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SIX PROBLEM AREAS OF PRODUCTS LIABILITY UNDER THE UNIFORM COMMERCIAL CODE*

WARREN FREEDMAN**

The state of Alabama has become the most recent addition to the ever growing list of states which have enacted the Uniform Commercial Code. While eight states have failed to adopt the Code, prospects are good for the eventual enactment of the Code in these jurisdictions. It therefore behooves us to make this timely study of the importance of the Uniform Commercial Code upon product liability law today.

Basic to our review is a recognition that the warranty aspects of products liability are governed by the Uniform Commercial Code. Section 2-102 declares that Article 2 [which incidentally is the longest article, consisting of seven parts and 104 sections, or about one-fourth of the entire Code] applies to all transactions in goods, except security transactions and statutory sales to special classes of buyers. Section 2-715(2)(b), relating to the damages of the buyer, states that consequential damages of a seller's breach of warranty include "injury to person or property proximately resulting from any breach of warranty." Section 2-719(3) pertains to a limitation on consequential damages "for injury to the person in the case of consumer goods." Generally, state laws which were applicable to the warranty aspects of products liability have been rescinded by enactment of the Uniform Commercial Code. In New

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1 Effective date, January 1, 1967.
2 Arizona, Delaware, Idaho, Louisiana, Mississippi, South Carolina, South Dakota, and Vermont.
3 The American Bar Association Committee on State Legislation had rated Delaware, South Carolina and South Dakota as having an "excellent" chance of adopting the Code in 1965. However, in Arizona, Idaho, Louisiana, and South Dakota, bills seeking adoption of the Code were not even introduced in the 1965 session of the Legislature.
4 The U.C.C. was six years in preparation before endorsed in Fall 1951, by the American Bar Association. It was first adopted by Pennsylvania in 1953, effective July 1, 1954. After New York recommended changes, a revised version was introduced into the Massachusetts Legislature in 1957 and made effective October 1, 1958. Subsequent changes are now incorporated in the 1962 Official Text.
York, for example, Article 5 of the New York Personal Property Law (the New York version of the Uniform Sales Act) has been repealed.

I submit that the important problem areas are delineated under the following six axioms:

(1) necessity of "sale" of product before warranties can arise;
(2) breach of warranty presupposes "fault" on the part of the seller and/or manufacturer;
(3) the 4-year statute of limitations does control;
(4) disclaimers of liability and limitation on consequential damages are enforcible;
(5) extension of benefits of warranties to designated persons is fait accompli; and
(6) the definitions of warranty, express and implied, must be reasonable.

I. NECESSITY OF "SALE" OF PRODUCT

Under § 2-106(1), the transaction in goods is defined in terms limiting the transaction to the sale of goods, i.e., a sale "consists of the passing of title from the seller to the buyer for a price." Section 2-204 emphasizes the contractual basis of the sale. Recently, the federal court in Pennsylvania,\(^5\) and the state courts of Connecticut,\(^6\) Tennessee,\(^7\) Illinois,\(^8\) and Delaware\(^9\) have all ruled that, in the absence of a sale of a product, no express or implied warranty can arise. Federal Judge Kirkpatrick, in 1964, in the Young case (Pennsylvania),\(^10\) ruled, as a matter of law, that no warranty will be implied in favor of one who is not in the cate-

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\(^7\) O’Rear v. Bendix Aviation Corp. (Tenn. 1964) (not yet reported).


\(^10\) Young v. Goldenberg, supra note 5.
gory of a purchaser in the distributive chain. In New York in 1961, in Deaves v. Fabrics Fire Hose Co.,\textsuperscript{11} the court declared:

A cause of action for breach of warranty ordinarily depends upon a contractual relation between the parties to the action. A personal injury suffered by one not a party to the contract . . . may not be recompensed by suit against the seller.

In Connecticut in 1963, in the Epstein case,\textsuperscript{12} the court noted that the plaintiff asked for a beauty treatment, and not for the purchase of goods; hence, neither party intended "a transaction in goods" within the meaning of the Uniform Commercial Code. Indeed, the court reasoned that the materials used in the performance of those services were patently incidental to the subject, which was treatment, and not the purchase of an article. And the Delaware Superior Court, in Ptomey v. Sayers,\textsuperscript{13} also determined that a warranty cannot arise in the absence of a sale. Judge Lynch, in his opinion, citing the decision in the Epstein case, stated:

It clearly appears that plaintiff did not purchase from and defendant did not sell to plaintiff any article or commodity; plaintiff entered defendant's place of business and one of defendant's operators rendered services to plaintiff in giving a permanent hair wave . . . . Whether the giving of a beauty treatment—which, in my opinion, would involve a treatment of a person's hair, including the giving of a permanent wave—amounts to a sale of goods or rendering of a service, is considered and determined in Epstein v. Giannattasio. It was held in that case that this is a transaction of "service" and no claim can be asserted on any theory of breach of warranty . . . . It is clear from such discussion that the same legal theories applicable in such instances are likewise applicable to treatments in beauty shops, including treatments of the human hair.\textsuperscript{14}

