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# An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)

William L. Stallworth\*

## I. INTRODUCTION

The purpose of this Article and a forthcoming follow-up Article is to identify some of the general principles that explain case law developments under Uniform Commercial Code section 2-318.<sup>1</sup> There are many fine commentaries in this area,<sup>2</sup> but in the final analysis it is still hard to discern the general legal principles guiding the developments in case law. As some of the commentaries openly admit, the case law in this area seems confusing.<sup>3</sup> One reason for this is that both "remote"

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1. Alternative A to section 2-318 provides:

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

2. See, e.g., Alex Devience, Jr., *The Developing Line Between Warranty and Tort Liability Under the Uniform Commercial Code: Does 2-318 Make a Difference?*, 2 DEPAUL BUS. L.J. 295 (1990); David B. Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 IND. L.J. 593 (1986); William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731 (1990); Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into The Void*, 67 B.U. L. REV. 9 (1987); 2 FRED O. HARRIS & ALPHONSE M. SQUILLANTE, *WARRANTY LAW IN TORT AND CONTRACT ACTIONS* 155-97 (1989).

3. See, e.g., Devience, *supra* note 2, at 295; John F. Kamin, Note, *The Extension*

purchasers<sup>4</sup> and nonpurchasers<sup>5</sup> have attempted to use section 2-318 to obtain standing<sup>6</sup> to sue for breach of warranty.<sup>7</sup> The remote purchaser is typically a buyer who is suing a vendor in the chain of distribution other than the immediate seller.<sup>8</sup> The nonpurchasers who try to use section 2-318 include members of the purchaser's family or household,<sup>9</sup> the purchaser's house guests,<sup>10</sup> the purchaser's employees,<sup>11</sup> social guests<sup>12</sup> or invitees,<sup>13</sup> and even bystanders.<sup>14</sup> Some courts permit the

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of Implied Warranty Protection To Employees of a Purchaser (reviewing *Whitaker v. Lian Feng Machine Co.*), 14 S. ILL. U. L.J. 123 (1989). For an overview of the law in this area, see HARRIS & SQUILLANTE, *supra* note 2, at 155-97; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, Ch. 11 (3d ed. 1988); 2 WILLIAM D. HAWKLAND, U.C.C. SERIES § 2-318 (1992).

4. See, e.g., *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383 (Ariz. 1981); *Perfetti v. McGhan Medical*, 662 P.2d 646 (N.M. Ct. App. 1983); *Szrama v. Alumo Prods. Co.*, 462 N.Y.S.2d 156 (N.Y. Sup. Ct. 1983); *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979). The term "remote purchaser" is defined *infra* part II.D.

5. See, e.g., *Milbank Mut. Ins. Co. v. Proksch*, 244 N.W.2d 105 (Minn. 1976); *Ciampichini v. Ring Bros.*, 339 N.Y.S.2d 716 (N.Y. App. Div. 1973); *Westlake v. Big Town Supermart, Inc.*, No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985). The different types of "nonpurchasers" are discussed *infra* parts II.D and II.E.

6. See, e.g., D. Brit Nelson, *Is Privity Still Required In A Breach of Express Warranty Cause of Action for Personal Injury Damages*, 43 BAYLOR L. REV. 551 (1991). Section 2-318 confers standing to sue for breach of warranty under Article 2 of the Uniform Commercial Code. This Article will use terms like "section 2-318 plaintiff" as shorthand to refer to the plaintiffs who file breach-of-warranty claims pursuant to section 2-318. A legal purist might say that it is inaccurate to use such terminology because section 2-318 does not provide an independent cause of action. Rather, it merely confers standing to sue under other provisions of the Code (e.g., sections 2-314 and 2-315, discussed *infra* part II).

7. In this Article, remote purchasers and nonpurchasers are collectively referred to as "non-privity plaintiffs" due to the lack of privity with the defendants. The term "lack of privity" is discussed *infra* part II.D.

8. See *infra* part II.D.

9. See, e.g., *Lane v. Barringer*, 407 N.E.2d 1173 (Ind. Ct. App. 1980) (purchaser's mother); *Wolfe v. Ford Motor Co.*, 376 N.E.2d 143 Mass. App. Ct. (1978) (purchaser's niece).

10. See, e.g., *Tomczuk v. Town of Cheshire*, 217 A.2d 71 (Conn. Super. Ct. 1965) (purchaser's guest injured while using a bicycle purchaser bought for his daughter); *Handrigan v. Apex Warwick, Inc.*, 275 A.2d 262 (R.I. 1971) (purchaser's friend injured in a fall from a ladder while helping paint purchaser's house).

11. See, e.g., *Weaver v. Ralston Motor Hotel, Inc.*, 218 S.E.2d 260 (Ga. Ct. App. 1975) (purchaser's employee, a truck driver, injured when truck became disabled).

12. See, e.g., *Curlee v. Mock Enters, Inc.*, 327 S.E.2d 736 (Ga. Ct. App. 1985) (finding plaintiff was not the purchaser's house guest because accident occurred on purchaser's boat).

