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The Extension of Warranty Protection to Lease Transactions

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THE EXTENSION OF WARRANTY PROTECTION TO LEASE TRANSACTIONS

The warranty provisions[1] of Article 2 of the Uniform Commercial Code are specifically applicable to sales transactions.[2] It is obvious that a lease or bailment for hire,[3] which merely transfers possession for a rental charge, does not comply with the Code's definition of a sale. The purposes of this comment are to analyze pre-Code precedents and the Code itself to ascertain whether the Code's provisions and policies are consistent with extending warranty protection to meet those consumer needs created by the growth of leasing concerns,[4] and to determine under what circumstances it is appropriate that warranty coverage be afforded to the lessee. The conflict between the application of strict liability in tort and the Code warranties will also be examined.

I. The Code Warranties

The presence of warranties affords a consumer a basis for relief when he receives unsuitable merchandise. The warranties imposed by the Code are of both an express and an implied nature. Section 2-313 asserts that affirmations of fact create express warranties if they "are part of the basis of the bargain." This Code section does not change in substance the comparable provision of the prior codification of sales law, the Uniform Sales Act.[5] The basic distinction is that under the U.S.A. there had to be proof of inducement before warranty liability arose, while the Code seems to have eliminated the element of "particular reliance."[6] Commentators have noted that at best a

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[1] The sales warranties are found in U.C.C. §§ 2-312 through 2-318. Unless otherwise indicated, all Uniform Commercial Code references are to the 1962 Official Text.

[2] U.C.C. § 2-106(1) notes "A 'sale' consists in the passing of title from the seller to the buyer for a price."

[3] In U.C.C. § 2-313, Comment 2, the term "bailment for hire" is used. The precise meaning of this term is in doubt. Legal sources have used "bailment for hire" and "lease" interchangeably to mean the rental of a chattel for a price. See Cintrone v. Hertz Truck Leasing and Rental Serv., 45 N.J. 434, 449-52, 212 A.2d 769, 777-78 (1965); L. Vold, Law of Sales, § 4 (1931); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 655 (1957). However, there is authority which distinguishes a lease from a bailment for hire on the basis that, while in a lease the lessor charges a fee for the use of his property, the bailment for hire is a contract in which the bailor for hire agrees to pay an adequate recompense for the safe-keeping of the thing intrusted to the custody of the bailee for hire. See, e.g., Black's Law Dictionary 179-80 (4th ed. 1951); 2 Halsbury's Laws of England 114 (3d ed. 1953). It is submitted that this distinction between a lease and a bailment for hire is antiquated and overly technical, but that, in any event, the Code warranty provisions can be extended to leases under appropriate circumstances.

[4] Cintrone v. Hertz Truck Leasing and Rental Serv., 45 N.J. 434, 448, 212 A.2d 769, 776 (1965) took judicial notice of the expansion of leasing establishments. No section of the Code expressly prohibits the extension of warranties to leases.

[5] Uniform Sales Act § 12 states:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. . . .

[6] U.C.C. § 2-313, Comment 3 asserts, "[A]ffirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence

fine line separates "part of the basis of the bargain" from actual reliance.[7] Moreover, it is unclear, because "basis of the bargain" has no legal meaning, whether the Code meant to change the existing law by the change in language.[8] It would seem that the significance of the Code's variation lies only in the proof of the breach of an express warranty. Statements of the seller made during a bargain are presumed to be part of the description of the goods and are incorporated into the fabric of the agreement. Clear affirmative proof must be presented by the seller in order to obviate this presumption.[9]

Section 2-314 imposes upon sellers, if they are merchants[10] with respect to goods of that kind, certain warranties which are not dependent upon the agreement of the parties. It is noted that the development of these implied warranties of merchantability, which first began to emerge in the early nineteenth century, reflected a changing social attitude toward the seller's responsibility.[11] The comments to section 2-314 note that, in the absence of a disclaimer, "The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade."[12] Unlike the U.S.A., the Code sets forth detailed standards for merchantability.[13]

Section 2-315 provides a warranty of fitness for the particular purpose when a buyer relies on the seller's skill or judgment in selecting suitable goods. Of note, it is not necessary that the seller be a merchant as in section 2-314.[14] The buyer's reliance, the key element to be considered, need not be expressed to the seller so long as the seller has reason to realize the purposes intended or that the reliance exists.[15] If not excluded or modified,

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no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. . . ."

[7] R. Duesenberg and L. King, 3 Sales & Bulk Transfers Under the U.C.C. § 6.01 (1966); Donovan, Recent Developments in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code, 19 Me. L. Rev. 181, 201 (1967).

[8] 1 New York Law Revision Commission Report, Study of the Uniform Commercial Code 392-93 (1955).

[9] U.C.C. § 2-313, Comment 3.

[10] U.C.C. § 2-104(1) states:

> "Merchant" means a person who deals in the goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

[11] W. Prosser, The Law of Torts 653 (3d ed. 1964).

[12] U.C.C. § 2-314, Comment 2.

[13] U.C.C. § 2-314(2) indicates that to be merchantable goods must be such as at least

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

[14] U.C.C. § 2-315, Comment 4.

[15] U.C.C. § 2-315, Comment 1.

"Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting."[16] Section 2-315 represents a change from the U.S.A.'s provisions[17] in this area, particularly in eliminating the requirement that the buyer's reliance be known to the seller.