And, to a similar effect is the reasoning of Judge Jacobs of the Connecticut Circuit Court in 1964, in the Cassina\textsuperscript{15} case:

The normal methods of sale and distribution of the cosmetic product (like other mass-marketed consumer products) seldom involve a direct sale by the manufacturer to the ultimate consumer. A substantial volume of cosmetic sales is distributed into professional channels such as beauty salons and barber shops, which service businesses obviously do not "sell" the product to the pa-

\textsuperscript{14} Ibid.
tron, but merely render a "service" which may consist of application of the given cosmetic product along with other products and other services to the patron. Freedman, Allergy and Products Liability 169 (1961 ed.) . . . When account is taken of the character of the work to be done in the present case ("stripping" and "dyeing" hair), the amount of the compensation to be paid for the bargain ($25.00); the peculiar subject-matter of the contract, the comparative values of the material used and the services rendered—these are potent factors which must be weighed—the court is led to the inevitable result that the parties bargained essentially for work, labor and services, not one for the sale of goods. (italics added)

Even in Georgia under a unique statute providing for recovery of damages against a product manufacturer for breach of implied warranty, the courts have held that the plaintiff must be a "purchaser" or an "ultimate consumer" before he could recover on the statutory warranty.\(^\text{16}\)

The Tennessee Court of Appeal in Kyker v. General Motors Corp.\(^\text{17}\) dismissed the case against the product manufacturer, not only because of lack of privity of contract, but because there was no evidence that the product manufacturer was "a contracting party to this sale." The Nevada Supreme Court, in Long v. Flanigan Warehouse Co.,\(^\text{18}\) has held that the injured plaintiff was not a "buyer" within the meaning of the then Uniform Sales Act, and therefore could not recover for breach of warranty. The North Carolina Supreme Court, as recently as November 25, 1964, in Terry v. Double Cola Bottling Co.\(^\text{19}\) opined: "Warranty—actual or implied—is contractual. It does not extend beyond the parties to the contract." Citing Prince v. Smith\(^\text{20}\) and other recent North Carolina decisions,\(^\text{21}\) the court concluded that warranty extends no further than the parties to the contract of sale.

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\(^{17}\) 381 S.W.2d 884 (Tenn. 1964).


\(^{19}\) 265 N.C. 1, —, 138 S.E.2d 753, 754 (1964).


\(^{21}\) Murray v. Bensen Aircraft Corp., 259 N.C. 638, 131 S.E.2d 367 (1963), and Wyatt v. North Carolina Equipment Co., 253 N.C. 355, 117 S.E.2d 21 (1960). Also a disclaimer of warranties and a limitation on the buyer's remedies were upheld by the North Carolina Supreme Court on September 23, 1964, in Lilley v. Manning Motor Co., 262 N.C. 468, —, 137 S.E.2d 847, 849-50 (1964), where the Court opined: (1) "there can be no implied warranty of quality . . . where there is an express warranty (disclaimer)"; (2) "under the terms of the (express) warranty defendant (vendor) was entitled to notice of defects in the parts of the automobile and to be given an opportunity to remedy the deficiencies." The action against the product manufacturer was dismissed on demurrer.

See also Brookshire v. Florida Bendix Co., 153 So. 2d 55 (1963), where the Florida
Liability has generally been denied when a “sale” was not consummated nor completed, as where the buyer made a selection but had not yet paid for the product. In the leading case, *Day v. Grand Union Co.*, the plaintiff picked up a bottle of beer from the counter of a self-service supermarket and the bottle allegedly “exploded” in her hand. No recovery was permitted upon the alleged breach of warranty.

The “service” of food or drink to be consumed upon the premises has, however, been expressly by statute constituted as a “sale” giving rise to warranties, even though the element of “service” predominates in the transaction, and transfer of title to the product is incidental to the “service” and not the subject of a sale. In Alabama, in *Broyles v. Brown Engineering Co.*, the court overruled defendant’s demurrer that there was no warranty in a contract for professional services to design a drainage system. The Alabama test apparently employed in this distinctly minority view finding implied warranty in a “service,” was that all of the elements of the service were within the exclusive control of the professional engineer. However, construction contracts, where the furnishing of materials is only incidental to the work and labor performed, do not come within the purview of the Uniform Commercial Code; and where service predominates, as in requested automobile repairs, “there can be no warranty in the usual sense, without a sale.” In a leading case, *Gagne v. Bertran*, the California Supreme Court reversed the plaintiff’s jury verdict as to the allegation of breach of implied warranty, upon the grounds that the test-hole digging contract was one for the performance of a service.


