to dismiss the breach of warranties claims due to the plaintiff's lack of privity, the plaintiff appealed.¹³¹

The issue on appeal, which had not been specifically ruled on below, was whether an ultimate purchaser's employee could recover from the seller

121. *Id.* at 594.

122. *Id.* at 595.

123. 313 A.2d 913 (Me. 1973).

124. *Id.* at 919–20.

125. *Id.* at 921.

126. 693 F. Supp. 1073 (S.D. Fla. 1987).

127. *Id.* at 1077.

128. *Whitaker*, 509 N.E.2d at 592.

129. *Id.*

130. *Id.*

131. *Id.*

for breach of warranty.¹³² The defendants argued that the plaintiff was not among the class of intended beneficiaries enumerated in Alternative A.¹³³ The court responded by stating that the enumerated class of Alternative A is not a limitation on potential plaintiffs since the language and commentary of section 2-318 proves “that the requirement of privity between the purchaser and remote manufacturer is not established.”¹³⁴ The defendants argued section 2-318 restricts those in horizontal privity from recovering for breach of warranty but does not affect those in vertical privity.¹³⁵ Further, the defendants stated the Illinois Legislature’s decision to adopt Alternative A establishes their intention to deny employees the right to recover as third-party beneficiaries to a seller’s warranties made to their employer, since employees “would clearly be allowed to recover for breach of warranty under alternatives B and C.”¹³⁶

Relying on Official Comment 3 to section 2-318, the court held the statute was not restricted by developing case law concerning issues of horizontal privity.¹³⁷ Additionally, the court relied on the Official Comment to section 2-313¹³⁸ and found “the ‘purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell . . . and to hold the seller liable if he has failed to supply goods of the agreed upon quality.’”¹³⁹

132. *Id.* at 592.

133. *Whitaker*, 509 N.E.2d at 593. The defendants relied on *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239–40 (N.D. Ill. 1981) (holding that Illinois courts have not allowed a plaintiff who is outside the class of persons enumerated within section 2-318 the right to recover for breach of warranty) and *Hemphill v. Sayers*, 552 F. Supp. 685, 693 (S.D. Ill. 1982) (holding that a plaintiff cannot recover as a functional equivalent to family members or guests, and the legislature’s adoption of the most narrowly worded alternative proves their intent to bar such plaintiffs from recovery). *Id.*

134. *Id.* (quoting *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550, 556 (Ill. 1974)).

135. *Id.*

136. *Id.* at 593–94.

137. *Whitaker*, 509 N.E.2d at 594.

138. U.C.C. section 2-313 provides:

(1) Express warranties by the seller are created as follows:

- (a) 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.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) 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.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but 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.

U.C.C. § 2-313 (2001).

139. *Whitaker*, 509 N.E.2d at 594 (quoting § 2-313 cmt. 4).

The court then explained that a seller expressly warrants if he makes “any affirmation of fact or promise . . . to the buyer which relates to the goods and becomes part of the basis of the bargain.”¹⁴⁰ The court reasoned that section 2-318 creates a conclusive presumption that a purchaser who bargained for a warranty of safety sought the warranty on behalf of himself and the enumerated class of third-party beneficiaries “if it is reasonable to expect that such person may use, consume or be affected by the goods.”¹⁴¹ Therefore, both express and implied warranties were found to form “part of the basis of any bargain in the trade.”¹⁴² Thus, the court held:

[T]he warranty extends to any employee of a purchaser who is injured in the use of the goods, as long as the safety of that employee in the use of the goods was either explicitly or implicitly part of the basis of the bargain when the employer purchased the goods.¹⁴³