Section 2-316 provides that language of disclaimer inconsistent with express warranties will not be given legal effect.[18] The means by which implied warranties may be excluded or modified are also set forth. Basically, the approach is one of notice in a consensual situation: any disclaimer must be put clearly before the buyer.[19] In order to exclude or modify an implied warranty, the Code requires that the language be "conspicuous"[20] and, in some cases, be in writing as well.[21] This requirement is designed so that a reasonable man will recognize the extent of the commitment which he has made. Section 2-316 thus protects the buyer from the seller's concealed attempts to shirk his legal obligations in contrast to the less stringent provisions of the U.S.A., which more readily allowed the disclaiming of warranties.[22] Further to deter unfair dealings, the courts have been granted by the Code "police powers" to refuse enforcement of a contract, or any of its clauses, which are found to be "unconscionable."[23] The comments following section 2-302 indicate that the prevention of oppression and unfair surprise are the principles to be followed in making this determination and that the total commercial setting must be considered.[24] Initially there was criticism of section 2-302, particularly because of the Code's failure to define uncon-

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[16] Id.

[17] See Uniform Sales Act (hereinafter U.S.A.) § 15(1), (4), (5).

[18] U.C.C. § 2-316(1). See also U.C.C. § 2-316, Comment 1.

[19] Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 Stan. L. Rev. 974, 993 (1966). Certain obligations are imposed on the buyer by § 2-316(3)(a), (b), (c). For example, a warranty will be excluded if the buyer ignores language such as "with all faults," which should call the buyer's attention to the exclusion of warranties. If the buyer examines or refuses to examine the goods, provided that he has the opportunity to do so before entering into the contract, a warranty will not be implied as to the defects discoverable by a reasonable inspection. Moreover, custom, the course of dealings or course of performance can also exclude or modify an implied warranty.

[20] U.C.C. § 1-201(10) defines conspicuous: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . ."

[21] U.C.C. § 2-316(2).

[22] There was no formulated procedure under the U.S.A. by which a warranty could be excluded or modified. The only provision covering this matter is U.S.A. § 71 which rather broadly asserts:

> 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.

However, see also, Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117, 157-168 (1943), where it is noted that courts often looked with a jaundiced eye upon the seller's efforts to limit his responsibilities, and required that a disclaimer be brought to the attention of the buyer before it would be enforced.

[23] See U.C.C. § 2-302.

[24] U.C.C. § 2-302, Comment 1.

scionability,[25] and it was feared that confusion and inconsistency would be the results of applying this section.[26] However, the fears of the critics have proved to be unjustified as decisions have developed in a unified pattern[27] following the guidelines set forth in the Code.[28] Thus section 2-302 seems to protect the legitimate interests of both buyer and seller.

Section 2-318 sets forth those persons who shall receive warranty protection in personal injury cases. Absent privity of contract, pre-Code courts were reluctant to allow parties the right to sue.[29] The draftsmen recognized that unjust results often were reached under the strict privity requirements. The 1949 proposed draft of the Code would have effectively abolished the concept of privity by extending the seller's warranty for personal injuries and property damages to those "whose relationship to the buyer is such as to make it reasonable to expect that such person[30] might use the defective goods." Ultimately the Code reached the position that privity would not be required for certain specified persons.[31] Beyond those specifically enumerated beneficiaries of warranty protection, the Code expressly enunciates a neutral position.[32]

In products liability cases, the privity question is a key element in the growing confrontation between the application of the Code and the application of strict liability in tort, as established by Section 402A of the *Restatement (Second) of Torts*.[33] In reality, both a warranty theory and strict liability

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[25] See Comment, Unconscionability—the Code, the Court and the Consumer, 9 B.C. Ind. & Com. L. Rev. 367 (1968).

[26] Id. at 369.

[27] Id. at 378.

[28] U.C.C. § 2-302, Comment 1.

[29] The principle was established in an old English case, Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842), that no duty was owed to a person not a party to the contract. This requirement was followed in an innumerable number of cases, particularly to shield the manufacturer from liability. For a comprehensive study of the erosion of the privity fortress, see Prosser, The Assault on the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966). The food cases such as Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942), first broke the privity barrier. This result was later extended to non-food cases. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). See Donovan, supra note 7 at 219.

[30] The 1949 draft of § 2-318 was derived from § 43, Uniform Revised Sales Act (Proposed Final Draft No. 1, 1944).

[31] U.C.C. § 2-318 extends warranty protection 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. . . ." It is beyond the scope of this comment to discuss the court interpretations of "family," "guest," etc. See, e.g., Donovan, supra note 7, at 220-24; Note, Products Liability: Employees and the Uniform Commercial Code, Section 2-318, 68 Dick. L. Rev. 444 (1964); Comment, Product Liability—Application of the Word "Family" as Used in Section 2-318 of the U.C.C. Included Nephew of Purchaser, 12 N.Y.L.F. 530 (1966).

[32] U.C.C. § 2-318, Comment 3.