13. See, e.g., *Crews v. W.A. Brown & Sons, Inc.*, 416 S.E.2d 924 (N.C. Ct. App. 1992); *Miller v. Sears, Roebuck & Co.*, 500 N.E.2d 557 (Ill. App. Ct. 1986), *overruled in part on other grounds*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); *Steckal v. Houghton Elevator Co.*, 449 N.E.2d 1264 (N.Y. 1983).

14. See, e.g., *Ciampichini v. Ring Bros.*, 339 N.Y.S.2d 716 (N.Y. App. Div. 1973). As

purchaser's family members to sue for breach of warranty under the Code despite the absence of privity of contract with the defendant seller;<sup>15</sup> but in other cases, warranty actions instituted by members of the purchaser's family have been dismissed on the grounds of lack of privity.<sup>16</sup> Similarly, some courts permit the purchaser's employees to sue for breach of warranty,<sup>17</sup> but other courts dismiss such actions for lack of privity.<sup>18</sup> By the same token, some courts permit "bystanders" to sue for breach of warranty,<sup>19</sup> but other courts dismiss such actions on lack of privity grounds.<sup>20</sup> Sometimes section 2-318 is involved in litigation between corporations,<sup>21</sup> but in other cases the courts have ruled that corporations lack standing to sue under section 2-318.<sup>22</sup>

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used in this Article, the term "bystander" refers to people who are neither purchasers nor users; for example, a pedestrian who is injured when a defective automobile runs out of control.

15. *See, e.g.*, *Chaffin v. Atlanta Coca Cola Bottling Co.*, 194 S.E.2d 513 (Ga. Ct. App. 1972) (purchaser's mother); *Harris v. Great Atlantic & Pacific Tea Co.*, 23 Mass. App. Dec. 169 (Mass. Dist. Ct. 1962) (purchaser's minor son); *Milbank Mut. Ins. Co. v. Proksch*, 244 N.W.2d 105 (Minn. 1976) (purchaser's father).

16. *See, e.g.*, *Lane v. Barringer*, 407 N.E.2d 1173 (Ind. Ct. App. 1980) (rejecting a § 2-318 claim by the purchaser's mother); *Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985) (rejecting a § 2-318 claim by the purchaser's wife); *Johnson v. General Motors Corp.*, 502 A.2d 1317 (Pa. Super. Ct. 1986) (rejecting a § 2-318 claim by the purchaser's wife).

17. *See, e.g.*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 59 (Ill. App. Ct. 1987); *Yentzer v. Taylor Wine Co.*, 199 A.2d 463 (Pa. 1964); *Eisenmann v. Cantor Bros.*, 567 F. Supp. 1347 (N.D. Ill. 1983).

18. *See, e.g.*, *Cowens v. Siemens-Elcoma AB*, 837 F.2d 817 (8th Cir. 1988) (applying Missouri law); *Armijo v. Ed Black's Chevrolet Ctr., Inc.*, 733 P.2d 870 (N.M. Ct. App. 1987); *Fisher v. Graco, Inc.*, 440 N.Y.S.2d 380 (N.Y. App. Div. 1981).

19. *See, e.g.*, *Ciampichini v. Ring Bros.*, 339 N.Y.S.2d 716 (N.Y. App. Div. 1973) (passenger injured in an auto accident sued manufacturer of the other vehicle for breach-of-warranty).

20. *See, e.g.*, *Miller v. Sears, Roebuck & Co.*, 500 N.E.2d 557 (Ill. App. Ct. 1986), *overruled in part on other grounds*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); *Moss v. Polyco*, 522 P.2d 622 (Okla. 1974).

21. *See, e.g.*, *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646 (Del. Super. Ct. 1985); *Groppel Co., v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985).

22. *See, e.g.*, *Spiegel v. Sharp Elecs. Corp.*, 466 N.E.2d 1040 (Ill. App. Ct. 1984); *Monsanto Co. v. Alden Leeds, Inc.*, 326 A.2d 90 (N.J. Super. Ct. Law Div. 1974); *Hardesty v. Andro Corp.*, 555 P.2d 1030 (Okla. 1976).

In this area of products-liability law, the plaintiffs' injuries vary from personal injury<sup>23</sup> to property damage<sup>24</sup> to economic loss.<sup>25</sup> Economic loss can be "direct" or "consequential."<sup>26</sup> The courts have traditionally been most sympathetic toward personal injury claims.<sup>27</sup> As a result, the courts often permit nonprivity plaintiffs to use implied warranty claims to recover for personal injury,<sup>28</sup> but not for economic loss or property damage.<sup>29</sup> On the other hand, some jurisdictions do permit nonprivity plaintiffs to use implied warranty actions to recover for economic loss or property damage.<sup>30</sup> Other states permit nonprivity plaintiffs to

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23. See, e.g., *Steckal v. Haughton Elevator Co.*, 449 N.E.2d 1264 (N.Y. 1983); *Tirino v. Kenner Prod. Co.*, 341 N.Y.S.2d 61 (N.Y. Civ. Ct. 1973); *Hargrove v. Newsome*, 470 S.W.2d 348 (Tenn. 1971), *cert. denied*, 405 U.S. 907 (1972).