In applying the facts of the case, the court held that the bandsaw the plaintiff’s employer bought from defendants did not conform to its implied warranty of merchantability or its implied warranty of fitness for a particular purpose.¹⁴⁴ In bargaining for a safe, merchantable bandsaw, the plaintiff’s employer “sought the safety on behalf of its employees who were to use the saw [since a] corporation cannot use the bandsaw at all unless its employees operate it.”¹⁴⁵ Therefore, the court held the defendants either expressly or impliedly warranted that the bandsaw was safe for the plaintiff’s use, thus enabling the plaintiff to bring an action for breach of warranty.¹⁴⁶

B. *McNally v. Nicholson Manufacturing Co.*

In *McNally v. Nicholson Manufacturing Co.*,¹⁴⁷ the Supreme Court of Maine relied on policy arguments and its interpretation of official code comments in holding that an employee who was required to be in close proximity of a machine during the course of his employment was a beneficiary of

140. *Id.* The court quoted ILL. REV. STAT. § 2-313 (1985), which was replaced by 810 ILL. COMP. STAT. ANN. 5/2-313(a) (1993).

141. *Id.* at 595 (quoting ILL. REV. STAT. 1985 Ch. 26, ¶ 2-318 (current version at 810 ILL. COM. STAT. 5/2-318 (2004))).

142. *Id.*

143. *Id.*

144. *Whitaker*, 509 N.E.2d at 595.

145. *Id.*

146. *Id.*

147. 313 A.2d 913 (Me. 1973).

the warranties given to his employer by a manufacturer.¹⁴⁸ The plaintiff was injured during the course of his employment while operating a skidder, which transfers logs into a chipping machine that grinds them into chips used for making pulp and paper.¹⁴⁹ Plaintiff brought a breach of warranty action against the manufacturer of the skidder due to injuries sustained from a piece of wood forcefully flying out of a side opening and striking him in the head.¹⁵⁰ The plaintiff alleged the defendant's publication, advertising, and interviews created an express warranty to the plaintiff's employer since the skidder was represented to be safely made for its intended purpose.¹⁵¹ Plaintiff further alleged the defendant created the implied warranty of merchantability by selling the chipper to his employer.¹⁵² However, the superior court granted defendant's motion to dismiss for failure to state a claim for which relief can be granted because the plaintiff, as the purchaser's employee, was not in privity of contract with the defendant.¹⁵³

In reversing the ruling of the lower court, the Supreme Court of Maine first noted the trend of other jurisdictions that relaxed or deserted privity requirements in a breach of warranty action.¹⁵⁴ This was the first case to come before the court on the issue of horizontal privity, which had "no intervening attention to the problem by the Maine Legislature."¹⁵⁵ The court analyzed the differences between vertical and horizontal privity, and found:

These "horizontal" relationships to the last purchaser were described in Section 2-318 in terms of: (1) a "natural person" "injured in [his] person by breach of the warranty", (2) who is "in the family or household" or "a guest in . . . [the] home" of the last purchaser and (3) who "it is reasonable to expect" is a "person [who] may use, consume or be affected by the goods . . ."¹⁵⁶

Except for being a member of the ultimate purchaser's family, household, or a houseguest of the ultimate purchaser, the court found the plaintiff met the criteria required to bring a breach of warranty action under section 2-318, since he was a natural person who was personally injured and it was

148. *Id.* at 921.

149. *Id.* at 914.

150. *Id.*

151. *Id.*

152. *McNally*, 313 A.2d at 914.

153. *Id.* at 916.

154. *Id.* at 916-17.

155. *Id.* at 917.