[33] Restatement (Second) of Torts, § 402A (1965) asserts that:

(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 the ultimate user or consumer, or to his property, if

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

reach the same result.[34] However, section 402A refuses to be hampered by the technicalities of sales law.[35] Although it would seem that there are factual situations where strict liability in tort is preferable to a warranty theory (for example, a non-commercial setting where a remote user incurs a physical injury), it is submitted that strict liability has been adopted in cases where the Code also could have provided effective relief.[36] Commenting upon this development one author notes the paradox of two parallel theories, warranty and strict liability, reaching the same result (absolute liability), and using the same standard (defectiveness).[37] Another writer has voiced his irritation with judicial decisions superseding legislative enactments.[38] Although favoring the ends often reached by applying strict liability, he submits that a unified system is needed and that such could be realized through amendment of the Code.[39] Taking a contrary position, a commentator contends that both the Code and section 402A have a useful role to play in products liability.[40] The Code, he argues, is suited to handle commercial transactions between commercial parties, but the law of sales has no application in personal injury suits.[41] Although a distinction based on the kind of injury incurred finds sup-

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

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

(a) the seller has exercised all possible care in the preparation and sale of his product, and

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

[34] See the following articles and cases cited therein: Littlefield, Some Thoughts on Products Liability Law: A Reply to Professor Shanker, 18 W. Res. L. Rev. 10 (1966); Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692 (1965); Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers, 17 W. Res. L. Rev. 5 (1965).

[35] Restatement (Second) of Torts, Explanatory Notes § 402(a), comment m at 356 (1965) expressly indicates:

> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is to be used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

[36] See, for example, Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965) where, in a strictly commercial transaction where buyer's damages were out of pocket losses, strict liability in tort was adopted.

[37] Rapson, supra note 34.

[38] Shanker, supra note 34 at 8-11.

[39] Id. at 39-47, where the author proposes changes and clarification in the Code.

[40] Littlefield, supra note 34.

[41] Id. at 18-20.

port among courts,[42] section 2-318 neither requires nor supports such a position. The wording of section 2-318 grants warranty protection to persons who "may use, consume or be affected by the goods and *who* [*are*] *injured in person* by breach of the warranty." (Emphasis added.) Therefore, it would seem that the nature of the injury received should not be solely determinative in the choice between the Code and section 402A. Rather, along with privity, the setting and the relative bargaining positions of the parties should be one of the elements to be considered.

II. Pre-Code Treatment of Warranties in Non-Sale Situations

Pre-Code courts often displayed a reluctance to extend warranty protection to transactions which deviated from the traditional sale. Rather than determining whether the facts of a given contract justified the imposition of a warranty, these courts attempted to classify the transaction as a sale or a non-sale, often finding that no sale was present and therefore refusing to grant warranty protection.[43]

One area where there has been little support for extending warranty protection to the non-sale transaction is the contract in which a service element is present. These are of two kinds: the pure service contract where professional advice or guidance is the consideration sought, and the mixed contract, where a service element is present, but goods are transferred as well. Generally, in pure service contracts only express warranties have been enforced.[44] This result is considered justifiable because (1) it was not within the reasonable expectations of the parties that a given goal could be guaranteed; (2) the parties bargained for services not results; and (3) the existence of variables not within the servicer's control would put an unjust and undue burden on him if he were required to warrant a given result. However, in *Broyles v. Brown Eng'r Co.*,[45] the court held that an engineering contractor impliedly warrants that the plans and specifications submitted for a housing project are fit for the purposes for which they were intended. In so doing, the court did not refute the proposition that a servicer should not be obligated to guarantee the results in pure service contracts. On the contrary, it is submitted that the court recognized that a modification of this rule should be effectuated when the scarcity of elements beyond the servicer's control makes it highly unlikely that the benefits of the contract cannot be produced. For

[42] See Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965), where Chief Justice Traynor, whose opinion in Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962), served as a catalyst to the adoption of § 402A, contended that § 402A and the U.C.C. are consistent and complementary. The Code should be applied only when monetary-business damages are at issue, while § 402A should reign in the personal injury field. But see also, Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965), where strict liability in tort was applied when property damages were incurred.

[43] See Farnsworth, supra note 3 at 663-664. The author notes that American courts have followed the "essence" test adopted by the English courts. This test classified a service-good contract as a service or a sale depending on whether the work or the materials supplied was the essence of the agreement.

[44] Comment, Contract Formation and the Law of Warranty: A Broader Use of the Code, 8 B.C. Ind. & Com. L. Rev. 81, 87 (1966); see Note, Implied Warranties in Service Contracts, 39 Notre Dame Law. 680, 682-84 (1964).

[45] 275 Ala. 35, 151 So.2d 767 (1963).

example, the court noted that in medicine and the law, factors beyond the practitioner's power to regulate make the imposition of a warranty unjust. In medicine, the court proceeds, the reaction of a patient to a drug or to surgery, are variables which cannot be readily predicted. Similarly, it is an undue burden to make a lawyer warrant the outcome of a case. In concluding that the defendant-contractor warrants that he will convey a reasonably accurate survey, the court noted the absence of unknown or uncontrollable topographical or landscape conditions which could prevent the adequate performance of his services.[46] Hence, the nature of the servicer's profession and the circumstances in which the particular services are to be rendered are the factors to be considered in the determination whether an implied warranty is in order.