23 Note Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964), holding that a blood transfusion was a “service” and not a “sale”; hence no warranty could arise. Also, Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805 (Minn. Super. Ct. 1963).


25 Stammer v. Mulvaney, 264 Wis. 244, 58 N.W.2d 671 (1953).


Indeed, in the absence of a sale, no warranty can arise with respect to the product.

II. "Fault" as the Basis for Breach of Warranty

A breach of a warranty, it is submitted, is in the nature of tortious conduct, which presupposes "fault" on the part of the seller or the product manufacturer. In the celebrated case of Goldberg v. Kollsman Instrument Corp., the highest New York court fastened liability upon the assembler of the product, because breach of warranty is "a tortious wrong." In Gay v. A & P Food Stores, the New York court in 1963 affirmed the tortious nature of a breach of warranty:

Violation of a duty owing to another is a wrongful act; breach of contract involving violation of duty may be likewise a wrongful act. . . . Though the action may be brought solely for the breach of implied warranty, the breach is a wrongful act, a default, and, in its essential nature, a tort.

Underlying the Uniform Commercial Code is a basic recognition that imposition of liability does not rest upon any equitable theory of distribution of loss, because it is axiomatic that "fault" equals "liability," and "no fault" equals "no liability." Where the seller or product manufacturer is "at fault," the warranty is deemed to have been breached. In the absence of tortious conduct or "fault," the warranty is not breached.

29 39 Misc. 2d 360, 362, 240 N.Y.S.2d 809, 811-2 (1963). Contra, Angelilli Construction Co. v. Sullivan and Son, 45 Misc. 2d 171, 256 N.Y.S.2d 189 (1964), holding that an action for breach of warranty for property damage (and not for personal injury) was not a "tortious act" within the meaning of N.Y.C.P.L.R. § 302, and therefore the third party defendant (a non-domiciliary from Ohio) was not subject to the jurisdiction of the New York court. Mr. Justice Gagliardi opined: "It would be wrong to take pronouncements in the changing law of privity so literally as to apply them uncritically to the changing law of personal jurisdiction." Angelilli Construction Co. v. Sullivan and Son, id. at 174, 256 N.Y.S.2d at 192.
30 "Defective goods, not warranty, causes the harm to the remote person whether sub-buyer or stranger. Here, the attack on the 'citadel of privity' is not an attack on privity, but an attack on accepted bases of liability. Warranty is transactional behavioral. To hold a manufacturer liable where he is free of negligence is to attack the general principle of no liability (apart from contract or transaction) without fault and extend the category of strict tort liability. Warranty is not strict liability in this sense and it is immaterial that it may have been akin to tort in its origin. The bases for warranty, express or implied, and the bases for non-transactional liability without fault are different. Liability for breach of warranty should be distinguished not only from liability for deceit or negligence but also from the absolute or strict liability for certain non-transactional conduct (liability without fault). Liability on non-transactional principles for conduct arising from or connected with a transaction is not precluded; but those principles should not be confused with warranty." McCurdy, Warranty Privity in Sales of Goods, 1 Houston L. Rev. 201, 225 (1964).
The tort concept of Reliance (upon the seller's skill or judgment) is essential to the cause of action for breach of implied warranty of merchantability under § 2-314 and for breach of implied warranty of fitness for a particular purpose under § 2-315. In *McMeekin v. Gimbel Bros.*, the federal court in Pennsylvania held that absence of proof of reliance upon the implied warranty of fitness for particular purpose was ground for directing judgment in favor of the seller. Indeed, the necessity for reliance upon the seller's skill or judgment prompted the Sixth United States Court of Appeals in *Yount v. Positive Safety Manufacturing Co.* to bar recovery to an employee for injuries allegedly sustained in the use of defendant's machine.

Indeed, "fault" is the basis for breach of warranty.

### III. The 4-Year Statute of Limitations

Under § 2-725 a four-year statute of limitations is delineated with respect to sales, contracts of sale, actions based upon sales contracts, and for breaches of warranty. In *Gardiner v. Philadelphia Gas Works*, the Pennsylvania court in 1964 held that the 4-year statutory period supplanted the 2-year statutory limitation for personal injuries [and presumably the 6-year statute of limitations for commencement of a contract action]. Although the parties may, by agreement, reduce this period of limitation to not less than one year, they cannot extend the time beyond the 4-year period [§ 2-725(1)].

