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Strict Liability And Warranty In Consumer Protection: The Broader Protection Of The Ucc In Cases Involving Economic Loss, Used Goods, And Nondangerous Defective Goods

STRICT LIABILITY AND WARRANTY IN CONSUMER PROTECTION: THE BROADER PROTECTION OF THE UCC IN CASES INVOLVING ECONOMIC LOSS, USED GOODS, AND NONDANGEROUS DEFECTIVE GOODS

Shortly after the introduction of section 402A of the Restatement of Torts (section 402A),[1] which provides for strict liability to the consumer, a leading advocate of strict liability predicted that strict liability would become the exclusive consumer protection law and that the word "warranty" soon would pass "quietly down the drain."[2] The prediction has not proved accurate. Lack of agreement among courts over whether strict liability permits consumers to recover economic losses[3] and whether strict liability extends to sales of used goods[4] and goods that are defective but not dangerous[5] indicates that strict liability suffers from doctrinal confusion. In contrast, courts generally agree that the warranties of the Uniform Commercial Code (UCC) permit consumers to recover economic losses[6] and extend to sales of used goods[7] and goods that are defective but not dangerous.[8] Further, recent judicial and legislative developments have restricted and in some cases abolished traditional warranty defenses, such as contractual disclaimers,[9] lack of privity,[10] and lack of notice[11] in consumer warranty actions. A comparison of section 402A and the UCC's warranties in the areas of economic loss, used

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[1] Section 402A of the Restatement of Torts provides:

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

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

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

RESTATEMENT (SECOND) OF TORTS § 402A; *see* text accompanying notes 21-32 *infra* (explanation of § 402A).

[2] Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 804 (1966) [hereinafter cited as *The Fall*]. In a sale of personalty, a warranty is a representation, express or implied, made by the seller as part of a contract of sale, having reference to the character or quality of the goods, and by which the seller promises to insure that certain facts are as the seller represents them to be. Hausken v. Hodson-Feenaughty Co., 109 Wash. 606, 611-12, 187 P. 319, 321-22 (1920).

[3] *See* text accompanying notes 44-50 *infra*.

[4] *See* text accompanying notes 57-63 *infra*.

[5] *See* text accompanying notes 69-77 *infra*.

[6] *See* text accompanying notes 51-56 *infra*.

[7] *See* text accompanying notes 64-68 *infra*.

[8] *See* text accompanying notes 78-85 *infra*.

[9] *See* text accompanying notes 89-117 *infra*.

[10] *See* text accompanying notes 118-38 *infra*.

[11] *See* text accompanying notes 139-60 *infra*.

goods, and nondangerous defective goods shows that the UCC provides consumers with broader protection than strict liability in these areas.

Under the common law, courts generally considered the buyer's acceptance of goods[12] as a waiver or release by the buyer of the seller's responsibility for the quality of the goods.[13] The Uniform Sales Act, adopted in 1906, sought to ameliorate the harshness of this rule by providing that the buyer's acceptance of the goods did not discharge the seller's liability for breach of warranty.[14] Under the Uniform Sales Act, the buyer could recover damages for the seller's breach of express warranties[15] and implied warranties of fitness and merchantability.[16]

The Uniform Sales Act, essentially a codification of contract law,[17] allowed defendants in breach of warranty actions several contract defenses. The defense of lack of contractual privity between the buyer and the seller was the most criticized defense.[18] Other defenses available

[12] Acceptance of goods at common law was the receipt of the goods by the buyer with intention to retain the goods, indicated by some action of the buyer sufficient to show the buyer's intention. Brown & Bigelow v. Bard, 64 Misc. 249, 256, 118 N.Y.S. 371, 376 (1909); Schmidt v. Thomas, 75 Wis. 529, 532, 44 N.W. 771, 772 (1890). Under the Uniform Sales Act and the Uniform Commercial Code (UCC), acts inconsistent with ownership of the goods by the seller constitute acceptance. Uniform Sales Act § 48 (1906); U.C.C. § 2-606.

[13] *See, e.g.*, American Mfg. Co. v. A.H. McLeod & Co., 78 Fla. 162, 164-65, 82 So. 802, 802-03 (1919) (purchaser of defective rope waives defect by acceptance); Liquid Carbonic Co. v. Coclin, 161 S.C. 40, 46, 159 S.E. 461, 463-64 (1931) (purchaser of defective soda fountain waives defect by acceptance). *See generally* 5 S. WILLISTON, CONTRACTS § 708 (3d ed. 1961) [hereinafter cited as WILLISTON]; 8 WILLISTON, *supra*, § 983. The special food warranty was an exception to the rule that the seller was not responsible for the quality of his product after the buyer's acceptance. The food warranty allowed a consumer of adulterated food to hold the seller of the food liable for the consumer's physical injuries without proving the seller's negligence. *See generally* H. MELICK, THE SALE OF FOOD AND DRINK 1-32 (1936); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103-10 (1960) [hereinafter cited as *The Assault*].

[14] UNIFORM SALES ACT § 49 (1906). *See generally* 5 WILLISTON, *supra* note 13, § 714.

[15] UNIFORM SALES ACT § 12 (1906). *See generally* 8 WILLISTON, *supra* note 13, § 970. An express warranty arises when the seller represents a fact that induces a customer to purchase the seller's product. Adrian v. Elmer, 178 Kan. 242, 245, 284 P.2d 599, 602 (1955); E.I. Du Pont De Nemours & Co. v. E.L. Bruce Co., 174 Tenn. 148, 156, 124 S.W.2d 243, 246 (1939); *see* text accompanying note 27 *infra* (express warranty under UCC).

[16] UNIFORM SALES ACT § 15 (1906). *See generally* 8 WILLISTON, *supra* note 13, § 981. Implied warranties arise by force of law when the circumstances surrounding the sale, such as the relation between the parties and the subject matter of the sale, justify imposing an obligation on the seller for the quality of his goods. Carmichael v. Lavengood, 112 Ind. App. 144, 150, 44 N.E.2d 177, 180 (1942) (en banc); Rogers v. Toni Home Perm. Co., 167 Ohio St. 244, 249, 147 N.E. 2d 612, 616 (1958); *see* text accompanying notes 28-29 *infra* (implied warranties under UCC).

[17] *See* Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Judicial Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 20-21 (1965) [hereinafter cited as *Judicial Eclipses*] (Uniform Sales Act represents common law of contracts).

[18] *See, e.g.*, James, *Products Liability*, 34 TEX. L. REV. 192, 193-95 (1955) (society's interest in protecting health transcends commercial reasons for adhering to privity requirement); *The Assault*, *supra* note 13, at 1123 (remote seller who solicits consumers to use his products should not escape responsibility for harm caused by his products by saying that consumer lacks privity of contract). *See also* 8 WILLISTON, *supra* note 13, § 998, at 732 n.18.

under the Uniform Sales Act included lack of timely notice by the buyer to the seller of the seller's breach of warranty[19] and the defense of contractual disclaimer of warranties.[20] These defenses sometimes allowed manufacturers of defective products to escape liability for damages caused by their defective products.[21]

The UCC was adopted in 1952 in response to the inadequacy of the Uniform Sales Act to deal with modern commercial problems.[22] While the purpose of the Uniform Sales Act was to codify contract law,[23] the drafters of the Uniform Commercial Code intended to modernize the law of commercial transactions and to bring the law into line with current business practices,[24] even to the point of rejecting classic contract prin-

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Privity of contract is the relation that exists between two or more contracting parties. Bonfils v. McDonald, 84 Colo. 325, 332, 270 P. 650, 653 (1928). *See generally* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 9-24 (1980) [hereinafter cited as EPSTEIN].

[19] *See* UNIFORM SALES ACT § 49 (1906) (seller not liable for breach if buyer fails to give seller notice of breach within reasonable time). *See generally*, 8 WILLISTON, *supra* note 13, § 993; *see also* text accompanying note 140 *infra* (requirement of notice under UCC).

[20] *See* Cudahy, *Limitation of Warranty Under the Uniform Commerical Code*, 47 MARQ. L. REV. 127, 127 (1963); Jaeger, *How Strict is the Manufacturer's Liability?*, 48 MARQ. L. REV. 293, 312 (1964). The Unform Sales Act did not have a specific provision dealing with disclaimers, but contained a general section authorizing disclaimers. UNIFORM SALES ACT § 71 (1906); Cudahy, *supra*, at 127; Jaeger, *supra*, at 312. *See gnerally* 8 WILLISTON, *supra* note 13, § 993A. Disclaimers of warranties limit the seller's liability by limiting the situations in which the seller can be in breach of warranty. Gladden v. General Motors Corp., 83 N.J. 320, 330, 416 A.2d 394, 399 (1980); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-11, at 471-72 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS]; *see* text accompanying notes 89-107 *infra* (disclaimers under UCC). Disclaimers should be distinguished from limitations on remedies, which restrict the remedies available to the buyer once a breach occurs. 83 N.J. at 330, 416 A.2d at 399; WHITE & SUMMERS, *supra*, § 12-11, at 471-72.

[21] *See, e.g.*, Chanin v. Chevrolet Motor Co., 15 F. Supp. 57, 58-59 (N.D.Ill. 1935) (manufacturer of defective windshield escaped liability because consumer was not in contractual privity with manufacturer), *aff'd*, 89 F.2d 889 (7th Cir. 1937); Chiquita Mining Co. v. Fairbanks, Morse & Co., 60 Nev. 142, 153, 104 P.2d 191, 195 (1940) (seller of defective machine escaped liability by successfully asserting contractual disclaimer); Aaron Bodek & Son v. Avrach, 297 Pa. 225, 228-29, 146 A. 546, 547-48 (1929) (seller of defective blankets escaped liability by successfully asserting that buyer did not give notice of breach within reasonable time).

[22] *See* Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968, 973 (Del. 1980) (UCC grew from recognition that current laws were inadequate to deal with modern business practices); Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 372-73 (1957) [hereinafter cited as Llewellyn] (legislative and administrative developments made Uniform Sales Act obsolete); Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 2 (1967) (Uniform Sales Act failed to keep up with changing business practices).

[23] *See The Assault, supra* note 13, at 1128-29 (Uniform Sales Act was a codification of common law rules); *Judicial Eclipses, supra* note 17, at 20-21 (Uniform Sales Act was codification of common law of sale contracts).