A mixed service contract differs from a pure service contract in that a mixed contract involves the transfer of goods along with the performing of a service.[47] The question then arises whether a warranty should attach to the goods supplied or used in a mixed contract. Despite the close analogy to sales transactions, in the absence of express warranties, pre-Code courts consistently failed to apply warranties to this kind of service contract. In *Foley Corp. v. Dove*[48] plaintiff corporation was building a drive-in theatre and hired defendant to construct an enclosure which would keep out the lights of the highway. When the building ultimately collapsed, plaintiff sued for damages on a warranty theory under the U.S.A. Despite the fact that only the presence of a service element distinguished this transaction from a sale, the court refused to extend warranty protection to the building constructed and purchased. The court reasoned that a construction contract, where the furnishing of materials is only incidental to the work and labor performed, does not come within the purview of the warranties of the U.S.A.[49] Even in Code states, courts have continued this categorization of transactions, and, as if the rule were self-evident, have refused to apply sales warranties to situations where a service element is an integral part of the contract.[50]

Blood transfusion cases represent another aspect of the service-sale issue. Courts have consistently held that supplying blood in a hospital is part of the services provided and is not a sale.[51] Duesenberg and King argue that

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[46] Id. at 40, 151 So.2d at 772.

[47] Comment, Contract Formation and the Law of Warranty: A Broader Use of the Code, 8 B.C. Ind. & Com. L. Rev. 81, 87 (1966).

[48] 101 A.2d 841 (D.C. Mun. Ct. App. 1954).

[49] Id. at 842.

[50] See Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (1963), where a warranty was not extended to the materials applied in a beauty parlor treatment; and, Aegis Prods., Inc. v. Arriflex, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (Sup. Ct. 1966), where the parts replaced in a movie camera, as part of a repair contract, were not warranted. However, a recent New Jersey decision, Newmark v. Gimbel's, Inc., 102 N.J. Super. 279 (App. Div. 1968), reached the contrary result on a set of facts similar to those in *Epstein*, the logic of which decision was expressly rejected. The court reasoned that the application of warranties should be determined by the elements necessitating their imposition, rather than the specific nature of the transaction.

[51] Sloneker v. St. Joseph's Hosp., 233 F.2d 105 (D. Colo. 1964); Balkowitsch v. Minneapolis War Memorial Blood Bank, 270 Minn. 151, 132 N.W.2d 805 (1965); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954). But see Jackson v.

these decisions were based on policy grounds rather than logic,[52] since the courts were troubled by the inability of hospitals to protect themselves by discovering the defect in the blood furnished to the patients. Hospitals, it was felt, should not bear the risks for a disease-ridden blood supply to which its negligence did not contribute. The authors contend that it is unreasonable to argue that a recipient of a transfusion is not purchasing the blood supplied, as this item is clearly accounted for in the hospital bill. In any event, it is argued that reasoning by analogy to the law of sales should result in the extension of warranty provisions to the blood provided.[53]

III. Warranties as Applied to Leases

It has been noted that only the contemplated future return of the chattel distinguishes a lease from a sale.[54] Moreover, the same business ends often can be reached in a lease as in a sale.[55] Yet, because a lease is not technically a sale, the same problems of extending warranty protection are present as existed in the previously discussed non-sale situations. An analysis of pre-Code decisions reveals that courts were more receptive to bringing leases within the confines of warranty protection when the chattel was in the nature of a dangerous instrumentality, or one to which considerable danger could attach if defective.[56] Implicit in the decisions extending warranty protection to leases is a recognition that those elements which justified the imposition of warranties in sales cases are present in lease transactions as well.[57] For example, in *Booth S.S. Co. v. Meier & Oelhaf Co.*,[58] a third party defendant-contractor was held liable on common law warranty principles for leasing a defective part to the plaintiff. The elements of reliance on the competence of the lessor-contractor, his ability to bear the risk and the dangers inherent in providing a defective article were cited to support the lessor's liability and affirm the application of sales warranties in this non-sale transaction.[59] In contrast, there is authority for the proposition that the lessor's liability is contingent upon a *negligent* failure to provide goods fit for the

Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (L. Div. 1967), where the court did find a sale.

[52] Duesenberg & King, supra note 7, at § 7.01[2][b][i].

[53] See also Comment, Blood Transfusions and the Warranty Provisions of the Code, 9 B.C. Ind. & Com. L. Rev. 943 (1968).

[54] Farnsworth, supra note 3, at 655.

[55] Vold, supra note 3, at 84.

[56] Booth Steamship Co. v. Meier & Oelhaf Co., 262 F.2d 310 (2d Cir. 1958) (defective ship part); Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E.2d 342 (1923) (defective crane); Gambino v. John Lucas & Co., 263 App. Div. 1054, 34 N.Y.S.2d 383 (Sup. Ct. 1942) (defective gas tank); Standard Oil Co. of New York, 231 App. Div. 101, 246 N.Y.S. 142 (Sup. Ct. 1930) (defective storage tank); Thomson Spot Welder Co. v. The Dickelman Mfg. Co., 15 Ohio App. 270 (1921) (defective electric welding machine); Dufort v. Smith, 53 Pa. D. & C. 307 (1944) (defective airplane).

[57] See 2 F. Harper and F. James, The Law of Torts § 28:19, where the following are given as reasons for imposing warranties on the seller: (1) one party is in a better position to know the antecedents that affect the quality of the goods; (2) to control these conditions; and (3) to distribute the loss.

[58] 262 F.2d 310 (2d Cir. 1958).