156. *Id.* at 918 (quoting U.C.C. § 2-318 (1999)) (alteration in original).

reasonable to expect for him to use or be affected by the machine.¹⁵⁷ Therefore, the issue on appeal was whether the section's express inclusion of the enumerated class of beneficiaries in horizontal privity with the ultimate purchaser should "be given a strictly literal interpretation which excludes any other relationship no matter how closely akin, policy-wise."¹⁵⁸

Interpreting the language of Official Comment 3 to section 2-318, the court found the section was impartial "beyond" the enumerated class, and such neutrality was attributed to developing issues of vertical privity.¹⁵⁹ However, since the court found section 2-318 only addressed issues of horizontal privity, the court relied on Official Comment 2 to section 2-313 to find the correct judicial interpretation of section 2-318.¹⁶⁰ The text of Official Comment 2 to section 2-313 that addresses section 2-318 states:

The provisions of Section 2-318 on third party beneficiaries expressly recognizes this case law development *within one particular area*. Beyond that, the matter [of lack of privity] is left to *the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise*.¹⁶¹

The court reasoned the phrase "particular area" addressed by section 2-318 should be interpreted in regards to non-purchasing parties in horizontal relationships with the ultimate purchaser and their ability to recover against a seller's breach of warranty.¹⁶² Therefore, the court interpreted the Official Comment to section 2-313 to mean that the "policies" of section 2-318 should provide "useful guidance [for] further cases as they arise" in resolving issues of horizontal privity.¹⁶³ Based on this interpretation, the court concluded that the correct judicial approach to resolving issues of horizontal privity should be determined on a case-by-case basis, and policy supports that non-purchasing parties could be regarded as functional equivalents to those specifically enumerated in Alternative A.¹⁶⁴

Since it must be reasonable to expect non-purchasing parties to "use, consume or be affected by the goods" in order to gain third-party beneficiary standing, the court held the ultimate purchaser would want those who are expected to come in contact with the goods to have the same warranty pro-

157. *McNally*, 313 A.2d at 918.

158. *Id.*

159. *Id.* at 920.

160. *Id.*

161. *Id.* at 919-920 (quoting U.C.C. § 2-313 cmt. 2 (2001)) (emphasis in original).

162. *McNally*, 313 A.2d at 920.

163. *Id.* (citing § 2-313 cmt. 2).

164. *Id.* at 920.

tection a seller has given to him.¹⁶⁵ Therefore, the plaintiff, who was employed by the ultimate purchaser and required to work in close proximity with the skidder during the course of his employment, was held to be a beneficiary of the warranties given to his employer.¹⁶⁶ Thus, the employer would want the plaintiff to be a beneficiary of his seller's warranties regarding the fitness and safety of the chipper.¹⁶⁷ Further, the court gave a figurative interpretation to the word "family" to allow the plaintiff to fall within the enumerated class of Alternative A since employees are seen as members of the corporate "family."¹⁶⁸ Consequently, an ultimate purchaser's employee was a third-party beneficiary to a seller's warranty under section 2-318.¹⁶⁹

C. Carlson v. Armstrong World Industries, Inc.

In *Carlson v. Armstrong World Industries, Inc.*,¹⁷⁰ the plaintiff contracted pleural disease from exposure to and inhalation of asbestos fibers during the course of his employment as a painter.¹⁷¹ The plaintiff brought a breach of warranty action against defendants who mined, manufactured, and distributed asbestos-containing products.¹⁷² The defendants moved to dismiss for failure to state a claim upon which relief can be granted.¹⁷³

Section 672.318 of the *Florida Statutes* expressly extends warranty coverage to a purchaser's employee.¹⁷⁴ Since the plaintiff alleged that the defendants sold the product to either the plaintiff, his employer, or others who had knowledge that the plaintiff would be exposed to the product, the court found that the plaintiff was an intended beneficiary of the implied warranty of merchantability between the defendant and the plaintiff's employer.¹⁷⁵ "Therefore, defendant's motion to dismiss . . . [was] denied."¹⁷⁶

165. *Id.* at 921 (quoting § 2-318).

166. *Id.*

167. *McNally*, 313 A.2d at 921 (citing *Delta Oxygen Co. v. Scott*, 383 S.W.2d 885, 893 (Ark. 1964)).

168. *Id.* *Contra* *Halderman v. Sanderson Forklifts Co.*, 818 S.W.2d 270, 273 (Ky. Ct. App. 1991) (holding that the employer-employee relationship does not fall within the definition of "family" under Alternative A).