[24] *See* Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968, 973 (Del. 1980) (major concern of UCC is to establish sales law to deal effectively with contemporary realities); U.C.C. § 1-102(2)(A) (underlying purpose of UCC is to modernize law governing commerical transactions); Llewellyn, *supra* note 22, at 372-73 (UCC makes unwieldy modern commercial law accessible and clear).

ciples.[25] In particular, the drafters of the UCC completely rewrote the sections of the Uniform Sales Act regarding warranties.[26] A person injured by a defective product has three possible warranties under the Uniform Commercial Code through which he may recover damages. If a seller makes a promise or affirmation of fact about goods which becomes part of the basis of the bargain, the seller has made an express warranty that the goods conform to the promise or affirmation.[27] If the seller knows the purpose for which the buyer requires the goods, and that the buyer is relying on him to furnish suitable goods, an implied warranty arises that the goods are fit for the buyer's particular purpose.[28] If a seller is a merchant with respect to goods of the kind, an implied warranty of merchantability arises that the goods are fit for the ordinary purposes for which buyers use such goods.[29] Despite its inclusion of the criticized contract defenses of privity, notice, and disclaimer, every state except Louisiana has adopted the UCC.[30]

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[25] *See Judicial Eclipses, supra* note 17, at 21 & n.57 (UCC rules relating to form, formation, and modification of sales contract replace common-law rules). In addition to rejecting some contract principles, the UCC adds new doctrines that extend sales law beyond contracts. *Id.*; *see, e.g.*, U.C.C. § 1-203 (obligation of good faith in performance of contracts); U.C.C. § 2-302 (relief from unconscionable contracts); U.C.C. § 2-316 (limitations on seller's ability to limit buyer's warranties).

[26] *See* 8 WILLISTON, *supra* note 13, § 982, at 536 (UCC warranty sections are significantly different from Uniform Sales Act warraty sections); Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 796-801 (1953) (UCC warranty sections reflect modern case law).

[27] U.C.C. § 2-313; *see, e.g.*, Drayton v. Jiffee Chem. Corp., 591 F.2d 352, 358-59 (6th Cir. 1978) (newspaper and television advertisements created express warranty that drain cleaner was safe for consumers to use); Valley Datsun v. Martinez, 578 S.W.2d 485, 490 (Tex. Civ. App. 1979) (used car salesman created express warranty by telling purchaser that car was in excellent condition). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.04[4] (1981) [hereinafter cited as FRUMER & FRIEDMAN]; WHITE & SUMMERS, *supra* note 20, §§ 9-2 to -5, at 327-32; *see also* RESTATEMENT (SECOND) OF TORTS § 402B (tort liability for express representation).

[28] U.C.C. § 2-315; *see* Addis v. Bernardin, Inc., 226 Kan. 241, 245, 597 P.2d 250, 254 (1979). In *Addis*, the seller knew that the buyer wanted jar lids to accompany containers of the buyer's highly acidic salad dressing and that the buyer was relying upon the seller to furnish appropriate lids. *Id.* at 246, 597 P.2d at 254. The seller, however, furnished the buyer with jar lids that were not compatible with acidic products. *Id.* The lids failed to seal the jars adequately, and the buyer recovered damages for the seller's breach of the seller's implied warranty of fitness for particular purpose. *Id. See generally* WHITE & SUMMERS, *supra* note 20, § 9-9, at 257-60.

[29] U.C.C. § 2-314. The UCC provides that merchantable goods are goods that pass without objection in the trade under the contract description; are of fair average quality; are fit for the ordinary purposes for which such goods are used; are of even kind, quality, and quantity; are adequately contained, packaged, and labelled; and conform to any promise made on the container or label. *Id.*; *see* text accompanying note 81 *infra*. *See generally* WHITE & SUMMERS, *supra* note 20, §§ 9-6 to -8. The requirement that the goods must be fit for the ordinary purposes for which such goods are used, U.C.C. § 2-314(2)(c), is the requirement ususally identified with the warranty of merchantibility. WHITE & SUMMERS, *supra* note 20, § 907, at 349, 353.

[30] WHITE & SUMMERS, *supra* note 20, § 1, at 1. A number of commentators have argued that a state's adoption of a comprehensive sales law such as the UCC precludes the courts

To free consumers from the entangling contract defenses surrounding the warranties of the Uniform Sales Act and the UCC,[31] the American Law Institute adopted section 402A in 1965.[32] Section 402A provides that the seller of any dangerously defective product is liable for the physical harm caused to the person or property of the ultimate user of the product.[33] An injured consumer need not show that the seller was negligent,[34] but only that the seller was in the business of selling the product, that the seller put an unreasonably dangerous product on the market, and that the defect caused the consumer physical harm.[35] The justification for extending strict liability to sellers, according to the official commentary to section 402A, is that one who supplies people with products that may endanger their health and property and who encourages the public to rely on the safety of his product should not escape liability when the product proves defective.[36] The commentary further provides that the basis of strict liability in section 402A is tort, and therefore the UCC does not govern strict liability.[37] The defenses of lack of privity,

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from adopting common-law tort theories such as strict liability which seek to circumvent the statutory sales law. *E.g.*, Dickerson, *Was Prosser's Folly Also Traynor's?*, 2 HOFSTRA L. REV. 469, 469-88 (1974); *Judicial Eclipses, supra* note 17, at 18. *Contra* Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123, 136-42 (1974) [hereinafter cited as *Preemption*]. The Delaware Supreme Court had held that the UCC's provisions on sales pre-empt the adoption of strict liability. Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968 (Del. 1980).

[31] Section 402A, Comment m. The official commentary to section 402A states that warranty was originally a tort theory, but became so closely identified with contract law that the warranty theory became an obstacle to the recognition of the seller's liability. *Id.*; *accord, The Fall, supra*, note 2, at 801.

[32] *See* note 1 *supra* (text of § 402A). *See generally* EPSTEIN, *supra* note 18, at 57-67. The American Law Institute adopted § 402A over the opposition of some of the Institute's members. *See* Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 830-31 (1973) [hereinafter cited as *Nature of Strict Liability*] (describing opposition to the "defective" requirement of § 402A). Schorlarly criticism of § 402A arose immediately after its adoption. *See, e.g., Judicial Eclipses, supra* note 17, at 34-35 (products liability suits should not be classified solely as tort or contract); Smyser, *Products Liability and the American Law Institute: A Petition for a Rehearing*, 42 U. DET. L.J. 343, 345-47 (1965) (case law does not support extension of strict liability beyond food).

[33] Secion 402A; *see, e.g.*, International Harvester Co. v. Chiarello, 27 Ariz. App. 411, 414-15, 555 P.2d 670, 673-74 (1976) (strict liability under § 402A applies to manufacturer of car with defective brakes); Marko v. Stop & Shop, Inc., 169 Conn. 550, 553, 364 A.2d 217, 219-20 (1975) (strict liability under § 402A appilies to manufacturer of soft drink bottle when bottle explodes); *see* text accompanying notes 69-77 *infra* (dangerously defective requirement).

[34] Section 402A (2); *see* Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 329, 319 A.2d 914, 920 (1974). The *Kuisis* court pointed out that strict liability under § 402A looks to the fitness of the defendant's product rather than to the negligence standard of whether the defendant breached his duty of care. *Id.* at 329, 319 A.2d at 920.

[35] Section 402A(1); *accord*, Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 188 (1965); *The Fall, supra* note 2, at 840-42. *See also* text accompanying notes 69-73 *infra* (unreasonably dangerous requirement).

[36] Section 402A, Comment f; *accord, The Fall, supra* note 2, at 799.

[37] Section 402A, Comment m; *accord*, Monsanto Co. v. Thrasher, 463 S.W.2d 25, 27 (Tex. Civ. App. 1970). The *Monsanto* court held that strict liability is a separate remedy

lack of notice, and disclaimers are not available under section 402A.[38] Since the adoption of section 402A, courts enthusiastically have received strict liability. Forty states have adopted strict liability by judicial decision.[39] Four other states have adopted strict liability by statute.[40] Only six states continue to reject strict liability.[41] The widespread acceptance

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from the UCC since strict liability specifically covers the area of consumer protection, which the UCC does not cover adequately. *Id.*

[38] Section 402A, Comments l, m; *accord*, Haugen v. Ford Motor Co., 219 N.W.2d 462, 470-71 (N.D. 1974) (UCC defenses do not limit seller's strict liability).

[39] Fisher v. Bell Helicopter Co., 403 F. Supp. 1165, 1174 (D.D.C. 1975) (by implication); Casrell v. Altec Indus., Inc., 335 So. 2d 128, 132-33 (Ala. 1976) ("extended manufacturer's liability doctrine" provides that manufacturer is negligent as matter of law when manufacturer markets product not reasonably safe for its intended use); Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244, 248 (Alaska 1969); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559-60, 447 P.2d 248, 251-52 (1968) (en banc); Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 61, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1962) (en banc); Hiigel v. General Motors Corp., 190 Colo. 57, 63, 544 P.2d 983, 987 (1975) (en banc); Garthwait v. Burgio, 153 Conn. 284, 289-90, 216 A.2d 189, 192 (1965); West v. Caterpillar Tractor Co., 336 So. 2d 80, 86 (Fla. 1976); Stewart v. Budget Rent-a-Car Corp., 52 Hawaii 71, 75, 470 P.2d 240, 243 (1970); Shields v. Morton Chem. Co., 95 Idaho 674, 676, 518 P.2d 857, 859-60 (1974); Suvada v. White Motor Co., 32 Ill. 2d 612, 617-18, 210 N.E.2d 182, 186-87 (1965); Cornette v. Searjeant Metal Prod., Inc., 147 Ind. App. 46, 52, 258 N.E.2d 652, 655-56 (1970); Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684-85 (Iowa 1970), *aff'd*, 199 N.W.2d 373 (1972); Brooks v. Dietz, 218 Kan. 698, 702, 545 P.2d 1104, 1108 (1976); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441, 446-47 (Ky. 1965); Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 602, 250 So. 2d 754, 755 (1971) (UCC not adopted); Phipps v. General Motors Corp., 278 Md. 337, 340-46, 363 A.2d 955, 957-63 (1976); McCormack v. Hankscraft Co., 278 Minn. 322, 337-38, 154 N.W.2d 488, 500-01 (1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364-65 (Mo. 1969); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513-14, 513 P.2d 268, 272-73 (1973); Kohler v. Ford Motor Co., 187 Neb. 428, 435, 191 N.W.2d 601, 606 (1971) (personal injury only); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 413, 470 P.2d 135, 138 (1970); Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 38-39, 260 A.2d 111, 113 (N.H. 1969); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 59-62, 207 A.2d 305, 311-12 (1965); Stang v. Hertz Corp., 83 N.M. 730, 735, 497 P.2d 732, 737 (1972); Codling v. Paglia, 32 N.Y.2d 330, 342, 345 N.Y.S.2d 461, 469-70, 298 N.E.2d 622, 628-29 (1973); Johnson v. American Motors Corp., 225 N.W.2d 57, 66 (N.D. 1974); Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 322, 364 N.E.2d 267, 270-71 (1977); Kirkland v. General Motors Corp., 521 P.2d 1353, 1360-61 (Okla. 1974); Heaton v. Ford Motor Co., 248 Or. 467, 470, 435 P.2d 806, 807-08 (1967) (en banc); Webb v. Zern, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966); Ritter v. Narragansett Elec. Co., 109 R.I. 176, 188, 283 A.2d 255, 261 (1971); Engberg v. Ford Motor Co., 87 S.D. 196, 205, 205 N.W.2d 104, 109 (1973); Ford Motor Co. v. Lonon, 217 Tenn. 400, 419-20, 398 S.W.2d 240, 248-49 (1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 156-58 (Utah 1979); Zaleskie v. Joyce, 133 Vt. 150, 154-55, 333 A.2d 110, 113-14 (1975); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 531-32, 452 P.2d 729, 734-35 (1969) (en banc) (strict liability extends only to manufacturers); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 680 (W. Va. 1979); Dippel v. Sciano, 37 Wis. 2d 443, 459, 155 N.W.2d 55, 63 (1967).