[59] Id. at 314.

purposes intended.[60] It would seem that the requirement of negligence is more often found in cases where the article, if defective, is not likely to produce a significant degree of harm to the lessee.[61] However, even in cases involving dangerous instrumentalities, such as motor vehicles, it has been held that the lessor need only exercise reasonable care to avoid liability.[62]

With the developing responsibilities imposed upon the seller of goods, courts have turned away from the negligence doctrine and have begun to assert that the risk of harm from defective goods should be borne by the one who puts such an article into the stream of commerce rather than by the person injured by it.[63] A landmark decision was *Cintrone v. Hertz Truck Leasing and Rental Serv.*,[64] which indicates the need for consumer protection in the expanding area of leasing and rental concerns.[65] *Cintrone* holds that public policy demands that the lessee, as well as the buyer of automobiles, be protected against injuries from defective component parts. As it was essentially decided on common law principles of strict liability and breach of warranty, *Cintrone* cannot be cited as a Code case. However, Comment 2 to section 2-313[66] is mentioned in the court's opinion and the rationale of *Cintrone* is consistent with Code principles.

In concluding that sales warranties should be extended to leases, the court in *Cintrone* indicated that the elements of consumer reliance, the superior ability of one party to control the quality of the product and to bear the risk of harm, if defective, are common to both lease and sale situations. The court observed that when one is put into the driver's seat "the relationship between the parties fairly calls for an implied warranty of fitness for use, at least equal to that assumed by a new car manufacturer. The content of such warranty must be that the car will not fail mechanically during the rental period."[67]

The fact that the court seemed to emphasize the dangerous nature of automobiles in its reasoning raises the question whether the nature of the

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[60] McNeal v. Greenberg, 40 Cal. 2d 740, 255 P.2d 810 (1953); Milestone System v. Gasior, 160 Md. 131, 152 A. 810 (1931); Mitchell v. Lonergan, 285 Mass. 266, 189 N.E. 39 (1934); Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1939); Vaningan v. Mueller, 208 Wis. 527, 243 N.W. 419 (1932).

[61] Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1939) (horse rental); Vaningan v. Mueller, 208 Wis. 527, 243 N.W. 419 (1932) (horse rental).

[62] McNeal v. Greenberg, 40 Cal. 2d 740, 255 P.2d 810 (1953) (rented tractor); Milestone System v. Gasior, 160 Md. 131, 152 A. 810 (1931) (rented automobile); Mitchell v. Lonergan, 285 Mass. 266, 189 N.E. 39 (1934) (rented automobile).

[63] See note 29 supra and the accompanying discussion regarding the decline of lack of privity as a bar.

[64] 45 N.J. 434, 212 A.2d 769 (1965).

[65] Id. at 448, 212 A.2d at 776.

[66] U.C.C. § 2-313, Comment 2 provides:

> Although this section is limited in its scope and direct purpose to warranties made by the seller as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined to either sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of *bailments for hire*. . . . (Emphasis added.)

[67] Cintrone v. Hertz Truck Leasing and Rental Serv., 45 N.J. 434, 449-50, 212 A.2d 769, 777 (1965).

chattel will ultimately determine whether the lessee will receive warranty protection. Significantly, *Cintrone*'s reasoning was found inapplicable in three cases which subsequently reached the New Jersey Superior Court level: *Magrine v. Krasnica*,[68] *Conroy v. 10 Brewster Ave. Corp.*,[69] and *Jackson v. Muhlenberg Hosp.*[70] The court's reasoning in the latter two cases is relevant to the issue at hand.

Arguing on the basis of *Cintrone*, the plaintiff in the *Conroy* case contended, on common law principles, that an implied warranty of fitness should be extended to the lease of an apartment. The New Jersey Superior Court rejected this contention and stated that *Cintrone* was applicable only to the mass producer or lessor. There was no indication, the court asserted, that warranties were to be applied to transactions involving isolated sales or leases.

In the *Jackson* case, the issue was whether a warranty of fitness should be extended to blood transfusions. Plaintiff sued on both a breach of warranty under the Code and strict liability in tort. Though the court found a sale,[71] it clearly distinguished the sale of blood from the leasing of cars on policy grounds. It indicated that the dangers inherent in the leasing of a malfunctioning car, and the ability of the lessor to know and to control this condition, were not present in the sale of blood. Accordingly, strict liability in tort was not applied. As the seller's warranties were deemed to have been effectively disclaimed, plaintiff was denied recovery on the warranty count as well.[72]

One may conclude that *Cintrone*, *Conroy* and *Jackson* stand for the proposition that the specific qualities of the good and the position of the lessor in the market (*i.e.*, whether the lessor is a mass dealer with respect to the goods rented), are key factors to be considered when the problem of applying sales warranties to non-sales situations arises. It has been pointed out[73] that, although the *Cintrone* court cited several New York cases as precedent for its decision, it failed to discuss *Covello v. State*[74] where the state, the lessor of roller skates at a public arena, was held liable for negligence and for breaching a common law warranty of fitness. It may be asked why, if *Covello* was not cited because it did not deal with a dangerous instrumentality,

[68] 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967). In this case, which makes only brief reference to the Code, the defendant was a dentist who was sued by his patient in strict liability in tort when a needle being used by the defendant broke in plaintiff's jaw. The court could find no relationship at all between a dentist, who is not a supplier but provides a service, and a volume-producing lessor of cars. Hence, the plaintiff's argument that the defendant should bear the risk for harm resulting in the course of his business was rejected. Such a burden, the court felt, should be imposed only upon an enterprise which can effectively spread the risk.