24. See, e.g., *Wear v. Chenault Motor Co.*, 293 So. 2d 298 (Ala. Civ. App. 1974); *Pack & Process*, 503 A.2d 646; *Milbank Mut. Ins. Co. v. Proksch*, 244 N.W.2d 105 (Minn. 1976); *Monsanto Co.*, 326 A.2d 90. Property damage involves physical harm to the plaintiff's personal property. WHITE & SUMMERS, *supra* note 3, at 462.

25. See, e.g., *Spiegel*, 466 N.E.2d 1040; *Groppel*, 616 S.W.2d 49; *Spring Motors*, 489 A.2d 660. As Professors White and Summers explain: "[an] action brought to recover for inadequate value, costs of repair, and replacement of defective goods is one for 'economic loss' . . . . Of course borderline cases do arise that do not fit comfortably in either the property damage or economic loss category. "WHITE & SUMMERS, *supra* note 3, at 462.

26. The distinction between "direct" economic loss and "consequential" economic loss is that:

"Direct" economic loss . . . includes ordinary loss of bargain damages: the difference between the actual value of the goods accepted and the value they would have had if they had been as warranted. Courts will also frequently measure direct economic loss by the purchaser's cost of replacement or cost of repair. "Consequential economic loss," on the other hand, encompasses all economic harm a purchaser suffers beyond direct economic loss as defined above. Thus, consequential economic loss includes loss of profits resulting from the failure of goods to function as warranted, loss of goodwill and loss of business reputation.

WHITE & SUMMERS, *supra* note 3, at 463.

27. *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).

28. See, e.g., *Chastain v. Fuqua Indus., Inc.*, 275 S.E.2d 679 (Ga. Ct. App. 1980); *Wolfe v. Ford Motor Co.*, 434 N.E.2d 1008 (Mass. 1982); *Westlake v. Big Town Supermart, Inc.*, No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985). See generally WHITE & SUMMERS, *supra* note 3, at 456-62.

29. See, e.g., *Gross v. Systems Eng'g Corp.*, 36 U.C.C. Rep. Serv. (Callaghan) 42 (E.D. Pa. 1983); *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028 (Ill. 1988); *Szajna v. General Motors Corp.*, 503 N.E.2d 760 (Ill. 1986); *Bagel v. America Honda Motor Co.*, 477 N.E.2d 54 (Ill. App. Ct. 1985); *Dutton v. International Harvester Co.*, 504 N.E.2d 313 (Ind. Ct. App. 1987).

30. See, e.g., *Flory v. Silvercrest Indus., Inc.*, 633 P.2d 383 (Ariz. 1981); *Spiegel v. Sharp Elecs. Corp.*, 466 N.E.2d 1040 (Ill. App. Ct. 1984); *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985); see also WHITE & SUMMERS, *supra* note 3, at 464.

recover for direct economic loss but not for consequential economic loss.<sup>31</sup> To complicate matters further, the defendants in these products liability actions can be direct sellers<sup>32</sup> or remote sellers,<sup>33</sup> depending upon their position in the chain of distribution. Some courts hold that implied warranty actions cannot be maintained against remote sellers when economic loss is the only injury that the plaintiff has sustained;<sup>34</sup> other courts reach just the opposite conclusion.<sup>35</sup>

The most common defense that section 2-318 plaintiffs encounter is the lack-of-privity defense.<sup>36</sup> Other defenses may be based on lack of notice,<sup>37</sup> warranty disclaimers,<sup>38</sup> remedy limitations,<sup>39</sup> and the statute of limitations.<sup>40</sup> The drafters seemed to have envisioned that some of

31. See WHITE & SUMMERS, *supra* note 3, at 466.

32. See, e.g., *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550 (Ill. 1974); *Szrama v. Alumo Prods. Co.*, 462 N.Y.S.2d 156 (N.Y. Sup. Ct. 1983); *Singer v. Federated Dept. Stores, Inc.* 447 N.Y.S.2d 582 (N.Y. 1981); *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979). The term "direct" seller is discussed *infra* part II.D.

33. See, e.g., *Gross*, 36 U.C.C. Rep. Serv. (Callaghan) 42; *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646 (Del. Super. Ct. 1985); *Rothe*, 518 N.E.2d 1028; *Spiegel*, 466 N.E.2d 1040; *Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987); *Dutton*, 504 N.E.2d 313; *Spring Motors Distribs., Inc.*, 489 A.2d 660. The term "remote" seller is discussed *infra* part II.D. The distinction between remote sellers and direct sellers is clarified *infra* part II.D.