[40] ARK. STAT. ANN. § 85-2-318.2 (Supp. 1981); GA. CODE ANN. § 105-106 (Supp. 1981); ME. REV. STAT. ANN. tit. 14, § 221 (1980); S.C. CODE § 15-73-10 (1977).

[41] Haste v. American Home Prod. Corp., 577 F.2d 1122, 1124 (10th Cir.) (applying Wyoming law), *cert. denied*, 439 U.S. 955 (1978); Chestnut v. Ford Motor Co., 455 F.2d 967, 969 (4th Cir. 1971) (applying Virginia law); Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968,

of strict liability has prompted some courts to suggest that strict liability has superseded the UCC in products liability cases.[42]

Despite its rapid acceptance, strict liability has failed to develop into the ultimate consumer remedy that its supporters envisioned.[43] The courts have not found strict liability easy to apply. For example, courts disagree on whether strict liability permits consumers to recover economic losses and whether strict liability extends to sales of used goods and goods that are defective but not dangerous.

Several strict liability cases decided before the adoption of section 402A allowed plaintiffs to recover solely economic losses.[44] Section 402A, however, provides only that the seller is liable for the consumer's physical harm.[45] Leading proponents of strict liability have stated that recovery of economic losses, such as loss of bargain and loss of profits, is essentially a contract remedy and therefore is not consistent with strict liability.[46] Accordingly, most courts do not allow consumers to recover economic losses under a strict liability theory.[47] Other courts, however,

980 (Del. 1980); Swartz v. General Motors Corp., 375 Mass. 628, 630-31, 378 N.E.2d 61, 63-64 (1978); Johnson v. Chrysler Corp., 74 Mich. App. 532, 535, 254 N.W.2d 569, 571 (1977); Fowler v. General Elec. Co., 40 N.C. App. 301, 304, 252 S.E.2d 862, 864 (1979).

[42] *See, e.g.*, Sterner Aero AB v. Page Airmotive Inc., 499 F.2d 709, 712 (10th Cir. 1974) (dictum) (many jurisdictions have abandoned implied warranties in favor of strict liability in consumer protection); Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 429, 79 Cal. Rptr. 369, 373 (1969) (dictum) (strict liability virtually has superseded implied warranties in cases involving personal injuries from defective products); *accord*, Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1308 n.77 (1981) [hereinafter cited as Priest] (warranties currently are irrelevant in recovery for personal injury losses because of acceptance of strict liability).

[43] *See generally* Shanker, *A Reexamination of Prosser's Products Liability Crossword Game*, 29 CASE W. RES. L. REV. 550 (1979) [hereinafter cited as *Crossword Game*].

[44] *See, e.g.*, Spence v. Three Rivers Builders & Masonry Supply Inc., 353 Mich. 120, 126, 90 N.W.2d 873, 876 (1958) (plaintiff recovered damages for lost business); Mazetti v. Armour & Co., 75 Wash. 622, 630, 135 P. 633, 636 (1913) (plaintiff recovered damages for loss of business reputation and profits).

[45] Section 402A; *see* note 1 *supra* (text of § 402A).

[46] *See The Fall*, *supra* note 2, at 821-23 (strict liability should not extend liability for loss of bargain to manufacturer since buyer's bargain will depend on dealings between retailer and consumer); *Preemption*, *supra* note 30, at 142 (strict liability should not extend to recovery of economic losses since economic losses are contractual in nature and recovery in tort actions should be confined to physical injuries and consequential damages).

[47] *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 283-86 (Alaska 1976) (buyer of defective mobile home who suffered only economic loss could not recover damages under strict liability theory); Beauchamp v. Wilson, 21 Ariz. App. 14, 17-18, 515 P.2d 41, 44-45 (1973) (buyer of defective diesel truck could not recover economic losses under strict liability theory); Henderson v. General Motors Corp., 152 Ga. App. 63, 64, 262 S.E.2d 238, 239-40 (1979) (buyer of car could not recover economic loss under strict liability theory); *accord*, Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 318, 327 (1973) (applying strict liability to economic losses will deprive the seller of opportunities to allocate commercial risks in contract with buyer). *See generally* Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647 (1977); Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Tort and Contract*, 54 NOTRE DAME LAW. 118 (1978).

have rejected the distinction between physical harm and economic loss and allow the buyer to recover his economic losses from the seller of the defective product.[48] In *Santor v. A&M Karagheusian, Inc.*,[49] for example, the New Jersey Supreme Court permitted a consumer who purchased defective carpeting to recover his damages for loss of bargain under a strict liability theory on the ground that the seller should not escape liability because the consumer suffered an economic loss rather than a personal injury.[50]

In contrast, the UCC permits recovery of economic losses in a breach of warranty case.[51] Recovery of economic losses is possible under the UCC whether the sale of the defective goods was a commercial transaction[52] or a consumer transaction.[53] Some courts have held that the UCC completely pre-empts strict liability in recovery of economic losses.[54] In *Seely v. White Motor Co.*,[55] for example, the California Supreme Court

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[48] *See, e.g.*, Moorman Mfg. Co. v. National Tank Co., 92 Ill. Ap. 3d 136, 139-46, 414 N.E.2d 1302, 1306-11 (1980) (damages for loss of profits due to defective storage tank recoverable under strict liability); Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 604-10, 182 N.W.2d 800, 808-11 (1970) (damages for loss of bargain and cost of making repairs on defective golf carts recoverable under strict liability); City of La Crosse v. Schubert, Schroeder & Assoc., Inc., 72 Wis. 2d 38, 44-45, 240 N.W.2d 124, 127-28 (1976) (cost of making repairs on defective roof recoverable under strict liability).

[49] 44 N.J. 52, 207 A.2d 305 (1964).

[50] *Id.* at 60, 207 A.2d at 309.

[51] *See* U.C.C. § 2-714(2) (plaintiff can recover damages for loss of bargain); U.C.C. § 2-715(2)(a) (plaintiff can recover damages for loss of profits); U.C.C. § 2-715(2)(b) (plaintiff can recover consequential damages for injuries to person or property). *See generally* WHITE & SUMMERS, *supra* note 20, § 11-8, at 414.

[52] *See, e.g.*, Industrial Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793, 803-04 (D. Minn. 1980) (retailer recovered lost profits from manufacturer of defective radios under warranty theory); Western Equip. Co. v. Sheridan Iron Works, Inc., 605 P.2d 806, 810 (Wyo. 1980) (retailer recovered damages for loss of bargain from manufacturer of defective water tank under warranty theory).

[53] *See, e.g.*, Miles v. Kavanaugh, 350 So. 2d 1090, 1093 (Fla. App. 1977) (buyer of defective airplane recovered damages for cost of repair and loss of use under breach of warranty theory); Morrow v. New Moon Homes, Inc., 548 P.2d 279, 289-92 (Alaska 1976) (buyer of defective mobile home recovered damages for loss of bargain under breach of warranty theory). Courts generally interpret privity requirements more strictly when the consumer suffers only economic loss than when the consumer suffers personal injury. *See, e.g.*, Flory v. Silvercrest Indus., Inc., 129 Ariz. 574, 577-79, 633 P.2d 383, 386-88 (1981) (en banc) (lack of privity barred buyer of defective mobile home from recovering economic losses under breach of warranty theory); State *ex rel.* Western Seed Prod. Corp. v. Campbell, 250 Or. 262, 266-68, 442 P.2d 215, 217-18 (1968) (en banc) (lack of privity barred buyer of defective seeds from recovering loss of profits under breach of warranty theory), *cert. denied*, 393 U.S. 1093 (1969). *See generally* WHITE & SUMMERS, *supra* note 20, §§ 11-5 to -6, at 406-10.

[54] *See, e.g.*, Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 161-62 (Minn. 1981) (policies underlying strict liability do not support extending strict liability to economic losses); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 79-83 (Tex. 1977) (strict liability applies only in cases involving physical harm while UCC governs cases involving economic losses).

[55] 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

held that strict liability permits consumers to recover damages only for their physical harm and cannot displace the UCC's provisions governing recovery of economic losses.[56]

In addition to judicial confusion over whether strict liability allows recovery of economic losses, disagreement exists among courts that have adopted strict liability over whether strict liability should extend to sellers of used goods.[57] In *Turner v. International Harvester Co.*,[58] the New Jersey Supreme Court held that strict liability should extend to sellers of used goods since sellers of used goods can spread the cost of insuring against injuries.[59] Some courts, however, have held that strict liability does not extend to sale of used goods for the reason that the buyer of used goods does not have the same reasonable expectation of quality that a buyer of new goods enjoys.[60] Other courts have refused to extend strict liability to sellers of used goods since sellers of used goods cannot pressure manufacturers to make a safer product.[61] In *Peterson v. Lou*

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[56] *Id.* at 14, 45 Cal. Rptr. at 21, 403 P.2d at 149.