[69] 97 N.J. Super. 75, 234 A.2d 415 (App. Div. 1967).

[70] 96 N.J. Super. 314, 232 A.2d 879 (L. Div. 1967).

[71] *Jackson* is the first case which has held that a transfusion does constitute a sale. In essence, the result of this case, like Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954), which *Jackson* expressly refutes, is that negligence is required in blood transfusion suits, provided that the disclaimer is deemed reasonable. See 47 Neb. L. Rev. 166 (1968).

[72] Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 329, 232 A.2d 879, 888 (L. Div. 1967). The court considered that the disclaiming of liability for any harm by labels so indicating on each bottle was reasonable.

[73] Note, 61 Nw. U.L. Rev. 144, 150-151 (1966).

[74] 17 Misc. 2d 637, 187 N.Y.S.2d 396 (Ct. Cl. 1959).

that case was not distinguished on this ground.[75] It may be inferred from this omission that *Cintrone* did not necessarily limit its holding to a leased chattel of a dangerous nature. Rather, it may be argued that implicit in *Cintrone*'s failure to mention *Covello* is the recognition that the mechanical components of the goods are not the only critical factors because any article, if defective, can cause harm. It would seem, particularly in the light of the further clarification of *Cintrone* provided by the *Jackson* and *Conroy* cases, that such an implication is unwarranted. Nonetheless, although they are an important consideration, it is submitted that the inherent qualities of the chattel should not be solely determinative, but rather should constitute one of the elements in the total commercial setting to be evaluated.

A corollary to the proposition that a lessor should warrant the goods rented is the argument that the financial burden caused by defective products should be borne by the "enterprise" in the course of whose business the damages arise. In this way the lessor is compelled either to sustain all losses or to spread the risk by purchasing insurance or by passing these costs on to the consumer in higher prices. Hertz Rent A Car is an illustration of the kind of large-scale enterprise which can readily bear the economic burdens caused by defective goods. It is conceded, however, that many smaller-sized leasing firms might not be in a better position than the lessee to bear these financial costs. It is submitted that the extent to which the lessor can distribute the loss is certainly of significance in deciding whether the circumstances merit the application of warranty principles.

The reliance element is another factor to be considered in deciding whether a lessor will be obligated to warrant the quality of his goods. *Cintrone* indicates that a lessor's aggressive advertising can indeed induce reliance by the lessee. It has been contended that the reliance of the lessee exceeds that of the buyer: "[I]t is generally true that the bailee for hire spends less time shopping for the article than he would in selecting like goods to be purchased, and since the item is not one which he expects to own, he will usually be less competent in judging its quality."[76] It has been further argued that the lessee's reliance is greater in short-term leases than when a chattel is to be rented for a long period of time.[77] The explanation is that the needs of a lessee who desires to rent a car for a day or a weekend would generally require immediate satisfaction. He is likely to have neither the time nor the patience to look extensively for a car, and consequently he has no choice but to rely on the ability of the lessor to furnish him with a vehicle which will be adequate for his purposes. Therefore, the argument for warranty protection under such circumstances is stronger.

A further important aspect of the reliance element is the relative bargaining positions of the parties and the terms of the contract resulting therefrom. As stated previously, the Code reserves the right to the seller to exclude or modify warranties[78] so long as the buyer is adequately notified of such

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[75] Note, supra note 73, at 150 n.31.

[76] Farnsworth, supra note 3, at 673-74.

[77] Comment, supra note 44, at 91.

[78] U.C.C. § 2-316. See the discussion accompanying notes 18-28 supra.

limitations.[79] A recent Arkansas decision, *Sawyer v. Pioneer Leasing Corp.*,[80] found that the disclaimer and unconscionability clauses were equally applicable in sale and lease situations. Accordingly, it was held that the warranties of Article 2 should be applied to leases "where the provisions of the lease are analogous to a sale."[81] The *Sawyer* case is significant for, unlike *Cintrone*, the decision is based entirely on the Code. However, the court's holding that warranties should be applied to leases "where the provisions of the lease are analogous to a sale" raises some questions of interpretation. It would seem that this language is somewhat restrictive, suggesting a certain reluctance to extend the warranty protection. It is submitted that the approach of the court is in error. The needs of the lessee rather than the extent to which the terms of a lease contract resemble those of a sale should be the critical factor in determining whether a warranty should be imposed. It is contended that *Sawyer* would be far more valuable as precedent if it had unequivocally asserted that warranties should be extended to lease arrangements whenever the circumstances justifying their imposition are present. In this way, the underlying reasons for applying warranty principles to leases, rather than the specific details of the contract, would be the relevant factors to be considered. The dissenting judge points out that the majority opinion fails to provide any guidelines or standards to be followed. Specifically, he questions when a lease is "analogous to a sale" and whether such terms of the lease agreement (as the disposition of the leased chattel at the end of the rental period) are to determine if a lessee will receive warranty protection. For example, he asserts, "I am unable to discern how we will be able to decide the application of code provisions to leases on a section by section basis in the absence of clear statutory intent."[82] It is submitted that the dissent's criticisms are in order. The majority has proposed a general standard[83] without analyzing and setting forth the elements necessary to permit the application of the Code's warranties to leases. Nonetheless, the criticism by the dissent in no way negates or undermines the fact that circumstances in lease situations often do require that a warranty be implied. As has been suggested, *Sawyer* could and should have adopted a standard whereby the imposition of warranties in leases would depend not on the provisions of the transaction, but rather on the presence of those factors which justify placing the burden for defective goods on the lessor. The proposition further can be drawn from the dissent that the majority has extended warranty protection to a transaction

[79] Id.