The impact of this 4-year period upon the short statutes of limitations for personal injuries in nearly all states does not seem to have been recognized by the Code. Subsection (4) of § 2-725 to the effect that the state law on tolling the statute of limitations is not altered nor modified in any respect, is simply untrue. California and New York have recent decisions declaring that the

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32 319 F.2d 234 (6th Cir. 1963).
33 413 Pa. 415, 193 A.2d 612 (1964). Note that prior to adoption of the Code the Pennsylvania Supreme Court had held that the 2-year statute of limitations governed all actions for damages for personal injuries, whether arising out of tort or contract, *Jones v. Boggs and Buhl, Inc.*, 355 Pa. 242, 49 A.2d 379 (1946).
35 Alyssa Originals, Inc. v. Finkelstein, 22 App. Div. 2d 701, 254 N.Y.S.2d 21 (1964). The court ruled that where the essence of the action is the defendant's negligence, the
short (1 year in California and 3 years in New York) warranty statute of limitations applies to all personal injury and death actions, regardless of whether they sound in tort or in contract. Ohio, on the other hand, has ruled in one case\textsuperscript{36} that in an action for the sale of a dangerous substance, to wit: glass particles in milk, the 2-year statute of limitations for personal injuries did not control. Thus, there is the anomaly that the 4-year statute of limitations is applicable to breach of warranty, and a 1-, 2-, or 3-year statute of limitations may be applicable to the same personal injury based on negligence.

The time of accrual of the cause of action is when the breach of warranty occurs, \textit{i.e.}, the time "when tender of delivery is made," regardless of the plaintiff's lack of knowledge of the breach. Only when the warranty is deemed to extend to future performance does the cause of action occur at the time the breach is or should have been discovered [\$ 2-725(2)]. It is submitted that the statutory period for breach of warranty should begin to run from the \textit{time of sale}.\textsuperscript{37} It is immaterial when the defect in the product was discovered or discoverable by the buyer or the seller. Similarly, the statute of limitations in malpractice actions begins upon commission and not the discovery of the malpractice.\textsuperscript{38} The New York Court of Appeals in the \textit{Citizens Utilities} case,\textsuperscript{39} in declaring that the time of sale and not the time of the discovery of}


\textsuperscript{38} See Seger v. Cornwell, 44 Misc. 2d 994, 225 N.Y.S.2d 744 (1965), construing the 3-year statute of limitations under N.Y.C.P.L.R. \textsection 214(6).

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the breach controls, warned about the evils of stretching “by implication” the promise or warranty.

IV. DISCLAIMERS OF LIABILITY AND LIMITATION ON CONSEQUENTIAL DAMAGES

All warranties may be disclaimed, not only by exclusion or modification, as under § 2-316, but also, as a matter of law, when the warranty is deemed to be unconscionable. A warranty or its disclaimer is unenforceable by a court of law under § 2-302(1) if it is unconscionable. Unfortunately, the Code does not contain any definition of the word “unconscionable,” but the term can be characterized as the absence of good faith, diligence, reasonableness, and fair dealing [See § 1-102(3) generally].

Under § 2-316(2) an oral disclaimer of merchantability is conditioned upon seller’s mention of merchantability. Under subparagraph (1) express warranties are presumed to be consistent with each other (or with implied warranties), so that a disclaimer, negation, or limitation on liability which is inconsistent with the express warranty is inoperative under § 2-317. However, when in good faith the express disclaimer is specific and conspicuously disclosed, the express warranty must give way and be deemed to have been disclaimed, negated, or limited in accord with the disclaimer. Such express language as “there are no warranties that extend beyond the description on the face hereof” is sufficient. A reasonable construction of such disclaimer would effectuate the result that the seller had made no express or implied warranties. In Maryland Casualty Co. the federal court in West Virginia opined: “Not only is there no express warranty, but there is an express provision excluding any warranty. In the presence of such an agreement between the parties (a disclaimer), no implied warranty arises.” In Williams v. Chrysler Corp., the West Virginia Supreme Court stated:

41 The Colorado Supreme Court in Yanish v. Fernandez, 397 P.2d 881, 882 (1965), upheld the words “as is” and “no warranty” as a valid, enforceable disclaimer: “(The words), even though relied upon by the buyer (prevents the representations of the seller) from constituting express or implied warranties.”
The rule seems to be well established in this jurisdiction that a party to a valid contract may in advance limit its liability so long as one of the parties thereto is not a common carrier. . . . This decision is based wholly upon the finding that the express warranty or disclaimer between the parties is controlling and that this action cannot be maintained.

Consequential damages, which include "injury to person or property proximately resulting from any breach of warranty" [under § 2-715(2)(b)], may be limited or excluded entirely. However, under § 2-719(3) this limitation on consequential damages, in the case of consumer goods, is expressly deemed to be "prima facie unconscionable" and therefore unenforceable. No rhyme nor reason is given for making sacrosanct "consumer goods," which are defined under § 9-109(1) as goods "used or bought for use primarily for personal, family or household purposes." [This definition is incorporated in Article 2 by virtue of § 2-103(3)]. Nevertheless, the seller or manufacturer of consumer products may still disclaim warranties under § 2-316. In Kean v. Baldwin Auto Co., Inc., The New York Supreme Court, ruled that the standard automobile disclaimer was "a bar to any action which might accrue to the plaintiff against the dealer upon a breach of an express warranty" and also upon a breach of implied warranties. Thus, the limitation on consequential damages must give way to the enforceable disclaimer which is not unconscionable.