[57] *See generally*, Metzger, *Products Liability and the Seller of Used Goods*, 15 AM. BUS. L.J. 159, 161-69 (1977) [hereinafter cited as Metzger]; Note, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805 (1979); Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535 (1981).

[58] 133 N.J. Super. 277, 336 A.2d 62 (1975).

[59] *Id.* at 289, 336 A.2d at 69; *accord*, Hovenden v. Tenbush, 529 S.W.2d 302, 306-10 (Tex. 1975) (§ 402A applies to sellers of used goods as well as sellers of new goods). The official commentary to § 402A suggests that manufacturers can spread the costs of accidents resulting from their products by insuring against such accidents and passing the costs along to their customers as a cost of doing business. Section 402A, Comment f; *accord*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). By spreading the costs of accidents evenly among all consumers, strict liability may benefit those consumers who are relatively careless. *See* Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 706-07 (1980) [hereinafter cited as Owen] (not fair or efficient for prudent consumer to pay to insure his less prudent neighbors); Priest, *supra* note 42, at 1350-51 (consumers who are relatively more careless benefit from cost-spreading theory).

[60] *See, e.g.*, Rix v. Reeves, 23 Ariz. App. 243, 245-46, 532 P.2d 185, 187-88 (1975) (buyer of used wheel rim could not expect same level of quality as buyer of new rim); Tillman v. Vance Equip. Co., 286 Or. 747, 755-56, 596 P.2d 1299, 1303-04 (1979) (sale of used crane does not generate sufficient expectation of safety to justify imposition of strict liability); *accord*, Tauber-Arons Auctioneers Co. v. Superior Court, 101 Cal. App. 3d 268, 279-83, 161 Cal. Rptr. 789, 796-98 (1980) (citing *Tillman* as rule governing sales of used goods in California).

[61] *See* Tillman v. Vance Equip. Co., 286 Or. 747, 756, 596 P.2d 1299, 1304 (1979). The *Tillman* court noted that sellers of used goods, unlike retailers in the original chain of distribution of goods, have no continuing relation with the manufacturer and cannot exert pressure on the manufacturer to reduce the risk of injuries by making a safer product. *Id.*; *accord*, Tauber-Arons Auctioneers Co. v. Superior Court, 101 Cal. App. 3d 268, 283, 161 Cal. Rptr. 789, 798 (1980); *cf.* Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837, 843-44 (Miss. 1971) (seller of used goods does not meet definition of seller in § 402A). *See also* Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1081-1085 (1980) (imposing strict liability on commercial sellers of used goods will raise prices and drive consumers to riskier noncommercial sellers).

Bachrodt Chevrolet Co.,[62] for example, the Illinois Supreme Court refused to extend strict liability to a used car dealer on the ground that a used car dealer, unlike a retailer or wholesaler of a new car, cannot exert pressure on the car's manufacturer to enhance the safety of his product.[63]

In contrast to the confusion over whether strict liability protects a buyer of used goods, the UCC expressly applies to sale of used goods.[64] For example, courts have found that implied warranties arise in sales of used cars, saunas, and icemakers.[65] The official commentary to the UCC, however, provides that sellers of used goods have only such obligations for the quality of the product they sell "as are appropriate to the sale of used goods."[66] Accordingly, courts have held that the seller of used goods does not breach his warranties if he sells goods containing latent defects[67] or defects which the buyer had notice of before the sale.[68]

In addition to disagreeing over whether strict liability permits recovery of economic losses and whether strict liability extends to sellers of used goods, courts also disagree over whether the consumer who seeks to recover damages under a strict liability theory must show that the seller's product was both dangerous and defective.[69] Section 402A requires the consumer to show not only that the seller put a defec-

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[62] 61 Ill. 2d 17, 329 N.E.2d 785 (1975).

[63] *Id.* at 20-21, 329 N.E.2d at 786-87. If a seller of used goods makes substantial changes prior to sale, strict liability will apply. *See* Green v. City of Los Angeles, 40 Cal. App. 3d 819, 833, 115 Cal. Rptr. 685, 697 (1974) (stict liability applies to seller of used crane who made extensive modifications on crane); Realmuto v. Straub Motors, Inc., 65 N.J. 336, 344-45, 322 A.2d 440, 444 (1974) (strict liability applies to used car dealer for damages resulting from defective repairs).

[64] *See generally* Metzger, *supra* note 57, at 170-85; Comment, *UCC Implied Warranty of Merchantability and Used Goods*, 26 BAYLOR L. REV. 630 (1974); Note, *Used Goods and Merchantability*, 13 TULSA L.J. 627 (1978).

[65] *See* McNamara Pontiac, Inc. v. Sanchez, 388 So. 2d 620, 621 (Fla. App. 1980) (used car dealer breached warranty of merchantability by selling defective car); Centennial Ins. Co. v. Vic Tanney Int'l, 46 Ohio App. 2d 137, 144, 346 N.E.2d 330, 335 (1975) (implied warranty of merchantability arises in sale of used sauna heater); Regan Purchase & Sales Corp. v. Primavera, 68 Misc. 2d 858, 860-63, 328 N.Y.S.2d 490, 492-93 (1972) (implied warranty of merchantability arises in sale of used ice-maker).

[66] U.C.C. § 2-314, Comment 3.

[67] *See* Fuquay v. Revels Motors, Inc., 389 So. 2d 1238, 1239-40 (Fla. Dist. Ct. App. 1980). The *Fuquay* court held that the seller of a used car who did not know and could not have known about an alleged design defect in the car did not breach his warranty of mercantability to the buyers. *Id.*

[68] *See* Richards v. Goerg Boat & Motors, Inc., 384 N.E.2d 1084, 1093 (Ind. Ct. App. 1979) (seller of used houseboat did not breach implied warranty of merchantability when buyer had notice of defect prior to sale).

[69] *See generally* FRUMER & FRIEDMAN, *supra* note 27, § 16A[4][g]; Coleman, *Strict Liability in Tort: Defect Need Not Render Product "Unreasonably Dangerous,"* 49 WASH. L. REV. 231 (1973); Owen, *supra* note 59, at 685-91; *Nature of Strict Liability, supra* note 32, at 828-38; Comment, *Elimination of "Unreasonably Dangerous" from Section 402A—The Price of Consumer Safety?*, 14 DUQ. L. REV. 25 (1975).

tive product on the market, but also that the defect made the product unreasonably dangerous.[70] The unreasonably dangerous requirement serves to distinguish cases involving physical injuries from cases involving only economic loss,[71] but the requirements also may prevent a consumer who suffers personal or property damage from recovering under strict liability. For example, a farmer who suffers personal injuries in an accident involving a combine and who seeks to recover damages from the manufacturer of the combine under a strict liability theory must show not only that the combine contained a defect but also that the defect made the combine unreasonably dangerous.[72] Similarly, a homeowner who suffers property damage as a result of a defect in a television must prove not only the existence of a defect but also that the defect made the television unreasonably dangerous in order to recover under strict liability theory.[73]

To relieve the consumer from problems of proof, some courts do not require the consumer who seeks to recover damages under a strict liability theory to prove that the seller's product was both defective and unreasonably dangerous. The California Supreme Court, for example, in *Cronin v. J.B.E. Olson Corp.*,[74] rejected the section 402A requirement

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[70] Section 402A; *see* note 1 *supra* (text of § 402A). The commentary to § 402A provides that strict liabililty will not apply to sellers of products that may be dangerous but that are not unreasonably dangerous. Section 402A, Comment i. For example, butter may be dangerous because it deposits cholesterol in the arteries, but butter is not unreasonably dangerous unless it contains a foreign substance, such as poisonous fish oil. *Id.*

[71] *See Nature of Strict Liability, supra* note 32, at 832. The § 402A requirement that the defect be dangerous distinguishes cases in which the defective product is not harmful, such as a case involving an inoperative radio. *Id.* Such cases are contract problems and strict liability should not apply. *Id.*

[72] *See* Eickelberg v. Deere & Co., 276 N.W.2d 442, 444 (Iowa 1979). The *Eickelberg* plaintiff suffered injury when his hand was caught in the machinery of a combine. *Id.* at 443. He brought a strict liability action against the manufacturer of the combine. *Id.* at 443-44. The trial court instructed the jury that the jury had to find that the combine was unreasonably dangerous to return a verdict for the plaintiff. *Id.* at 444. The jury returned a verdict for the manufacturer, and the plaintiff appealed, claiming that the trial court's instruction was erroneous. *Id.* The Iowa Supreme Court affirmed the trial court's instructions as a correct statement of the doctrine of strict liability. *Id.* at 444-45.

[73] *See* Black v. General Elec. Co., 89 Wis. 2d 195, 201-03, 278 N.W.2d 224, 229-31 (1979). In *Black* a fire, allegedly started by a defective television, destroyed the plaintiff's home. *Id.* at 225. The plaintiff brought a strict liability action against the manufacturer of the television. *Id.* The trial court instructed the jury that the jury had to find that the television was unreasonably dangerous in order to return a verdict for the plaintiff. *Id.* at 226. The jury returned a verdict for the manufacturer, and the plaintiff appealed, claiming that the trial court's instruction was erroneous. *Id.* The Wisconsin Court of Appeals affirmed the trial court's instruction, noting that the unreasonably dangerous requirement is an essential element of a strict liability claim. *Id.* at 230.