169. *McNally*, 313 A.2d at 923.

170. 693 F. Supp. 1073 (S.D. Fla. 1987).

171. *Id.* at 1075.

172. *Id.*

173. *Id.*

174. *Id.* at 1077.

175. *Carlson*, 693 F. Supp. at 1078.

176. *Id.* However, in *Favors v. Firestone Tire & Rubber Co.*, 309 So. 2d 69, 73 (Fla. 4th Dist. Ct. App. 1975), the Fourth District Court of Appeal held:

VII. CONCLUSION

Although the purpose of section 2-318 was “to make uniform the law among the various jurisdictions,”¹⁷⁷ the states have only achieved uniformity in deciding issues of vertical privity by allowing purchasers to sue any party involved in the chain of selling a product.¹⁷⁸ Consequently, there remains a divergence among Alternative A jurisdictions resolving issues of horizontal privity.¹⁷⁹ Jurisdictions are split in deciding whether third-party beneficiary standing should extend beyond the buyer’s family, household, or house-guests. This inconsistency is substantially attributed to the ambiguous language of Official Code Comment 3 to section 2-318. The commentary states that Alternative A gives beneficiary status to “the family, household and guests of the purchaser,”¹⁸⁰ but directly follows this phrase by stating the section is “neutral” beyond the category of third-party beneficiaries contemplated by the drafters and does not intend “to enlarge or restrict the developing case law”¹⁸¹ in regards to extending warranty protection to “other persons in the distributive chain.”¹⁸² However, the Code’s failure to provide a definition of the term “distributive chain” has left the term open for judicial interpretation.¹⁸³ Therefore, if a court interprets the “distributive chain” to refer only to issues of vertical privity, an employee will be barred from bringing a breach of warranty action since they were not a purchaser.¹⁸⁴ On the other hand, if a court interprets the “distributive chain” in relation to extending warranty protection horizontally, an employee is more likely to recover since the court is not “restricted” to only protect the enumerated class.¹⁸⁵ The Code’s use of such vague language presents each state’s judiciary with the opportunity to interpret its meaning differently.

An automobile parts store employee, who was injured when the wheel assembly of a truck owned by one of the defendants exploded during the mounting of a tire, was not considered a third-party beneficiary of the truck manufacturer’s implied warranty to that defendant, despite an allegation that the store was the defendant’s agent, where the store had simply been engaged to change the truck’s tires, where there was no agency relationship between the defendant and the store, and where there was no direct employment relationship between the defendant and the injured employee.

41A FLA. JUR. 2D *Products Liability* § 51 (2004) (citing *Favors*, 309 So. 2d at 73).

177. 1 HAWKLAND, *supra* note 5, at § 2-318:1.

178. See *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981).

179. 1 HAWKLAND, *supra* note 5, at § 2-318:1.

180. U.C.C. § 2-318 cmt. 3 (2001).

181. *Id.*

182. *Id.*

183. § 2-103.

184. See *Teel v. Am. Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981).

185. See *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973).

Although the issue of extending warranty coverage could be decided either way, the fact that the Code failed to provide a definition for "distributive chain" and used the phrase in a section attempting to resolve privity issues seems to support the section's neutrality concerning both vertical and horizontal privity. The drafters' express inclusion of the buyer's family, household, and houseguests as beneficiaries only proves their disposition toward extending warranty protection to this enumerated class. The phrase "beyond this, the section in this form is neutral,"¹⁸⁶ should be construed to mean the section is impartial regarding whether other non-purchasers should have standing to sue on warranty claims.