V. EXTENSION OF BENEFITS OF WARRANTIES AND PRIVITY OF CONTRACT

The Uniform Commercial Code does not storm the citadel of privity of contract. Under § 2-318 the benefits of a warranty, express and implied, are merely extended to any natural person who is in the family or the household of the buyer, or who is a guest in the buyer's home, provided that it is reasonable to expect

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F.2d 53 (5th Cir. 1961), to the effect that a disclaimer of warranties is binding upon an injured third person suing in warranty.

44 See National Steel Corp. v. L. G. Wasson Coal Mining Corp., 338 F.2d 565 (7th Cir. 1964), in which the Seventh Circuit U.S. Court of Appeals ruled that a disclaimer, providing that the seller shall not be liable for consequential damages arising out of the use of defective material, barred the action for property damages.

See Also American Can Co. v. Horlamus Corp., 341 F.2d 730 (5th Cir. 1965): An express warranty limiting a can manufacturer's liability to "the cost to the buyer of the defective containers and any materials packed in them" was deemed effective and enforceable to limit a canned bread manufacturer's recovery for breach of implied warranty.

that such a person may use, consume or be affected by the product, and who is, in fact, injured in person or whose property is damaged by the breach of warranty. It has been expressly held that neither a guest in an automobile,\textsuperscript{46} nor a subpurchaser,\textsuperscript{47} nor an employee of the purchaser\textsuperscript{48} are beneficiaries of warranties under this Section. Indeed, the Code expressly states that the language of § 2-318 is not intended to enlarge the developing case law as to whether the seller's warranties extend to other persons in the distributive chain. Pennsylvania, the first state to enact the Code,\textsuperscript{49} has consistently held that warranties cannot be implied in favor of one not in the category of a purchaser in the distributive chain; and that the doctrine of privity of contract is essential to the cause of action for breach of warranty.\textsuperscript{50}

There is no inconsistency between (a) extension of the benefits of warranty, and (b) privity of contract. Even a liberal interpretation extending the benefits of warranties to persons other than the purchaser does not negate privity of contract. Section 2-318 merely brings into the "charmed circle" those special persons who are accorded the privilege of having the product that they may use or may consume warranted by the seller or product manufacturer.\textsuperscript{51} Judge Skeel of the Ohio Court of Appeals in \textit{Lonzrick v. Steel Corp.},\textsuperscript{52} in commenting upon the implied warranty sections of the Uniform Commercial Code, opined:

This statute does not deal with the rights of third persons not parties to the sale who come into possession of the goods and use them in the manner intended by the manufacturer and are thereby injured by reason of the faulty condition of the goods latent in

\textsuperscript{46} Thompson \textit{v.} Reedman, 199 F. Supp. 120 (E.D. Pa. 1961).
\textsuperscript{49} It is of interest to note that "when Pennsylvania enacted the Code, it had on its statute books exactly the same uniform commercial acts which Alabama now has." Schnader, \textit{Why Alabama Should Enact the Uniform Commercial Code in 1965}, 17 Ala. L.R. 1, 8 (1964).
\textsuperscript{51} See George \textit{v.} Douglas Aircraft Co., 332 F.2d 73 (2d Cir. 1964), applying Florida law. Here the employees of the purchaser of the DC-7C airplane were injured in the crash, and were held not to be entitled to the benefits of the express warranties, either as employees or as third party beneficiaries, because the manufacturer had confined the warranties to those named in the contract.
\textsuperscript{52} 1 Ohio App. 2d 374, 375, 205 N.E.2d 92, 93 (1965).
character due to improper manufacture or the use of faulty materials.

Privity of contract, even under prevailing decisions, has not been interred. Judge Froessel of the New York Court of Appeals, in the oft-cited 4-3 decision in Randy Knitwear, expressly declared that the requirement of privity had not been dispensed with "without limitation," for "we decide cases as they arise." It must not be overlooked that the Randy Knitwear case involved (a) breach of express, not implied warranties, and (b) property damage, not personal injuries. Eight months later the New York Supreme Court, Suffolk County, in Fortunato v. Craft, also distinguished the Randy Knitwear case. The New York Appellate Division, 4th Dept., on January 14, 1965, in Berzon v. Don Allen Motors, opined that implied warranties could not be extended beyond purchasers:

To extend Goldberg further to include bystanders and strangers, such as the plaintiffs, would be such a radical departure from established law that if it is to be accomplished it should be done by legislative action and not by judicial pronouncement.