[74] 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972) (en banc). In *Cronin*, an aluminum safety hasp holding bread trays broke, allowing the trays to slide from their racks and strike the plaintiff on the back of the head. *Id.* at 124, 104 Cal. Rptr. at 435, 501 P.2d at 1155. The plaintiff sought to recover damages on a strict liability theory, and the trial court entered judgment for the plaintiff. *Id.* at 124-25, 104 Cal. Rptr. at 436, 501 P.2d at

that the buyer must prove that the seller's product was unreasonably dangerous. The *Cronin* court reasoned that the unreasonably dangerous requirement was a relic of negligence liability that was inconsistent with strict liability.[75] Others courts have followed the *Cronin* decision.[76] Most courts, however, reject *Cronin* and continue to require the consumer who seeks to recover damages under a strict liability theory to prove that the seller's product was unreasonably dangerous.[77]

The consumer who seeks to recover damages for breach of warranty under the UCC does not have to prove that the defective product is dangerous.[78] The UCC applies to all transactions in goods,[79] whether or not the goods are dangerous.[80] The consumer who seeks to recover for breach of implied warranty of merchantability can show that the seller's goods are unmerchantable by showing that the goods are not fit for the ordinary purposes for which consumers use such goods.[81] For example, sellers of weak wine, peeling paint, and inoperative radios breach their warranties of merchantability.[82] Similarly, the consumer who seeks to recover for breach of the seller's express warranty does not have to show that the seller's goods are dangerous, but only that the seller's goods did not conform to the seller's promises or descriptions relating to the goods.[83] For example, a seller of mislabeled seeds breaches his ex-

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1156. The defendants appealed on the ground that the hasp was not unreasonably dangerous, and the California Supreme Court affirmed the judgment of the trial court. *Id.* at 127-35, 104 Cal. Rptr. at 438-43, 501 P.2d at 1158-63.

[75] *Id.* at 132-33, 104 Cal. Rptr. at 441-42, 501 P.2d at 1161-62.

[76] *E.g.*, Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 213-14 (Alaska 1975), *modified on other grounds*, 555 P.2d 42 (1976); Azzarello v. Black Bros. Co., 480 Pa. 547, 555-56, 391 A.2d 1020, 1024-27 (1978); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 680, 683 (W. Va. 1979).

[77] *E.g.*, Byrns v. Riddell, Inc., 113 Ariz. 264, 266, 550 P.2d 1065, 1067-68 (1976) (en banc); Kirkland v. General Motors Corp., 521 P.2d 1353, 1362-63 (Okla. 1974); Brown v. Western Farmers Ass'n, 268 Or. 470, 475 & n.5, 521 P.2d 537, 539 & n.5 (Or. 1974) (en banc).

[78] *See* Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L. REV. 205, 215 (1977) (standard of defectiveness in UCC and § 402A differ only in that plaintiff who seeks to recover under § 402A must prove that product was dangerous as well as defective); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 825 (1965) (difference between § 402A and UCC is that § 402A requires that product be dangerous as well as defective).

[79] U.C.C. § 2-102.

[80] Courts have found that the UCC's warranties arise in the sale of a number of nondangerous products. *See* note 65 *supra*; note 82 *infra*.

[81] U.C.C. § 2-314(2)(c); *see* note 29 *supra*.

[82] *See* Regina Grape Prod. Co. v. Supreme Wine Co., 357 Mass. 631, 635, 260 N.E.2d 219, 221 (1970) (seller of weak and discolored wine breached warranty of merchantability); Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171, 172 (Minn. 1978) (per curiam) (seller of paint that peeled permaturely breached warranty of merchantability); Mintz v. Daimler-Benz of North America, Inc., 73 Misc. 2d 212, 214-15, 341 N.Y.S.2d 781, 782-84 (1973) (seller of inoperative radio breached warranty of merchantability).

[83] U.C.C. § 2-313; *see* note 27 *supra*.

press warranty.[84] In some cases, such as inadequately warning label cases, the consumer does not have to show that the product was defective.[85]

Even though the UCC's warranties may provide broader protection to consumers in cases involving economic loss, used goods, and nondangerous defective goods, the consumer's warranty action may be subject to the warranty defenses of contractual disclaimers, lack of privity, and lack of notice. Courts are hostile to these defenses in cases involving consumer transactions, however, and have eroded, and in some cases even abolished, these defenses. Recent judicial and legislative developments, including the Magnuson-Moss Act, have restricted the seller's ability to disclaim or limit the UCC's warranties.[86] The UCC partially removed the strict privity barrier, and courts and legislatures continue steadily to weaken the privity requirements.[87] Finally, the UCC's notice requirements put a minimal burden on the consumer, and courts interpret the notice requirements liberally in favor of consumers.[88]

The UCC permits the seller to disclaim warranties but severely restricts the seller's ability to do so.[89] To disclaim the implied warranty of merchantability, for instance, the disclaimer expressly must mention merchantability.[90] The seller also must make the disclaimer

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[84] *See* Agricultural Serv. Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1064 (6th Cir. 1977) (seller who mislabeled okra seeds breached express warranty created by label on seeds).

[85] *See, e.g.*, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 481-82, 253 S.E.2d 344, 348-49 (1979); Tuttle v. Kelly-Springfield Tire Co., 585 P.2d 1116, 1120 (Okla. 1978). In *Reid*, the plaintiff suffered personal injuries when the aerosol deodorant he was using burst into flames when he struck a match immediately after applying the deodorant. *Id.* at 346. The plaintiff brought an action for breach of implied warranty of merchantability against the seller and the manufacturer of the deodorant on the grounds that the warnings on the can were inadequate. *Id.* at 347. The defendants contended that the plaintiff's action should fail, since the plaintiff failed to show any defect in the deodorant or the can. *Id.* at 348. The North Carolina Supreme Court rejected this argument for the reason that a failure to warn of dangerous propensities of a product could constitute a breach of the warranty of merchantability without a showing of defect. *Id.* at 348-49. In *Tuttle*, the plaintiff sustained personal injuries when a tire on his car had a blowout. 585 P.2d at 1117. The plaintiff brought an action for breach of warranty against the seller and the manufacturer of the tire. *Id.* The defendants argued that the lack of proof of a defect in the tire barred the plaintiff's action. *Id.* at 1120. The Supreme Court of Oklahoma rejected this argument, noting that the absence of a defect is irrelevant to the question of the seller's liability under the UCC for breach of warranty. *Id.* at 1120.

[86] *See* text accompanying notes 89-117 *infra*.

[87] *See* text accompanying notes 118-38 *infra*.

[88] *See* text accompanying notes 139-60 *infra*.

[89] U.C.C. § 2-316. *See generally* WHITE & SUMMERS, *supra* note 20, §§ 12-2 to -6, at 429-57.

[90] U.C.C. § 2-316(2); *see, e.g.*, Jackson v. H. Frank Olds, Inc., 65 Ill. App. 3d 571, 578-79, 382 N.E.2d 550, 555 (1978) (disclaimer of implied warranty of merchantability in sale of used car not effective since merchantability not mentioned in sales contract); Butcher v. Garrett-Enumclaw Co., 20 Wash. App. 361, 370, 581 P.2d 1352, 1359 (1978) (disclaimer of implied war-

conspicuous.[91] Disclaimers in small print[92] or on the back of a sales contract[93] are not conspicuous.

Since the seller prepares the disclaimer, courts construe disclaimers strictly against the seller in consumer transactions.[94] For example, courts carefully scrutinize consumer transactions to see if the consumer actually understood the purpose and terms of any disclaimers, and will find a disclaimer ineffective if the disclaimer did not become part of the bargain between the parties.[95] In *McNamara Pontiac, Inc. v. Sanchez*,[96] for instance, the court found that a disclaimer in a contract for the sale of an automobile was not effective when the buyer's English illiteracy prevented him from understanding the terms of the disclaimer.[97]

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ranty of merchantability in sale of portable sawmill not effective since merchantability not mentioned in sales contract). The seller can disclaim the implied warranty of fitness for a particular purpose by a conspicuous writing. U.C.C. § 2-316(2); *see* Billing v. Joseph Harris Co., 290 N.C. 502, 507-08, 226 S.E.2d 321, 324 (1976) (seller excluded warranty of fitness for particular purpose in contract for sale of seeds). Disclaimers of express warranties are very difficult for the seller to make. Any limitation or modification of express warranties is inoperative to the extent that it conflicts with the express warranty. U.C.C. § 2-316; *see* Woodruff v. Clark County Farm Bureau Coop. Ass'n, 153 Ind. App. 31, 51-52, 286 N.E.2d 188, 200 (1972) (disclaimer in contract for sale of chickens was unreasonable since disclaimer conflicted with seller's express warranty). The seller also can disclaim implied warranties by use of such phrases as "with all faults" or "as is" in the sales contract. U.C.C. § 2-316(3)(a); *see* Koperski v. Husker Dodge, Inc., 208 Neb. 29, 42-43, 302 N.W.2d 655, 662-63 (1981) (seller disclaimed implied warranties in contract for sale of car when contract provided that buyer took car "as is").

[91] U.C.C. § 2-316(2).

[92] *See, e.g.*, Transcontinental Refrig. Co. v. Figgins, 585 P.2d 1301, 1305-06 (Mont. 1978) (disclaimer in type no larger than rest of contract not conspicuous); Victor v. Mammana, 101 Misc. 2d 954, 955-56, 422 N.Y.S.2d 350, 351-52 (1979) (disclaimer in small print on label of can not conspicuous).

[93] *See, e.g.*, R.C. Durr Co. v. Bennett Indus., Inc., 590 S.W.2d 338, 340 (Ky. App. 1979) (disclaimer on back of sales contract not conspicuous); Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009, 1011-12 (1976) (disclaimer on back of contract not conspicuous since seller did not call disclaimer to buyer's attention).

[94] *E.g.*, Hauter v. Zogarts, 14 Cal. 3d 104, 114, 120 Cal. Rptr. 681, 690, 534 P.2d 377, 386 (1975) (dictum) (en banc); Woodruff v. Clark County Farm Bureau Coop. Ass'n, 153 Ind. App. 3d 31, 45, 286 N.E.2d 188, 196 (1972) (dictum).

[95] *See, e.g.*, Eichenberger v. Wilhelm, 244 N.W.2d 691, 697 (N.D. 1976) (disclaimer on label of herbicide not effective when not brought to buyer's attention); DeCoria v. Red's Trailer Mart, Inc., 5 Wash. App. 892, 896, 491 P.2d 241, 243-44 (1971) (disclaimer in contract for sale of mobile home not effective when not explicitly negotiated between buyer and seller).

[96] 388 So. 2d 620 (Fla. Dist. Ct. App. 1980). Shortly after the plaintiff purchased a used car, the car caught fire and was destroyed. *Id.* at 621. The plaintiff brought an action against the seller of the car for breach of implied warranty, and the seller claimed that the disclaimer of warranties in the sales contract barred the buyer's action. *Id.*

[97] *Id.*; *accord*, Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 142-44, 302 N.Y.S.2d 390, 393-95 (Civ. Ct. N.Y. 1969) (sales contract unconscionable and unenforceable when buyer's English illiteracy prevented buyer from understanding disclaimers). *But see* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 523 (1967) (general unconscionability provisions should not apply to disclaimer that meets requirement of UCC § 2-316).