Jurisdictions that view the category of third-party beneficiaries contemplated by the drafters as an exhaustive list of beneficiaries are contradicted by the language of the commentary. Regardless of whether "distributive chain" refers to issues of vertical or horizontal privity, the text of Official Comment 3 says the section is neutral beyond giving the enumerated class warranty coverage, and the section is not a restraint on developing case law regarding "whether the seller's warranties . . . extend to other persons in the distributive chain."¹⁸⁷ Therefore, the drafters recognized new privity issues may arise in a state's judiciary after its legislature enacted Alternative A. Thus, the drafters left future privity issues for the courts' determination on a case-by-case basis.¹⁸⁸ Therefore, jurisdictions denying employees standing as third-party beneficiaries because they are not among the enumerated class seem to be using flawed reasoning. These jurisdictions rely heavily on their legislative intent for adopting Alternative A. However, in adopting this alternative, the legislature is accepting the exact language of the entire alternative, including the commentary. By enacting Alternative A verbatim, it appears a state's legislature is also impartial as to whether warranty coverage should extend beyond the purchaser's family, household, and houseguests and intends for the courts to resolve this issue.

Further, denying warranty coverage to a purchaser's employees because they are protected under the worker's compensation laws is questionable public policy. If an employee who is injured during the course of his or her employment by a defective product purchased by their employer can only recover under a worker's compensation statute, they may be denied recovery for emotional distress or pain and suffering.¹⁸⁹ Therefore, if the employer who purchased the product was injured, they could recover far more against

186. § 2-318 cmt. 3.

187. *Id.*

188. *Id.*

189. See *Durniak v. August Winter & Sons, Inc.*, 610 A.2d 1277, 1279 (Conn. 1992) (citing *Skitromo v. Meriden Yellow Cab Co.*, 528 A.2d 826, 827 (Conn. 1987)).

a seller for their injuries than an employee who is injured by the same defective product and covered under worker's compensation.

In order to resolve the issue of whether employees should be third-party beneficiaries to a seller's warranties, a state's legislature should follow the Florida Legislature's lead and amend its version of Alternative A. By doing so, the legislature will take the issue of extending warranty coverage to a purchaser's employees out of the judiciary's hands, and the amendment will create uniformity since the issue will no longer be decided on a case-by-case basis. The statute could be amended to include employees without any changes to the commentary, thus leaving remaining issues of privity for the court's determination. Further, legislatures of jurisdictions that only intend to give third-party beneficiary standing to the purchaser's family, household, or houseguests can also resolve this issue by amending the statute to include language stating the enumerated list is exhaustive. Although jurisdictions may argue that a legislature's adoption of Alternative A instead of Alternatives B or C proves that the legislature only intended warranty protection for the enumerated class, giving such a narrow interpretation categorizes all other non-purchasing parties together and collectively denies them the right to bring a breach of warranty action.

An employee, like a non-purchasing plaintiff who is in the family or home of the purchaser, is a "natural person" who reasonably can be expected to "use, consume or be affected by the goods."¹⁹⁰ For that reason, employees should be viewed as functional equivalents to the enumerated class of Alternative A.¹⁹¹ Manufacturers, distributors, and retailers expect a purchaser's employee to use a product purchased by their employer for use during the course of their employment. Basically, "[a] corporation cannot use the . . . [product] at all unless its employees operate it."¹⁹² Therefore, jurisdictions denying standing to all parties not expressly mentioned within the section group employees with bystanders, who do not use the goods, and lessees, who may not be contemplated at all by the seller.

In conclusion, the ambiguities of Official Comment 3 have allowed the courts to reach different conclusions in deciding issues of privity. However, it seems logical to construe the ambiguous language in relation to both vertical and horizontal privity. In order to resolve the discrepancy among jurisdictions, a state's legislature should take action by amending its state's statutory version of Alternative A to include employees within the class of protected beneficiaries. As it stands, leaving issues of privity for the courts to

190. § 2-318, Alternative A.

191. *McNally*, 313 A.2d at 920.

192. *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 595 (Ill. App. Ct. 1987).

decide on a case by case basis will deny employees their right to recover for injuries sustained from a defective product.