34. See, e.g., *Koellmer v. Chrysler Motors Corp.*, 276 A.2d 807 (Conn. Super. Ct. 1970); *General Motors Corp. v. Halco Instruments, Inc.*, 185 S.E.2d 619 (Ga. Ct. App. 1971); *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 544 P.2d 306 (Idaho 1975).

35. See, e.g., *Morrow v. New Moon Homes Inc.*, 548 P.2d 279 (Alaska 1976); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806 (Wyo. 1980).

36. The "lack-of-privity" defense is discussed *infra* parts II.D and IV.

37. For example, U.C.C. § 2-607(3)(a) provides that, after accepting goods, the buyer's failure to notify the seller of a breach of contract "within a reasonable time after [the buyer] discovers or should have discovered [the] breach" results in the waiver of any remedies against the seller, including the right to sue for breach of warranty. U.C.C. § 2-607(3)(a) (1987). In addition, U.C.C. §§ 2-602(1) and 2-605(1) contain other notice requirements. The Code's notice requirements are discussed *infra* part II.F.

38. In this Article, the term "warranty disclaimer" is used broadly to refer to both language that limits or modifies warranties and language that excludes or disclaims warranties. For purposes of this Article, U.C.C. § 2-316 is the pertinent statute. The topic of warranty disclaimers is discussed *infra* part II.F.

39. U.C.C. §§ 1-102(3) and 2-719 permit contracting parties to supplement, modify, limit, and exclude Code remedies. The topic of remedy limitations is discussed *infra* part II.F.

40. U.C.C. § 2-725 provides in pertinent part that:

these defenses would be effective in section 2-318 litigation.<sup>41</sup> However, some cases suggest that the lack-of-notice defense is ineffective against section 2-318 plaintiffs.<sup>42</sup> Other cases suggest that the courts are reluctant to permit defenses based on warranty disclaimers or remedy limitations.<sup>43</sup> In addition, some courts have ruled that the tort statute of limitations, rather than the Code statute of limitations, governs warranty claims filed pursuant to U.C.C. section 2-318.<sup>44</sup>

These complexities make section 2-318 decisions seem confusing, and, hence, some commentators complain that the case law under section 2-318 is conflicting and confusing. This Article, however, will focus upon identifying the general legal principles that explain and harmonize section 2-318 case law. The following are some general principles that this Article will extract from cases decided under section 2-318, Alternative A:

- (1) A nonpurchaser's warranty claim against a seller will be dismissed for lack of privity unless:
  - (a) The plaintiff is a natural person in the purchaser's family or household, or a houseguest who is suing to recover for personal injury, and the defendant is a direct seller;<sup>45</sup> or
  - (b) The plaintiff is an employee of the purchaser, is suing to recover for personal injury, and the claim is filed in a minority jurisdiction where the courts have abolished the "horizontal"

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An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . . A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach-of-warranty occurs when tender of delivery is made . . . .

U.C.C. § 2-725 (1987). The Code statute of limitations defense is discussed *infra* part II.F.

41. For example, Official Comment 1 to § 2-318 states, in pertinent part, "to the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." U.C.C. § 2-318 cmt. 1. See *infra* part II.F.

42. See, e.g., *Morgan v. Sears, Roebuck and Co.*, 693 F. Supp. 1154 (N.D. Ga. 1988); *Tomczuk v. Town of Cheshire*, 217 A.2d 71 (Conn. Super. Ct. 1965); see also WHITE & SUMMERS, *supra* note 3, at 481-83.

43. See, e.g., *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247 (10th Cir. 1988); *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981); *Spagnol Enters., Inc. v. Digital Equip. Corp.*, 568 A.2d 948 (Pa. Super. Ct. 1989).

44. See, e.g., *Salvador v. Atlantic Steel Boiler Co.*, 389 A.2d 1148 (Pa. Super. Ct. 1978) (clarifying the applicable limitations on a nonpurchaser's warranty claim), *aff'd*, 424 A.2d 497 (Pa. 1981); *Kelly v. Ford Motor Co.*, 290 A.2d 607 (R.I. 1972).

45. See *infra* parts IV.A.1, IV.A.4, and IV.A.5.

- and "diagonal" privity bars to warranty claims by a purchaser's employees;<sup>46</sup> or
- (c) One of the traditional common law exceptions to the privity requirement is available, such as the express warranty exception or the "intimate body product" exception.
- (2) A purchaser's warranty claim against a remote seller to recover for personal injury will be dismissed for lack of privity, unless:
- (a) The claim is filed in a jurisdiction where the courts have abolished the vertical privity bar to personal injury claims; or
- (b) One of the traditional common law exceptions to the privity bar is available.
- (3) A purchaser's warranty claim against a remote seller to recover for property damage or economic loss will be dismissed for lack of privity, unless the claim is filed in a jurisdiction where the courts have abolished the vertical privity bar to warranty claims for economic loss or property damage.<sup>47</sup>
- (4) There is conflict among the jurisdictions regarding the availability of other Code defenses<sup>48</sup> based on notice requirements, warranty disclaimers, remedy limitations, and the statute of limitations.<sup>49</sup> For example:
- (a) Some jurisdictions reject the lack-of-notice defense in personal injury cases,<sup>50</sup> yet accept such a defense when the plaintiff is suing to recover for economic losses.<sup>51</sup>
- (b) Some jurisdictions reject defenses based on warranty disclaimers<sup>52</sup> or remedy limitations.<sup>53</sup>
- (c) The jurisdictions are divided over whether the Code statute of limitations or the tort statute of limitations applies to personal injury litigation under U.C.C. section 2-318.<sup>54</sup>