The UCC permits sellers to limit the consumer's remedies and to disclaim the existence of warranties,[98] but the UCC is stricter in allowing limitations on remedies than in allowing disclaimers of warranties.[99] For example, the UCC does not allow the seller to limit his remedies in an unconscionable manner.[100] Limitations on the seller's consequential damages presumptively are unconscionable when the consumer suffers personal injuries,[101] but not when the consumer suffers only economic loss or property damage.[102]

In addition to not allowing enforcement of unconscionable limitations of remedies, the UCC disallows enforcement of a limited remedy if the remedy fails of its essential purpose.[103] A limited remedy fails of its

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[98] U.C.C. § 2-719. *See generally* WHITE & SUMMERS, *supra* note 20, §§ 12-8 to -12, at 462-85.

[99] *See* Herbstman v. Eastman Kodak Co., 131 N.J. Super. 439, 445-46, 330 A.2d 384, 387-88 (1974), *rev'd on other grounds*, 68 N.J. 1, 342 A.2d 181 (1975). The *Herbstman* court stated that the fact that the UCC distinguishes limitations of remedies from disclaimers of warranties indicates that courts should construe limitations on remedies more carefully than disclaimers of warranties. 131 N.J. Super. at 445-46, 330 A.2d at 387-88; *accord*, Tuttle v. Kelly-Springfield Tire Co., 585 P.2d 1116, 1119 (Okla. 1978) (citing *Herbstman* for proposition that UCC is stricter in allowing limitations on remedies than disclaimers of warranties).

[100] U.C.C. § 2-719(3). *See generally* WHITE & SUMMERS, *supra* note 20, § 12-11, at 471-81.

[101] U.C.C. § 2-719(3); *see, e.g.*, Ford Motor Co. v. Tritt, 244 Ark. 883, 889, 430 S.W.2d 778, 781-82 (1968) (limitation of consequential damages in sale of truck was unconscionable when defect in truck caused buyer's death); Tuttle v. Kelly-Springfield Tire Co., 585 P.2d 1116, 1118-20 (Okla. 1978) (limitation of consequential damages in contract for sale of tire was unconscionable when defect in tire caused personal injury). Consenquential damages are damages which do not flow directly from the acts of the repudiating party, but are the indirect results of such acts. Petroleo Brasileiro, S.A. v. Ameropan Oil Corp., 372 F. Supp. 503, 508 (E.D.N.Y. 1974); U.C.C. § 2-715(2). Incidental damages, on the other hand, are damages normally incurred when a buyer or seller repudiates his contract. 372 F. Supp. at 508; U.C.C. § 2-715(1).

[102] *See, e.g.*, Orr Chevorlet, Inc. v. Courtney, 488 S.W.2d 883, 886-87 (Tex. Civ. App. 1972) (contractual limitation of consequential damages barred recovery for loss of use due to defect in car); Kleven v. Geigy Agric. Chem., 303 Minn. 320, 327-29, 227 N.W.2d 566, 571-72 (1975) (limitation of consequential losses in contract for sale of chemicals barred buyer's recovery for crop loss due to failure of chemical). Limitations of consequential damages for commercial losses are not presumptively unconscionable, but a court can find such limitations to be unconscionable. *See, e.g.*, Select Pork, Inc. v. Babcock Swine, Inc., 640 F.2d 147, 149-50 (8th Cir. 1981); Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20, 22-23 (M.D. Ala. 1975); Frank's Maintenance & Eng'r, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 989, 408 N.E.2d 403, 409-11 (1980). The *Select Pork* court found that the seller's limitation on consequential damages in a contract for the sale of swine was unconscionable since the sellers were just entering the swine production field and knew that they might not be able to produce enough swine to meet their contract obligations. 640 F.2d at 149-50. In *Majors v. Kalo Laboratories, Inc.*, the court found that the seller's limitation on consequential losses was unconscionable since the sellers were manufacturers of a new agricultural chemical of questionable effectiveness and the farmers who purchased the chemical faced potentially devastating commercial losses. 407 F. Supp. at 22-23. The *C.A. Roberts* court found that a limitation on the sellers' liability for consequential damages was unconscionable when the limiting clause was not conspicuous and not made known to the buyer, and the defects in the goods, steel tubing, were latent. 86 Ill. App. 3d at 989, 408 N.E.2d at 409-11.

[103] U.C.C. § 2-719(2).

essential purpose when the remedy deprives the buyer of the substantial value of his bargain.[104] A contract for the sale of a new car, for example, may make repair and replacement of defective parts the exclusive remedy. If the car has so many defects that the car is constantly in the repair shop, the fact that the buyer's use of the car is limited may deprive the buyer of the substantial value of his bargain.[105] Similarly, limitation of the remedy of defects discovered within a week of sale may deprive the buyer of the substantial value of his bargain, since latent defects may not appear until after a week.[106] If the limited remedy fails, the general remedies of the UCC, including incidental and consequental damages, are available to the consumer.[107]

While the UCC restricts the seller's ability to disclaim warranties and limit remedies, several state legislatures have gone further and made disclaimers and limitations ineffective in consumer transactions.[108] West Virginia, for example, prohibits exclusions, modifications, or limitations of warranties in consumer transactions.[109] Ten other states have restricted the seller's ability to disclaim or modify warranties.[110]

In addition to state legislation, Congress has bolstered the UCC's implied warranties through the Magnuson-Moss Warranty Act.[111] The Mag-

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[104] *Id.* at Comment 2.

[105] *See, e.g.*, Goddard v. General Motors Corp., 60 Ohio St. 2d 41, 45-48, 396 N.E.2d 761, 765 (1979) (exclusive remedy of repair and replacement failed of its essential purpose when car was riddled with defects); Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 420-22, 265 N.W.2d 513, 520-23 (limited remedy of repair or replacement failed of its essential purpose when motor home was in constant need of repair). *But see* Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App. 1972). In *Lankford*, the plaintiff claimed that the exclusive remedy of repair failed since his car was in the repair shop 45 days for 50 defects during the first 18 months of use. *Id.* at 249. The court denied the plaintiff's claim, noting that the warrantor repaired each defect promptly. *Id.* at 251.

[106] *See* Wilson Trading Corp. v. David Ferguson Ltd., 23 N.Y.2d 398, 403-05, 297 N.Y.S.2d 108, 112-13, 244 N.E.2d 685, 691 (1968) (latent defects in unprocessed yarn made 10 day limit on notice fail of its essential purpose); *cf.* Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205, 1217-18 (3d Cir.) (15 day limitation on discovering and reporting latent defects in chemical resins was unreasonable and unenforceable), *cert. denied*, 400 U.S. 826 (1970).

[107] U.C.C. § 2-719(2); *see* Devore v. Bostrom, 632 P.2d 832, 834-35 (Utah 1981). In *Devore*, the limited remedy of return of the purchase price, stipulated in a contract for sale of a new car, failed of its essential purpose when the seller failed to return the buyer's purchase price within two months. *Id.* The court found that since the limited remedy failed the buyer could recover incidental and consequential damages under the general remedy provisions of the UCC. *Id.* at 835.

[108] *See generally* Millspaugh & Coffinberger, *Sellers' Disclaimers of Implied Warranties: The Legislatures Strick Back*, 13 U.C.C. L.J. 160 (1979).

[109] W. VA. CODE § 46A-6-107 (1980).

[110] ALA. CODE § 7-2-316(5) (1977); CAL. CIV. CODE § 1792.4 (West 1973); KAN. STAT. ANN. § 50-639(c) (1976); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (1981); MD. COM. LAW CODE ANN. § 2-316.1 (Supp. 1981); MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1980); MISS. CODE ANN. § 11-7-18 (Supp. 1981); MINN. STAT. ANN. § 325G.18(2) (West Supp. 1981); VT. STAT. ANN. tit. 9A, § 2-316(5) (1978); WASH. REV. CODE ANN. § 62A.2-316, -719(3) (1981).

[111] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1976) (Magnuson-Moss Act). *See generally* Eddy, *Effects of the*

nuson-Moss Warranty Act provides that if the seller offers any written warranties on a consumer product, the seller cannot disclaim or limit any implied warranties.[112] The seller can restrict the duration of the implied warranties to the duration of the written warranties if the seller sets forth the limitation in clear, unmistakable language and prominently displays the limitation on the face of the written warranty.[113] If a seller provides a full warranty to consumers, however, the seller cannot limit the duration of the written warranties.[114] Under the Magnuson-Moss Warranty Act, the consumer has a private right of action in state or federal court.[115] State law defines the nature of the damages the consumer may recover,[116] but the Magnuson-Moss Act gives the successful plaintiff costs and expenses, including attorneys' fees.[117]

Another defense to the consumer's warranty action other than contractual disclaimer is lack of privity.[118] At common law, courts con-

Magnuson-Moss Act Upon Consumer Product Warranties, 55 N.C. L. REV. 835 (1977); Smith, *The Magnuson-Moss Warranty Act: Turning the Table on Caveat Emptor*, 13 CAL. W. L. REV. 391 (1977); Comment, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code*, 62 CORNELL L. REV. 738 (1977).

[112] U.S.C. § 2308(a) (1976). An implied warranty under the Magnuson-Moss Act means a warranty arising under state sales law. *Id.* § 2301(7); *see, e.g.*, U.C.C. § 2-314 (implied warranty of merchantability); U.C.C. § 2-315 (implied warranty of fitness for particular purpose); *see* Ventura v. Ford Motor Co., 180 N.J. Super. 45, 62, 433 A.2d 801, 807-10 (1981) (disclaimer of implied warranties in sale of new car was invalid under Magnuson-Moss Act).

[113] 15 U.S.C. § 2308(b) (1976).

[114] *Id.* § 2304(a)(2) (1976). The Magnuson-Moss Act does not require the seller to give any warranties. *See* Gates v. Chrysler Corp., 397 So. 2d 1187, 1189 (Fla. App. 1981) (Magnuson-Moss Act does not apply unless seller attempts to restrict, modify, or disclaim implied warranties). The intent of the authors of the Magnuson-Moss Act was to force sellers, through competitive pressures, to offer full warranties. *See* 120 CONG. REC. 40, 172 (1974) (remarks of Sen. Magnuson). A full warranty is a warranty that meets the federal minimum standards for warranties. 15 U.S.C. § 2303(a)(1). To meet the federal minimum standards for warranties, the warrantor must remedy the defective product within a reasonable time and without charge, not impose any limitation on the duration of any implied warranty, not exclude or limit consequential damages for breach of warranty unless the exclusion conspicuously appears on the face of the warranty, and permit the consumer to elect either a refund for or replacement of the defective product. *Id.* § 2304(a).