Under present Alabama law, privity of contract is essential to recovery for breach of warranty against the manufacturer of a defective chattel: Cotton v. John Deere Plow Co., 246 Ala. 36, 18 So. 2d 727 (1944); Loegler v. Hill, 238 Ala. 606, 193 So. 120 (1940); Hood v. Warren, 236 Ala. 247, 183 So. 415 (1938); Attalla Oil and Fertilizer Co. v. Goddard, 207 Ala. 287, 92 So. 794 (1922); Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921). Adoption of the Code would leave this rule intact in cases where the plaintiff is the buyer. Alabama also presently bars recovery for lack of privity where the plaintiff in a warranty case is someone other than the buyer. In Sterchi Bros. Stores v. Castleberry, 256 Ala. 349, 182 So. 474 (1938), the court reasoned that a seller's warranty does not in itself impose any liability on a seller to third persons who are in no way parties to the contract because of the absence of privity of contract.


57 Id. at 530, 256 N.Y.S.2d at 644. Arkansas by statute (Act 35, Laws of 1965) has limited the application of the privity requirement, effective June 9, 1965, by declaring that the defense of privity of contract cannot be invoked by product manufacturers or vendors if the plaintiff claiming damages was a person whom the manufacturer or vendor might reasonably have expected to use, consume, or be affected by the product. It is submitted that the Arkansas statute is consistent with § 2-318 of the Code, for such persons are within the "charmed circle" of foreseeability, unlike donees or bystanders. Cf. Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965), wherein a bystander was injured by a defective shotgun shell; the case being decided under the Uniform Sales Act. Judge O'Hara's ringing dissent emphasized: "An action for breach of warranty whether or not sounding in tort, is still essentially a contract action. To recover thereunder a plaintiff has to have some relationship to the contract of sale, and the use
In *Berry v. American Cyanamid Company*, the Sixth United States Court of Appeals, applying Tennessee law, dismissed the implied warranty causes of action, and declared:

We must reject the argument that there was privity of contract between the plaintiff and Lederle. Privity of contract, as we understand it, is the relationship between two contracting parties. Clearly here, under the pleading, the plaintiff had no relationship with Lederle. He did not purchase the drug from Lederle. His only contact in the transaction was with his physician. The physician was not the agent of Lederle either in fact or by implication of law.

In *Olga Dani Lindsey v. Clairol Inc.*, Chief Judge Thomas J. Clary granted defendant's motion for a direct verdict:

The law of Texas ... with respect to warranty ... requires that the warranty run directly from the maker to the consumer, and if there is an intervening party, as there was here, the warranty does not run for lack of privity . . . .

And the landmark New Jersey case of *Henningsen v. Bloomfield Motors*, was severely limited to its facts by the New Jersey Appellate Division in *Santor v. A. and M. Karagheusian Inc.* At the trial plaintiff recovered upon breach of implied warranty (from the product manufacturer and its carpet distributor) the purchase price of the allegedly defective carpeting. But the appellate court reversed, citing New Jersey Study Comment, Annotation of Uniform Commercial Code, N.J.S. 12 A: 2-313: "New Jersey has held that privity of contract is needed to maintain an action for breach of warranty." The court also favorably cited a 1963 federal court case in New Jersey: "A person not a party to a contract, nor in privity thereto, cannot sue in respect to a breach of a duty arising out of contract."

VI. "WARRANTY" DEFINED IN TERMS OF REASONABleness

With the avowed design of consolidating and systematizing basic principles the Code has set forth definitions of "warranty."
The implied warranty of merchantability is described under § 2-314 as arising by implication out of a contract of sale, a course of dealing, and the usage of the trade. The implied warranty of fitness for a particular purpose is delineated under § 2-315, although neither "fitness" nor "particular purpose" are defined. Express warranties under § 2-313 may be created by affirmation or promise, by description and by sample or model. Words of art or formal language are not necessary, but a mere statement of value or opinion or commendation of the product does not create an express warranty [§ 2-313(2)]. The implied warranties are qualified and perhaps limited to a seller who, as a merchant, "deals in 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" [§§ 2-103 and 2-104(1)].

By defining "merchantability" under § 2-314(2), the Uniform Commercial Code has provided defense attorneys with six fingers to the proverbial hand! For a product manufacturer or vendor to be liable for breach of an implied warranty of merchantability, the plaintiff must prove the following:

(a) the product does not pass without objection in the trade under the contract description; and
(b) in the case of fungible products, the product is not of fair average quality within the description; and
(c) the product is not fit for the ordinary purpose for which such product is used;⁶⁵ and
(d) the product does not run within the variations permitted by the agreement of even kind, quality, and quantity within each unit and among all units involved;⁶⁶ and
(e) the product is not adequately contained, packaged and labeled as the agreement may require; and
(f) the product does not conform to the promises or affirmations of fact made on the container or label if any.