In considering the theories set forth in this Article, one must first understand at least the basic law of warranty claims and defenses un-

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46. See *infra* part IV.A.2.

47. See *infra* parts IV.A.3 to IV.A.5.

48. See *infra* part II.F.

49. See *infra* part IV.B.

50. See *infra* part IV.B.1.

51. See *infra* part IV.B.1.

52. See *infra* part IV.B.2.

53. See *infra* part IV.B.2.

54. See *infra* part IV.B.3.



der the Code. Thus, the following section presents a brief discussion of Code warranties and defenses, and section 2-318.

## II. CODE WARRANTIES AND SECTION 2-318 DERIVATIVE ACTIONS

### A. *The Code Warranties*<sup>55</sup>

Code warranties can be divided into warranties of title and warranties of quality.<sup>56</sup> Warranties of quality can be subdivided into express warranties and implied warranties.<sup>57</sup> Implied warranties can be further divided into the implied warranty of merchantability and the implied warranty of fitness for particular purpose.<sup>58</sup> Because a contract may include all three warranties,<sup>59</sup> actions filed pursuant to section 2-318 frequently contain claims for breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness.

### B. *Express Warranties*

Under the Code, an express warranty is typically created by something a seller says or does.<sup>60</sup> For example, an express warranty may arise when a seller makes a promise to a buyer that relates to the goods.<sup>61</sup> Express warranties can also be created through a seller's description of the goods,<sup>62</sup> or when a seller displays a sample or a model

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55. See generally Andrew M. Baker et al., *Special Project, Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30 (1978); Deborah L. Goetz et al., *Special Project, Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159 (1987).

56. See generally WHITE & SUMMERS, *supra* note 3, ch. 9.

57. See generally WHITE & SUMMERS, *supra* note 3, chs. 9-2 to 9-10.

58. See generally WHITE & SUMMERS, *supra* note 3, chs. 9-7 to 9-10.

59. U.C.C. § 2-315 cmt. 2 (1987). For example, shoes that a vendor advertises as Swiss climbing boots might carry an express warranty that the shoes were made in Switzerland, an implied warranty of merchantability and an implied warranty that the shoes are fit for mountain climbing. The shoes might breach the express warranty if they turn out to be made in Japan. They might breach the implied warranty of merchantability if they fall apart in two months under ordinary use. They might breach the implied warranty of fitness for particular purpose if they are unsuitable for mountain climbing, but not if they were unsuitable for jogging. *Id.*

60. See generally WHITE & SUMMERS, *supra* note 3, chs. 9-3 to 9-4.

61. U.C.C. § 2-313(1)(a) provides: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." U.C.C. § 2-313(1)(a) (1987).

62. U.C.C. § 2-313(1)(b) provides: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." *Id.* § 2-313(1)(b).

of the goods.<sup>63</sup> Indeed, express warranties can arise even though a seller never uses words like "warranty" or "guarantee."<sup>64</sup> However, a statement of opinion, a statement about the value of the goods, or a commendation of the goods usually will not create an express warranty.<sup>65</sup>

### C. Implied Warranties

Unlike express warranties, which are created by something that the seller says or does, implied warranties arise automatically by operation of law regardless of the seller's statements, conduct, or intentions, unless specifically excluded.<sup>66</sup>

#### 1. The Implied Warranty of Merchantability<sup>67</sup>

Unless excluded by appropriate language, the implied warranty of merchantability is automatically created by a sale of goods when the seller is a merchant with respect to goods of that kind.<sup>68</sup> Most simply, the implied warranty of merchantability is an implied promise that goods will at least be of fair average quality and fit for their ordinary purpose.<sup>69</sup> Therefore, a new coffee maker that bursts into flames under

63. U.C.C. § 2-313(1)(c) provides: "Any sample or model, which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the sample or model." *Id.* § 2-313(1)(c).

64. U.C.C. § 2-313(2) provides in pertinent part: "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty." *Id.* § 2-313(2).

65. U.C.C. § 2-313(2) provides in pertinent part: "[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." U.C.C. § 2-313(2) (1987).

66. U.C.C. § 2-313, Official Comment 1, provides, in pertinent part: "'Implied' warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated." *Id.* § 2-313 cmt. 1. While Official Comments to the U.C.C. do not have the force of law, they are customarily regarded as an authoritative aid in determining legislative intent. *Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261, 262-63 (Mo. Ct. App. 1976).