[115] 15 U.S.C. § 2310(d)(1) (1976). State law defines the extent to which a consumer who is not in contactual privity with a manufacturer can bring a breach of warranty action against the manufacturer. *See* Mendelson v. General Motors Corp., 105 Misc. 2d 346, 352, 432 N.Y.S.2d 132, 136 (N.Y. Sup. Ct. 1980) (state law controls vertical privity since warranties arise from state law), *aff'd*, 441 N.Y.S.2d 410 (1981); text accompanying notes 129-30 *infra* (distinction between vertical and horizontal privity).

[116] *See* Novosel v. Northway Motor Car Corp., 460 F. Supp. 541, 545 (N.D.N.Y. 1978) (state law determines applicable damages in breach of warranty action under Magnuson-Moss Act).

[117] 15 U.S.C. § 2310(d) (1976); *see* Oswald v. General Motors Corp., 594 F.2d 1106, 1136-37 (7th Cir.) (dictum), *cert. denied*, 444 U.S. 870 (1979). The *Oswald* court noted that the Magnuson-Moss Act provides the consumer with a more adequate remedy than is otherwise available under the UCC, since the successful plaintiff in a breach of warranty action brought under the Magnuson-Moss Act can recover the costs of litigation from the defendant. *Id.*

[118] *See* note 18 *supra* (definition of privity). *See generally* EPSTEIN, *supra* note 18, at 9-24.

sidered the seller's warranty to be contractual in nature and permitted only the one in contractual privity, the seller's immediate buyer who had made a sales contract with the seller, to sue the seller for breach of his warranty.[119] The UCC abolished the strict privity rule and extends the seller's warranty beyond the buyer of the goods.[120] The UCC provides three alternative provisions to govern privity, Alternatives A, B, and C.[121] Alternative A, which most states have adopted,[122] extends the seller's warranties beyond the buyer to members of the buyer's family, his household, or guests in his home who suffer personal injury as a result of the seller's breach of warranty.[123] Alternative B, which six states have adopted,[124] extends the seller's warranties beyond the buyer to any natural person whom the seller reasonably may expect to use, consume, or be affected by the goods and who suffers personal injuries as a result of the seller's breach of warranty.[125] Alternative C is similar to Alternative B with the difference that Alternative C extends the seller's warranties to buyers who suffer any injury from the seller's breach, while Alternative B extends the seller's warranties only to buyers who suffer personal injuries. Alternative C, which eleven states have adopted,[126] is identical to Alternative B excpet that the injured per-

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[119] Trnas World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 482, 148 N.Y.S.2d 284, 287 (1955) (dictum). *See generally* 8 WILLISTON, *supra* note 13, § 998.

[120] *See* U.C.C. § 2-318 (extension of UCC warranties to consumers not in contractual privity with seller). *See generally* WHITE & SUMMERS, *supra* note 20, §§ 11-3 to -7, at 401-11.

[121] U.C.C. § 2-318, Alternatives A, B, and C.

[122] ALASKA STAT. § 45.02.318 (1980); ARIZ. REV. STAT. ANN. § 44-2335 (1967); ARK. STAT. ANN. § 85-2-318 (1961); CONN. GEN. STAT. ANN. § 42a-2-318 (West Supp. 1980); D.C. CODE ANN. § 23:2-318 (1981); FLA. STAT. ANN. § 672.318 (West Supp. 1981) (includes employees, servants, and agents of buyer); GA. CODE ANN. § 109A-2-318 (1979); IDAHO CODE § 23-2-318 (1980); ILL. ANN. STAT. ch. 26, § 2-318 (Smith-Hurd 1963); IND. CODE ANN. § 26-1-2-318 (Burns 1974); KY. REV. STAT. ANN. § 355-2-318 (Baldwin 1972); MICH. COMP. LAWS ANN. § 440.2318 (1967); MISS. CODE ANN. § 75-2-318 (1981); MO. ANN. STAT. § 400.2-318 (Vernon 1965); MONT. REV. CODE ANN. § 87A-2-318 (1964); NEB. REV. STAT. § 2-318 (1971); NEV. REV. STAT. § 104.2318 (1973); N.J. STAT. ANN. § 12A:2-318 (West 1962); N.M. STAT. ANN. § 55-2-318 (1978); N.C. GEN. STAT. § 25-2-318 (1965); OHIO REV. CODE ANN. § 1302.31 (Page 1979); OKLA. STAT. ANN. tit. 12A, § 2-318 (West 1963); OR. REV. STAT. § 72.3180 (1977); PA. STAT. ANN. tit. 13, § 2318 (Purdon Supp. 1981); TENN. CODE ANN. § 47-2-318 (1979); WASH. REV. CODE ANN. § 62A:2-318 (1966); W. VA. CODE § 46-2-318 (1966); WIS. STAT. ANN. § 402.318 (West 1969).

[123] U.C.C. § 2-318, Alternative A. *See generally* Cochran, *Emerging Products Liability Under Section 2-318 of the Uniform Commercial Code: A Survey*, 29 BUS. LAW. 925, 926-29 (1974) [hereinafter cited as Cochran].

[124] ALA. CODE § 7-2-318 (1977); DEL. CODE ANN. tit. 6, § 2-318 (1975) (personal injury not required); KAN. STAT. ANN. § 84-2-318 (Supp. 1981); N.Y.U.C.C. § 2-318 (McKinney Supp. 1981); S.C. CODE § 36-2-318 (1977) (warranties extend to personal and property damage); VT. STAT. ANN. tit. 9A, § 2-318 (1966).

[125] U.C.C. § 2-318, Alternative B. *See generally* Cochran, *supra* note 123, at 929-31.

[126] COLO. REV. STAT. § 4-2-318 (1974); HAWAII REV. STAT. § 490:2-318 (1976); IOWA CODE ANN. § 554.2318 (West Supp. 1980); MINN. STAT. ANN. § 336.2-318 (West Supp. 1980); N.H. REV. STAT. ANN. § 382-a:2-318 (Supp. 1977); N.D. CENT. CODE § 41-02-35 (1968); R.I. GEN. LAWS § 6A-2-318 (Supp. 1981); S.D. COMP. LAWS ANN. § 57A-2-318 (1980); UTAH CODE ANN. § 70A-2-318 (1980); VA. CODE § 8.2-318 (1975); WYO. STAT. § 34-21-235 (1977).

son may recover damages for any injury, personal or economic.[127] A beneficiary of warranties under any of these alternatives can bring a direct action against the seller.[128]

The UCC extends the seller's warranties horizontally, from the buyer of the goods to other consumers or users of the goods.[129] The extent to which warranties extend vertically, or from the manufacturer and wholesaler to the ultimate user of the goods, depends upon the development of case law in each jurisdiction.[130] Many courts have gone beyond the UCC and abolsihed lack of vertical privity as a defense in breach of warranty cases, permitting consumers to bring breach of warranty actions directly against remote sellers.[131] For example, in *Morrow v. New Moon Homes, Inc.*,[132] the Alaska Supreme Court expressly abolished the vertical privity requirement in sales of consumer goods and permitted a purchaser of a mobile home, who purchased the mobile home from a retailer, to recover damages directly from the manufacturer for breach of implied warranty.[133] Eight states have adopted statutes abolishing lack of privity as a defense in consumers' breach of warranty actions.[134]

While the trend is toward abolishing privity requirements,[135] some courts continue to restrict the consumer's ability to bring an action for breach of implied warranty.[136] A consumer generally does not need to be

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[127] U.C.C. § 2-318, Alternative C. *See generally* Cochran, *supra* note 123, at 931-34.

[128] U.C.C. § 2-318, Comment 2.

[129] *See* Morrow v. New Moon Homes, Inc., 548 P.2d 279, 287-88, 288 n.25 (Alaska 1976) (UCC extends horizontal privity but is silent on vertical privity). *See generally* WHITE & SUMMERS, *supra* note 20, § 11-3, at 403.

[130] *See* Kassab v. Central Soya, 432 Pa. 217, 234, 246 A.2d 848, 855-56 (1968) (UCC leaves extent of vertical privity to courts). *See generally* WHITE & SUMMERS, *supra* note 20, § 11-3, at 403.

[131] *E.g.*, Bishop v. Sales, 336 So. 2d 1340, 1341-44 (Ala. 1976); Pusi v. Union Supply Co., 38 Colo. App. 435, 445, 561 P.2d 355, 363 (1976) (by implication), *aff'd*, 196 Colo. 162, 583 P.2d 276 (1978) (en banc); Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 113-15, 244 N.W.2d 105, 107-10 (1976); Kassab v. Central Soya, 432 Pa. 217, 232-35, 246 A.2d 848, 855-56 (1968).

[132] 548 P.2d 279 (Alaska 1976).

[133] *Id.* at 287-89.

[134] ARK. STAT. ANN. § 85-2-318.1 (West Supp. 1981); ME. REV. STAT. ANN. tit. 11, § 2-318 (Supp. 1981); MD. COM. LAW CODE ANN. § 2-318 (1975); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1979); MISS. CODE ANN. § 11-7-20 (Supp. 1981); N.H. REV. STAT. ANN. § 382-A:2-318 (Supp. 1977); TENN. CODE ANN. § 29-34-104 (1980); W. VA. CODE § 46A-6-108 (1980).

[135] *See generally* 2 FRUMER & FRIEDMAN, *supra* note 27, Introduction, § [1][6]; WHITE & SUMMERS, *supra* note 20, § 11-7, at 411; Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. L. REV. 1 (1963).