While these criteria do not purport to exhaust the meaning of merchantability, it is unfortunate that § 2-314(2)(e) does not define "adequately" with respect to the labeling of the product. Full compliance with pertinent federal, state or local labeling

statutes should preclude a court from ruling that the product labeling was inadequate, and that the implied warranty of merchantability was breached.\textsuperscript{67}

The implied warranty of fitness for a particular purpose necessitates that (a) the seller at the time of sale have reason to know the particular purpose for which the product was bought,\textsuperscript{68} and (b) the buyer relies upon the seller's skill and judgment. In the area of an allergic response to a product, no such implied warranty can arise unless the seller at the time of sale had reason to know of the individual buyer's idiosyncracy or predisposition to the product.\textsuperscript{69} But purchase of the product by its patent or trade name does not negate the implied warranty of fitness for particular purpose.\textsuperscript{70}

If a product is defective,\textsuperscript{71} deleterious, or inherently dangerous, the implied warranties have been breached; and if the breach

\textsuperscript{67} Note Ferguson v. Chas. Pfizer and Co. (Ore. 1964), which resulted in a jury verdict for the vaccine product manufacturer. Judge Langtry's charge to the jury on the implied warranty of merchantability was crucial: "The warranty of merchantability ... is that this product shall be reasonably fit for use as a vaccine to immunize the plaintiff, like other people .... This does not mean it must be perfectly adapted to such use."

\textsuperscript{68} For a recent illustration of a gross misconception in an effort to overprotect the consumer, see Crane v. Sears Roebuck and Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963), wherein the plaintiff and her husband had purchased a surface preparer for use in painting the interior of their restaurant. The label on the product read as follows: "CAUTION INFLAMMABLE MIXTURE. Do not use near fire or flame .... Contains more than 15% Benzo—Beware of Poisonous Fumes!!" Plaintiff and her husband, working with the windows open, applied some of the product to a wall when a sudden "whoosh" of flame engulfed the room and plaintiff caught on fire. The source of the flame was apparently a water heater about six feet from where the plaintiff was working. In affirming a verdict for the plaintiff, the California Court in 1963 upheld the following instruction: "To comply with this duty the manufacturer or supplier must appropriately label the product, giving due consideration to the likelihood of accident and the seriousness of consequences from failure to so label it as to warn of any dangers that are inherent in it and its use or that may arise from improper handling or use of the product." The Court defined the scope of the warning in terms of "reasonableness." Evidently, the jury felt that the labeling or instructions about poisonous fumes and inflammability were deficient because they did not mention combustibility or explosiveness. And yet the technical difference between combustibility and flammability is not for the layman; there can be no doubt that the plaintiff would not have altered his conduct if the labeling had the additional words "combustible" or "explosive." It is difficult to accept the premise of the jury that the product was improperly labeled! It also appears that the court refused to entertain the fact of contributory negligence, for the plaintiff had foolishly and carelessly used the product within six feet of the source of the flame.


\textsuperscript{70} See Kansas City Bolt Co. v. Rodd, 220 F.2d 750 (6th Cir. 1955).

\textsuperscript{71} See Gardner v. Coca Cola Bottling Co., 267 Minn. 505, 510, 127 N.W.2d 557, 561-2 (1964): "Before liability can result from a breach of implied warranty, there must be proof from which an inference is premissible that the product was defective .... It must appear that the defect, if there was one, was the producing cause of the mishap." Also, Kaspirowitz v. Shering Corp., 70 N.J. Super. 397, 175 A.2d 658 (1961).
was the proximate cause of the injury or damage, liability should result. However, the basic problem is again one of lack of definition of "defect," and we must go outside the Code to seek definition. "Defective condition" is defined in comment g of the Restatement (Second), Torts § 402A (1962), as "in a . . . condition . . . not contemplated by the ultimate user, which will be unreasonably dangerous to him." Under comment i, "unreasonably dangerous" is construed as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases . . . (the product), with the ordinary knowledge common to the community as to its characteristics." Comment k further delineates:

The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable danger.

Thus, the concept of Reasonableness is applicable to all breaches of warranty. The United States District Court for the Southern District of Florida, in Green v. American Tobacco Co., sanctioned the charge to the jury that, if the product was reasonably fit for its intended or ordinary use, the product manufacturer was relieved of liability for alleged breach of the warranty. Judge Choate charged that if the product was "unwholesome for the general public," "not suitable for use for the general public," or "endangers the general public to some degree, not individuals, but general public," only then was the plaintiff entitled to recover:

I instruct you that this implied warranty of reasonable fitness does not impose upon the defendant the duty to make an absolutely safe product. It does not mean that the goods are warranted to be foolproof or incapable of producing injury.73

The Supreme Court of New Jersey in Jakubowsky v. Minnesota Mining and Manufacturing Co., in reversing the Appellate

72 The proceedings in the district court are unreported. For an interesting history of the case on appeal see Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), certified question answered, 154 So. 2d 169 (Fla. Sup. Ct. 1963), answer conformed to, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943, 84 Sup. Ct. 1349 (1964).