67. For a discussion of the origins of the implied warranty of merchantability, see William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

68. U.C.C. § 2-314 provides, in pertinent part: "(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314(1) (1987).

69. U.C.C. § 2-314 provides, in pertinent part:

ordinary use is probably unmerchantable and the vendor may be liable for breach of the implied warranty of merchantability.

## 2. The Implied Warranty of Fitness for Particular Purpose

The implied warranty of fitness for particular purpose is created when, at the time of making the contract, the seller has reason to know of any particular purpose for which the buyer requires the goods and the seller knows that the buyer is relying on the expertise of the seller to provide suitable goods.<sup>70</sup> The implied warranty of fitness is an implied promise that the goods will be suitable for the buyer's *particular* purpose, which may not be the normal or customary use of the goods.<sup>71</sup> "For example, shoes are generally used for the purpose of

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- (2) Goods to be merchantable must be at least such as
- (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade.

*Id.* § 2-314(2), (3).

70. *Id.* § 2-315. This section provides as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [section 2-316] an implied warranty that the goods shall be fit for such purpose.

*Id.* § 2-315.

71. U.C.C. § 2-315 cmt. 2. Official Comment 2 to U.C.C. Section 2-315 provides, in pertinent part, as follows:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which the goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

*Id.* § 2-315 cmt. 2. The implied warranty of fitness for particular purpose is often simply called the "implied warranty of fitness." Accordingly, this Article refers to the implied warranty of fitness for *particular* purpose as the "implied warranty of fitness."

walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains."<sup>72</sup> If so, then the sale of the shoes may carry an implied warranty that the shoes are fit for mountain climbing. If the purchaser is subsequently injured during a rock-climbing expedition because the shoes are unsuitable for mountain climbing, then the seller may be liable in damages for breach of the implied warranty of fitness.

#### D. Defenses to Breach-of-Warranty Claims

##### 1. The Defense of Lack of Privity

The primary obstacle confronting plaintiffs is usually the defense of lack of privity. Privity of contract is the connection or relationship that exists between contracting parties.<sup>73</sup> When this relationship exists a buyer and seller are said to be "in privity of contract," or simply "in privity." *Winterbottom v. Wright*<sup>74</sup> is the first reported decision that recognized lack of privity as a defense.<sup>75</sup> In *Winterbottom*, a mail-coach driver sued a coach supplier to recover for the physical injuries he sustained when the mail coach tipped over.<sup>76</sup> The coach company was under contract with the Postmaster General to provide coaches for carrying the mail.<sup>77</sup> Under the contract, the coach company was exclusively responsible for the maintenance and repair of the coaches.<sup>78</sup> The coachman was employed by another company whose contract with the Postmaster General required it to provide horses and drivers to carry the mail.<sup>79</sup> The coach driver and his employer had relied on the coach company to keep the coach in a "fit, proper, safe, and secure state and condition."<sup>80</sup> In his complaint, the coachman claimed that the coach tipped over because the coach company had failed to fulfill its contrac-

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72. *Id.*

73. See 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 778 (1951 & Supp. 1992); 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 998A (3d ed. 1964 & Supp. 1992).

74. 152 Eng. Rep. 402 (Ex. 1842).

75. See 1 FRED O. HARRIS & ALPHONSE M. SQUILLANTE, WARRANTY LAW IN TORT AND CONTRACT ACTIONS 337 (1989).

76. *Winterbottom*, 152 Eng. Rep. at 403.

77. *Id.* at 402.

78. *Id.* at 402-03.

79. *Id.* at 403.

80. *Id.*

tual duty to maintain and repair the coach.<sup>81</sup> In essence, the coachman was suing the coach company for breach of contract, despite the fact that he was not a party to the contract between the Postmaster General and the coach company.<sup>82</sup> The court dismissed the complaint on the grounds of lack of privity of contract, ruling that only the parties to the contract could sue for breach of contract.<sup>83</sup>

There are two basic types of lack of privity: "vertical" lack of privity and "horizontal" lack of privity.<sup>84</sup> The problem of vertical lack of privity arises when a purchaser files a breach-of-warranty action against a

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81. *Id.*

82. *Id.* at 404-05.