[136] *See, e.g.*, Watkins v. Barber-Colman Co., 625 F.2d 714, 716 (5th Cir. 1980) (applying Georgia law) (absence of privity prevented employee of purchaser from recovering damages for breach of warranty from seller of allegedly defective machinery); Chance v. Richards Mfg. Co., 499 F. Supp. 102, 103-05 (E.D. Wash. 1980) (absence of privity prevented purchaser of allegedly defective hip prosthesis from recovering damages against manufacturer of prosthesis for breach of warranty).

in privity with a seller, however, to bring an action for breach of express warranty.[137] In a state whose courts restrictively interpret privity requirements for implied warranty actions, therefore, consumers may have broader protection under express warranties than implied warranties.[138]

In addition to the defenses of lack of privity and contractual disclaimers, the seller may rely on the buyer's failure to give notice of breach as a defense to a breach of warranty action.[139] The UCC provides that the buyer must give notice of breach to the seller within a reasonable time after the buyer discovers or should have discovered the breach or the buyer will be barred from any remedy.[140] However, the UCC distinguishes a reasonable time in the case of a consumer from a reasonable time in the case of a merchant buyer.[141] The purpose of notice, the official commentary states, is to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.[142] A reasonable time in the case of a consumer, therefore, is a longer time than a reasonable time in the case of a merchant buyer.[143]

In cases involving personal injuries to consumers, courts have extended and in some cases have abolished the notice requirement for the reason that in such cases notice would not give the seller an opportunity to cure or to minimize damages.[144] Other courts consider a buyer's prompt

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[137] *See, e.g.*, Hauter v. Zogarts, 14 Cal. 2d 104, 114-15, 114 n.8, 120 Cal. Rptr. 681, 687-88, 687 n.8, 534 P.2d 377, 383-84, 383 n.8 (1975) (en banc) (lack of privity did not bar breach of express warranty action against manufacturer of golf training device); Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282, 287-88 (Tex. Civ. App. 1980) (lack of privity did not bar breach of express warranty action against manufacturer of defective steel drums). *See generally* WHITE & SUMMERS, *supra* note 20, § 11-7, at 410-11.

[138] *Compare* Fowler v. General Elec. Co., 40 N.C. App. 301, 306-07, 252 S.E.2d 862, 864-65 (1979) (lack of privity barred breach of implied warranty action against manufacturer of refrigerator) *and* Williams v. General Motors Corp., 19 N.C. App. 337, 340, 198 S.E.2d 766, 768 (1973) (lack of privity barred breach of implied warranty action against manufacturer of automobile) *with* Williams v. Hyatt Chrysler-Plymouth, Inc., 48 N.C. App. 308, 312, 269 S.E.2d 184, 187-88 (1980) (lack of privity did not bar breach of express warranty action against manufacturer of automobile) *and* Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 501-02, 259 S.E.2d 552, 554 (1979) (lack of privity did not bar breach of express warranty action against manufacturer of tractor).

[139] *See generally* 2A FRUMER & FRIEDMAN, *supra* note 27, § 19.05[1]; Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be A Difference?*, 47 IND. L.J. 457 (1972); Note, *Notice of Breach and the Uniform Commercial Code*, 25 U. FLA. L. REV. 520 (1973) [hereinafter cited as *Notice*].

[140] U.C.C. § 2-607(3). *See generally* WHITE & SUMMERS, *supra* note 20, § 11-10, at 421-26.

[141] U.C.C. § 2-607, Comment 4.

[142] *Id.*; *see* Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 977 (5th Cir. 1976). Courts measure the merchant's good faith by reasonable commercial standards of fair dealing in the trade. *Id.* (quoting U.C.C. § 2-103(1)(b)).

[143] U.C.C. § 2-607, Comment 4.

[144] *E.g.*, Frericks v. General Motors Corp., 278 Md. 304, 312, 363 A.2d 460, 465 (1976); Fischer v. Mead Johnson Laboratories, 41 A.D.2d 737, 737-38, 341 N.Y.S.2d 257, 259 (1973).

notice to the retailer to be constructive notice to the manufacturer.[145] Courts also tend to allow long delays by consumers in giving notice when the seller is not prejudiced by the delay.[146] In *Maybank v. S.S. Kresge Co.*,[147] for example, a flashcube exploded and caused personal injuries to a consumer.[148] The only notice the consumer gave to the sellers of the defective flashcube was when the consumer filed a breach of warranty action against the sellers three years after the injury.[149] The North Carolina Supreme Court held that since the sellers suffered no prejudice from the delay, the consumer's delay in giving notice was not unreasonable.[150] In most cases in which the consumer fails to give any notice before filing a complaint, however, the lack of notice bars the consumer from recovery.[151]

The notice requirement puts a minimal burden on consumers. Some courts interpreted the Uniform Sales Act to require that the notice specify particular defects and indicate whether the buyer intended to seek damages.[152] Under the UCC, however, notice is sufficient as long as the buyer informs the seller that the transaction was not satisfactory to the buyer and requires further attention.[153] For example, oral notification is sufficient.[154] In one case, the buyer of a defective car had the car

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[145] *E.g.*, Prutch v. Ford Motor Co., 618 P.2d 657, 660-61 (Colo. 1980) (en banc); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 68, 207 A.2d 305, 313 (1965).

[146] *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 298-99 (3d Cir. 1961) (decided under Uniform Sales Act) (10 months delay in giving notice while plaintiff was in hospital not unreasonable); Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 349-50, 378 N.E.2d 1083, 1087-89 (1978) (four years delay in giving notice following plaintiff's stroke not unreasonable); *see* WHITE & SUMMERS, *supra* note 20, § 11-10, at 423 (courts will tolerate delay when buyer suffers personal injury).

[147] 302 N.C. 129, 273 S.E.2d 681 (1981).

[148] *Id.* at 132-33, 273 S.E.2d at 682.

[149] *Id.* at 134-36, 273 S.E.2d at 683-85.

[150] *Id.* at 137, 273 S.E.2d at 685; *accord*, Davidson v. Wee, 93 Ariz. 191, 379 P.2d 744, 749 (1963) (en banc) (decided under Uniform Sales Act) (complaint filed two months after injury was suficient notice).

[151] *E.g.*, Armco Steel Corp. v. Isaacson Struct. Steel Co., 611 P.2d 507, 510-13 (Alaska 1980); Voboril v. Namco Leisure World, Inc., 24 U.C.C. REP. SERV. 614, 614-15 (Conn. Super. Ct. 1978). The *Voboril* court noted that since the purpose of notice is to allow the parties to begin settlement negotiations, *see* note 159 *infra*, allowing a complaint to serve as notice would defeat the purpose of the notice requirement. *Id.*

[152] *See, e.g.*, American Mfg. Co. v. United States Shipping Board Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925) (notice must give seller early warning that buyer will seek damages); Aaron Bodek & Son v. Avrach, 297 Pa. 225, 230, 146 A. 546, 547-48 (1929) (notice must specify defect with reasonable particularity); *see* 8 WILLISTON, *supra* note 13, § 993, at 599-600 (decisions under Uniform Sales Act often held buyers to high standard of notice).

[153] U.C.C. § 2-607, Comment 4.

[154] *See, e.g.*, Jay V. Zimmerman Co. v. General Mills, Inc., 327 F. Supp. 1198, 1204 (E.D. Mo. 1971) (telephone calls by buyer to seller were sufficient notice of breach to seller of molds); Page v. Camper City & Mobile Home Sales, 292 Ala. 562, 565, 297 So. 2d 810, 811-12 (Ala. 1974) (personal notification by buyer to seller of defects was sufficient notice). *But see*

towed to the seller's place of business and informed the seller's employees that the car needed major repairs.[155] In the buyer's breach of warranty action against the seller, the court found that the buyer's actions gave the seller sufficient notice that the seller had breached its implied warranties.[156]

The UCC notice requirement serves a useful purpose. The notice requirement provides the seller with some protection against false claims.[157] The seller who receives prompt notice that the goods he sold are defective may be able to cure the defect and minimize damages.[158] Prompt notice also allows the parties to commence settlement negotiations and avoid litigation.[159] Besides protecting sellers, the notice requirement also benefits consumers. If the buyer notifies the seller promptly of a defect in the seller's product, the seller can halt production of the product and remove other defective products from the market, thereby protecting other consumers from injury.[160]

Although the purpose of strict liability is to free consumers from the complexity of sales law and the accompanying contract defenses,[161] strict liability has achieved its purpose only in part. The disagreements among courts over whether strict liability applies to economic losses,[162] used goods,[163] and nondangerous defective goods[164] indicates that strict liability suffers from doctrinal confusion.[165] In contrast, the warranties of the UCC apply to these areas,[166] and therefore in some cases provide consumers with broader protection than strict liability. In addition, liberal interpretations of the UCC in favor of consumers and legislation at the state and federal level have extended the scope of the consumer's warranty protection and have eroded the seller's traditional defenses to the

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Prompt Elec. Supply Co. v. Allen-Bradley Co., 492 F. Supp. 344, 347-48 (E.D.N.Y. 1980) (oral notification not sufficient when contract required written notice).

[155] Overland Bond & Inv. Co. v. Howard, 9 Ill. App. 3d 348, 355, 292 N.E.2d 168, 171 (1972).

[156] *Id.* at 354-55, 292 N.E.2d at 176.

[157] *See* Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 826-27 (6th Cir. 1978) (notice minimizes possibility of prejudice to seller by allowing seller opportunity to inspect goods and investigate claim), *cert. denied*, 441 U.S. 923 (1979); *Notice*, *supra* note 139, at 525 (most prevalent rationale for notice requirement is to prevent fraudulent claims against seller).

[158] *See* L.A. Green Seed Co. v. Williams, 246 Ark. 463, 438 S.W.2d 717, 719-20 (1969) (purpose of notice requirement is to enable seller to minimize damages).

[159] Armco Steel Corp. v. Isaacson Struct. Steel Co., 611 P.2d 507, 512 (Alaska 1980) (overriding purpose of notice requirement is to encourage settlement); U.C.C. § 2-607, Comment 4 (notice should open way for settlement).

[160] *Notice*, *supra* note 139, at 523-24.

[161] *See* text accompanying note 31 *supra*.

[162] *See* text accompanying notes 44-50 *supra*.

[163] *See* text accompnaying notes 57-63 *supra*.

[164] *See* text accompanying notes 69-77 *supra*.

[165] *See generally* Owen, *supra* note 59, at 681-85 (attributing doctrinal confusion to lack of uniform principles governing strict liability).

[166] *See* text accompanying notes 51-56, 64-68, 78-85 *supra*.

consumer's warranty action. Contrary to prediction,[167] warranties have not passed quietly down the drain, but challenge strict liability as the consumer's best means of recovering damages from sellers of defective goods.

WILLIAM R. CLEMENT, JR.

[167] *See* text accompanying note 2 *supra.*