73 Ibid.

Division, ruled that "the evidence (was) insufficient to establish an unreasonably dangerous condition of the product attributable to the defendant . . . . The plaintiff must show that the goods of which he complains were unreasonably dangerous for their intended use, and that the unreasonably dangerous condition existed when the goods left the defendant's hands . . . . The necessity for such proof is implicit in the opinion of this Court in Henning- sen . . . . It is precisely for this reason . . . that we find the plaintiff has failed to prove a breach of warranty." The court concluded:

The implied warranty of merchantability means that the product is reasonably fit for the purpose intended; it does not imply absolute perfection.\(^7\)

The California Supreme Court, in Magee v. Wyeth Laboratories, Inc.,\(^6\) found no breach of implied warranties because a product manufacturer's duty is to reasonably guard against probabilities of injury from the use of the product, not against possibilities of injury. An allergic response is delineated as a "possibility," and the implied warranty of merchantability did not run to the product.\(^7\) And in the Olga Dani Lindsey case, the federal court declared:

A manufacturer is not an insurer of its product so that the mere showing of the accident or trouble with the product entitles the person to recover. The plaintiff must show that there is some dereliction of duty on the part of the manufacturer which proximately caused the accident, and there is absolutely no testimony in this record which would warrant you in making a finding that the defendant was derelict in its duty. It can be responsible only for conditions that it can reasonably foresee, and there is no testimony here that I have found that justifies a jury in making such a determination.\(^8\)

Section 2-607(3)(a) provides for notice of breach of warranty to be given by the buyer to the seller or product manufacturer, despite the language of Greenman v. Yuba Power Products Inc.,\(^9\) that such notice was not a condition precedent.\(^8\) The notice re-

\(^7\) Id. at 185, 199 A.2d at 831.
\(^8\) In Alabama the giving of notice must be affirmatively pleaded. Smith v. Pizitz, Inc., 271 Ala. 101, 122 So. 2d 591 (1960).
quirements under §§ 1-201(25), (26) and (27), as well as the reasonable time conditions under § 1-204, are simply definitions but are applicable to the warranty sections, §§ 2-312 to 2-318, inclusive. Under § 2-607(3)(a) the buyer who has accepted the product "must within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy."

In closing, I would like to swing the cudgel for one moment against the plaintiffs' bar associations which are surreptitiously endeavoring to undermine the very foundations of the law of products liability. In their mad-rush toward Absolute Liability or "liability without fault," these stalwarts have recently begun to focus attention upon the advertising of the product, in the mistaken belief that the product manufacturer's liability can be extended in an action for deceit, negligent misrepresentation, false advertising, and/or breach of warranty by advertising. In Massachusetts, for example, there is a false advertising statute which makes it a crime for—

any person who, with intent to sell . . . merchandise . . . to the public . . . or who, with intent to increase the consumption or demand for such merchandise . . . makes . . . circulates or places before the public . . . an advertisement of any sort . . . which advertisement contains any assertion, representation, or statement of fact which is untrue, deceptive or misleading, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive, or misleading . . .

Plaintiffs' bar associations wishfully contend that this criminal statute gives a civil right of recovery to product consumers. But, violation of a penal statute in Massachusetts is merely evidence of negligence, and does not give rise to a tortious cause of action nor to an action for breach of warranty by advertising. Indeed, a 1963 amendment provides for injunctive relief at the hands of the attorney general or the aggrieved party (who is presumably a product competitor who was hurt by the false advertising). The statutory remedy excludes any action at law by a consumer for damages. Indeed, whether a civil action sounds in false advertising,

negligent misrepresentation, or breach of warranty by advertising, the plaintiff consumer must still prove—(a) the product manufacturer made certain representations of fact, (b) which were in fact false; (c) the product manufacturer knew the representation to be false (scienter); and (d) the representations were made with the intent to deceive the plaintiff consumer; (e) the plaintiff consumer relied to his detriment upon the representations, and (f) the plaintiff was in fact free from contributory negligence. Bridging the gap between liability and non-liability cannot be done by artful thinking. The Uniform Commercial Code was not intended to be an instrument for foisting strict liability upon the American product manufacturer. Whatever the social desirability of greater consumer protection, if there is any change to be made, it is for the Legislature and not for the courts to change the law by ignoring pertinent case decisions.