83. *Id.*

84. See WHITE & SUMMERS, *supra* note 3, at 456. Corresponding to these two types of lack of privity are two types of "non-privity" plaintiffs: "vertical" non-privity plaintiffs and "horizontal" non-privity plaintiffs. *Id.* Occasionally the phrase "horizontal lack of privity" is reserved for cases where a nonpurchaser sues a direct seller for breach of warranty. The courts that use the term in that manner have coined the term "diagonal lack of privity" to refer to the situation where a nonpurchaser sues a remote seller. See, e.g., HAWKLAND, *supra* note 3, at 659. However, the courts usually do not make such fine distinctions, although it might be helpful if they did. Generally, they broadly use the term "horizontal lack of privity" to describe the privity problem that occurs when a nonpurchaser is suing any vendor in the chain of distribution, regardless of whether the vendor is a direct seller or a remote seller. See, e.g., Whitaker v. Lian Feng Mach. Co., 509 N.E.2d 591 (Ill. App. Ct. 1987) (breach-of-warranty claim by purchaser's employee against both direct and remote sellers); Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974) (same). To avoid confusion this Article will follow the approach that the courts use. The term "horizontal lack of privity" is used to describe the privity problem that occurs when a nonpurchaser is suing any vendor in the chain of distribution, regardless of whether that vendor is a direct seller or a remote seller. Whenever it seems important to distinguish the direct seller from the remote seller, this Article will use the term "diagonal lack of privity" to refer to cases where a nonpurchaser sues a remote seller. The commentators occasionally refer to a third type of privity problem called "diagonal" lack of privity. See, e.g., Peter A. Donovan, *Recent Development in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 ME. L. REV. 181, 217 (1967). Diagonal lack of privity occurs in cases where a warranty action is instituted against a remote seller by a nonpurchaser. Some of the personal injury cases discussed *infra* part IV.A.2 could be used to illustrate the concept of diagonal lack of privity, although the courts treated them as cases of horizontal lack of privity. In those cases warranty claims were filed against manufacturers by nonpurchasers such as employees, invitees, and bystanders. See, e.g., Whitaker v. Lian Feng Mach. Co., 509 N.E.2d 591 (Ill. App. Ct. 1987) (dismissing suit brought by purchaser's employee against product manufacturer for breach of warranty); Ciampichini v. Ring Bros., 339 N.Y.S.2d 716 (N.Y. App. Div. 1973) (allowing suit by bystander against a product manufacturer for breach of warranty); Moss v. Polycy, Inc., 522 P.2d 622 (Okla. 1974) (affirming trial court's demurrer based on limitations in suit by purchaser's invitee against manufacturer for breach of warranty); Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974) (allowing suit filed by purchaser's employee against manufacturer for breach of warranty).

vendor in the distribution chain who is not the immediate seller.<sup>85</sup> For example, the woman who buys a defective lawnmower from a department store and then sues the manufacturer is a vertical nonprivity plaintiff.<sup>86</sup> Thus, vertical non-privity plaintiffs are often referred to as remote purchasers because they have not bought directly from the defendant seller.<sup>87</sup> Alternatively, the defendant sellers in vertical lack-of-privity cases are often referred to as remote sellers because they have not sold directly to the plaintiff purchasers.<sup>88</sup> The problem of horizontal lack of privity occurs when a nonpurchaser files a breach-of-warranty action against a vendor in the chain of distribution.<sup>89</sup> The following are examples of horizontal privity: a man who was injured by falling off a lawnmower sues the department store where his wife bought the lawnmower or the company that manufactured the lawnmower, or the employee who was injured by some heavy machinery sues the company that sold the equipment to her employer or the company that manufactured the equipment. The point is that lack-of-privity problems are basically disputes about whether various nonprivity plaintiffs have standing to sue for breach of warranty.

The lack-of-privity defense can produce harsh results. For this reason, the defense has been undermined by developments in case law,<sup>90</sup>

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85. See WHITE & SUMMERS, *supra* note 3, at 456.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.* The nonpurchaser may be someone who was injured while using the product or someone who never actually used the product, but was nevertheless affected by it. *Id.* In other words, nonpurchasers can be users or non-users.

90. See *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 918 (Me. 1973). For example, in step-by-step developments, the common law established exceptions to the privity requirement for certain kinds of products: "[F]irst, drugs and articles of food and drink (products of intimate internal bodily use) then, by analogical extension, toiletry and cosmetic articles (products of intimate external bodily use), and, ultimately, . . . mechanical products in general." *Id.* As a result, the lack-of-privity defense was an unreliable defense in common-law cases where personal injury was caused by food, beverages, drugs, or cosmetics. See, e.g., *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550, 555-56 (Ill. 1974) (rejecting manufacturer's lack-of-privity defense to remote purchaser's warranty action for recovery of personal injury damages); *La Hue v. Coca-Cola Bottling, Inc.* 314 P.2d 421, 422 (Wash. 1957) (rejecting manufacturer's lack-of-privity defense to nonpurchaser's warranty action for recovery of personal injury damages). By comparison, section 2-318 creates an across-the-board exception for all types of products, but only certain types of plaintiffs have standing to sue under that provision. See U.C.C. § 2-318; see also *infra* part I.E. For a comprehensive state-by-state discussion of the common-law exceptions to the privity requirement, see R.D.

the advent of strict liability in tort,<sup>91</sup> and congressional legislation.<sup>92</sup> Section 2-318 is an example of legislation that has weakened the vitality of the privity requirement.<sup>93</sup>