[80] — Ark. —, 428 S.W.2d 46 (1968). The action was brought by the appellee, Pioneer Leasing Corporation, to recover for default of payments totaling $2,039.40 for the rental of an ice machine. Appellant was an independent grocer. The terms of the lease transaction contained a term whereby the appellant assumed the risk completely for any defects in the machine. Because of this disclaimer, a verdict was directed in the trial court for the lessor-corporation. The Supreme Court of Arkansas reversed and concluded that a new trial was needed to determine whether the disclaimer clause in the lease contract met the standards set forth in § 2-316(2) of the Code.

[81] Id. at ——, 428 S.W.2d at 54.

[82] Id. at ——, 428 S.W.2d at 56.

[83] Id. at ——, 428 S.W.2d at 54. The standard set forth is that the Code's sale warranties should be applied to leases when the provisions of the lease are analogous to a sale.

not envisioned by the Code. The confusion resulting from this development, the dissenting judge feels, has defeated the purpose of making uniform the commercial laws of the various states. It would seem that Justice Fogleman is unduly concerned with the uniformity of the law of sales which the enactment of the Code was undoubtedly designed to foster. In particular, his comment that he found "nothing in the Commercial Code which remotely suggests that it has any such application [to leases of personal property]"[84] seems inconsistent with section 1-102 which clearly encourages the evolutionary development of the commercial law by the courts. It is submitted that the Code can reasonably be expanded to include warranties in lease situations.

Section 1-102 of the Code sets forth guidelines to its interpretations: "This Act shall be liberally construed and applied to promote its underlying purposes and policies."[85] Modernization[86] and expansion[87] of the commercial law, along with uniformity,[88] are then outlined as the keys to construing the Code. A commentator submits that:

> No longer is the primary aim merely uniformity with prior law and practice, however obsolescent. . . . Devotion to uniformity with the receding and perhaps obsolescent past shall not under Code law interfere unduly with present evolutionary growth with its focus on current changing and foreseeable needs of buyers.[89]

The Comments to the Code further indicate, "It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances. . . ."[90] After citing several Code sales cases where an interpretation consistent with the broader view encouraged by the Code was taken, the Comments note, "Nothing in this Act stands in the way of the continuance of such action by the courts."[91] Therefore, the Code, by its own terms, has dictated that a uniformity expanded by the necessity of growth is the standard to be followed. Writers have shed additional light on the interpretation of the Code by the observation that liberal construction under the Code means that "[u]nless a given construction or application in determining a particular dispute clearly contravenes the statute, either by commission or omission, courts should not defer to the legislature for a change in the rules."[92] It has been argued further, "One may reasonably conclude that the intent of the drafters of Section 2-313 of the Uniform Commercial Code was to pave the way for decisions which would recognize the sales analogy in bailment cases. These indications of legislative intent should and will be of great importance to the determination of this issue

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84 Id. at ——, 428 S.W.2d at 54.

85 U.C.C. § 1-102(1).

86 See U.C.C. § 1-102(2)(a).

87 See U.C.C. § 1-102(2)(b).

88 See U.C.C. § 1-102(2)(c).

89 Vold, Construing the Uniform Commercial Code: Its Own Twin Keys: Uniformity and Growth, 50 Cornell L.Q. 49, 62 (1964).

90 U.C.C. § 1-102, Comment 1.

91 Id.

92 W. Willier & F. Hart, Forms and Procedures under the U.C.C. ¶ 12:03[1] (1966).

in states where the Code is adopted."[93] The Code's capacity for growth finds support not only in the guidelines to its interpretation, but in the encouragement given by the draftsmen that the Code be extended to non-sale transactions under appropriate circumstances.[94] For example, a student commentator notes that section 2-313, Comment 2 indicates that the policies concerning express warranties as to sales might aid courts in dealing with similar circumstances, such as bailments for hire.[95] The conclusion reached is that the Code "is an example par excellence of a statute that is appropriate for use as a premise for reasoning."[96] In support of this proposition, it has been reasoned that "while rented goods are not 'sold,' a property interest short of 'title' is transferred as in a sale and the transaction is in the nature of a bargain. Thus, . . . warranties . . . could logically accompany the transaction."[97]

IV. Conclusion

This comment has indicated that a liberal construction of the Code allows the extension of Code warranties to leases under appropriate circumstances. Hence, though uniformity is one of its foundations, it is important to remember that the Code contains an inherent potential and prescription for growth to meet changing commercial conditions and needs. It was previously stated that the confrontation between the Code and section 402A is increasing and that strict liability has been adopted when the Code also could have provided an adequate remedy.[98] Similarly, it is submitted that the relief which section 402A provides the lessee should not be preferred in every lease situation to the warranty protection under the Code. Indeed, in a commercial setting, where both the lessor and the lessee are businessmen, circumstances not only justify but demand that the Code be applied. The inappropriateness of applying section 402A under these circumstances can be illustrated by the fact that strict liability cannot be disclaimed, yet basic to a commercial transaction is the seller's right to bargain and to shift the responsibilities for defects in leased goods.

It has been asserted further that those factors which justify the imposition of warranties in sales cases are often found in lease transactions. These are: (a) public policy which requires that the party which puts goods into the stream of commerce should bear the risk of harm caused by defective goods, rather than the person injured by it; (b) the fact that one party has induced the reliance of the consumer on his skill and knowledge; (c) the

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[93] 61 Nw. U.L. Rev. 144, 147 (1966).

[94] See Note, The Uniform Commercial Code as a Premise for Judicial Reasoning, 65 Colum. L. Rev. 880, 887 (1965). See also Duesenberg & King, supra note 7, at § 7.01 [2][b], where the authors note that "in the absence of any prohibitory provision, the court could simply say that if the warranty is good enough for a sale, it is good enough for a lease. . . ." The possibility is also raised that § 2-102 which uses the phrase "transactions in goods" might include leases. However, the authors note that § 2-314 restricts warranty coverage to sales, and the fact that the service of food is singled out for protection suggests that warranties were not meant to be applied so generally.

[95] Note, supra note 94, at 887.

[96] Id.

[97] Willier & Hart, supra note 92, at ¶ 12:02[1] (1966).

[98] See the discussion accompanying notes 33-42 supra.

fact that the former is in a better position to control the antecedents which affect the quality of the product; and (d) the fact that he is better able to distribute the loss. However, it is contended that a rule which holds, without exception, that a lessee should receive the Code warranty protection afforded to the buyer, should be rejected. The explanation is that the Code warranty provisions do not attach to a lease transaction as a matter of law. Thus, while a buyer need only prove that a defective product was conveyed at the time of sale, the total commercial setting of a rental must be evaluated in the determination whether it is equitable that a lessor be held to warrant his goods. It is concluded that the absence of obligatory statutory coverage allows the extension of warranty protection to the lessee to be determined by a more flexible standard, one capable of being adjusted in each case to meet the needs and interests of both the lessor and the lessee. It would seem, nonetheless, that there are factual situations in which it is hardly disputable that the responsibilities of a seller should be imposed on the lessor as well.[99] This conclusion depends largely on one basic consideration—the nature of the lessor's enterprise—for this matter reaches the issues of the relative market positions of the parties and the degree of the lessee's reliance. If the lessor is a merchant[100] with respect to the goods leased he should warrant their fitness. This result will be reinforced if the goods involved are in the nature of a dangerous instrumentality, or one to which considerable danger could attach if they prove defective. Indeed, the lessor, by holding himself out to the public as knowledgeable in a given field (by advertising and/or simply by being a merchant), has led the lessee to rely reasonably upon his skill and judgment. Moreover, it would be more equitable to impose upon the lessor-merchant, rather than the lessee, the financial risk of defective products, as he is more likely to be able to bear these costs and to distribute the loss. Perhaps every case will not reflect these conclusions as convincingly as the facts in *Cintrone*. Leasing concerns do vary in size and economic maturity. Nonetheless, the presumption should be that an enterprise-lessor can and should be responsible for damages resulting from non-merchantable goods which he rents. The lessor who holds himself out to the public as knowledgeable in a given field should assume the risks of harm, rather than the lessee who relies on this expertise. Therefore, in the absence of a conspicuous disclaimer the lessor-merchant, as his seller counterpart, should be held to the obligations of section 2-314.

The proposition that the lessor-merchant should impliedly warrant the chattel leased should not be extended to cases where the lessor is not a merchant with respect to the goods leased but merely makes an isolated lease. Several factors distinguish this latter situation from the relationship between the lessor-merchant and lessee. These are: (a) the lack of justifiable reliance on the non-merchant lessor's skill and knowledge; (b) the lessor's more limited ability to spread the risk; and (c) the more equal bargaining positions of the parties. Nevertheless, even in the isolated lease situation, it seems equitable to imply a warranty of fitness for a particular purpose when the

[99] See, e.g., Cintrone v. Hertz Truck Leasing and Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

[100] See U.C.C. § 2-104.

lessor has reason to know that the lessee is relying on his skill or judgment to select goods for him.[101]

Implying warranties in lease situations should in no way restrict the lessor from making use of the right to disclaim allowed by section 2-316. However, any exclusions or modifications of the lessor's obligation must conform to the criteria set forth by the Code. Indeed, because of the similarities of the interests to be protected, the courts should be equally wary in a lease of any unfair dealings and freely use their powers under section 2-302 whenever the lessor unduly takes advantage of his superior bargaining position. For example, if the lessor were able to disclaim at will all warranties in the short-term lease situation, the lessee would be sorely disadvantaged.

At a time when consumers in increasing numbers are leasing rather than purchasing goods of various kinds, commercial realities require that warranty protection be afforded to the lessee under appropriate circumstances. It is clear that the purposes and policies of the Code permit and encourage this development, and that sound public policy requires continued use of the Code as a basis for judicial reasoning.

WILLARD H. KRASNOW

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[101] Applying these standards in a lease situation essentially mirrors the warranties imposed in sales situations by U.C.C. § 2-315.