#### *E. Analysis of U.C.C. Section 2-318*

The purpose of section 2-318 is to give standing to certain non-privity plaintiffs to sue as third-party beneficiaries of the warranties that a buyer received under a sales contract, "thereby freeing any such beneficiaries from any technical rules as to 'privity.'"<sup>94</sup> The 1952 version of section 2-318 provided that the benefit of a warranty automatically extended to the buyer's family, household, and house guests.<sup>95</sup> However, this early version of section 2-318 was opposed as a statute that reduced the scope of warranty protection available to consumers by limiting the class of third-party beneficiaries to the purchaser's family members, household and houseguests.<sup>96</sup> As a result, some states refused to enact this version of section 2-318, while the remaining states either adopted nonuniform versions of the statute or proposed amendments to section 2-318.<sup>97</sup> The prospect of "further proliferation of separate variations in state after state"<sup>98</sup> concerned the drafters because the purpose of the Code is "to make uniform the law among the various jurisdictions."<sup>99</sup> The drafters amended section 2-318 in an effort to stop the states from

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Hursh, Annotation, *Privity of Contract as Essential to Recovery in Action Based on Theory Other Than Negligence, Against Manufacturer or Seller of Product Alleged to Have Caused Injury*, 75 A.L.R.2d 39 (1961).

91. For a comprehensive history of strict liability in tort, see William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

92. See, e.g., the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1988) (permitting consumers to recover for breach-of-warranty, despite the absence of privity between the consumer and the vendor). For an example of a case where a section 2-318 plaintiff added a Magnuson-Moss Warranty Act claim, see *Szajna v. General Motors Corp.*, 503 N.E.2d 760 (Ill. 1986). U.C.C. § 2-318, a legislative development that has diminished the vitality of the lack-of-privity defense, is discussed *infra* part I.E.

93. See U.C.C. § 2-318 (1992).

94. U.C.C. § 2-318 cmt. 2 (1992). For a comprehensive discussion of the various types of section 2-318 plaintiffs, see Jane M. Draper, Annotation, *Third Party Beneficiaries of Warranties Under U.C.C. 2-318*, 100 A.L.R.3d 743 (1990).

95. HAWKLAND, *supra* note 3, at 661. The 1952 version of section 2-318 was identical to the current Alternative A to section 2-318. *Id.*

96. HAWKLAND, *supra* note 3, at 661-62.

97. HAWKLAND, *supra* note 3, at 662-63.

98. HAWKLAND, *supra* note 3, at 663.

99. HAWKLAND, *supra* note 3, at 662 (quoting U.C.C. § 1-102(2)(c)).

adopting a variety of separate variations.<sup>100</sup> The amendment provided three alternative versions of section 2-318, reflecting conservative, moderate, and liberal solutions to the problem of the proper scope of warranty protection to afford nonprivity plaintiffs under the Code. The 1952 version of section 2-318 became "Alternative A," and Alternatives B and C were added.<sup>101</sup> With the exceptions of California, Louisiana, and Texas, all of the states have adopted some version of section 2-318.<sup>102</sup>

The majority of states have adopted Alternative A.<sup>103</sup> Alternative A provides, in pertinent part, that:

[A] seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.<sup>104</sup>

Alternative A is the most conservative version of section 2-318 because it limits the class of potential plaintiffs in four ways.<sup>105</sup> First, the statutory

100. HAWKLAND, *supra* note 3, at 663.

101. See HAWKLAND, *supra* note 3, at 663.

102. Texas has adopted a statute that leaves questions of horizontal and vertical privity for the courts. California omitted section 2-318, but has enacted a separate statute that is, in effect, similar to Alternative C. Louisiana has never enacted Article 2 of the Uniform Commercial Code.

103. Alternative A has been adopted in the following states: Alaska, Arizona, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin. See HAWKLAND, *supra* note 3, at 666 n.1. Technically, the Florida statute is a nonstandard version of Alternative A because it expands the class of third-party beneficiaries to include the purchaser's employees. See HAWKLAND, *supra* note 2, at 649. In addition, the courts in a few states have judicially amended some of Alternative A's restrictions. For example, the Illinois Court of Appeals and the Pennsylvania Supreme Court have expanded the class of third-party beneficiaries and the class of potential defendants. See, e.g., *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); and *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974). These cases are discussed *infra* part IV.A.2.

104. U.C.C. § 2-318 (1992).

105. In principle, Alternative A limits the class of potential plaintiffs in a fifth way because it contains a foreseeability requirement. In particular, the language of Alternative A confers standing only if it is "reasonable to expect that [the nonpurchaser] may use, consume, or be affected by the goods." *Id.* In practice, however, the foreseeability requirement rarely, if ever, operates as a limitation upon the right to sue for breach-of-warranty under Alternative A. See 4 ROBERT ANDERSON, UNIFORM COMMERCIAL CODE § 2-318:10 (1983). For example, in *Harris v. Great Atlantic & Pacific Tea Co.*, 23 Mass. App. Dec. 169 (Mass. Dist. Ct. 1962), the purchaser's nine-year-old son was injured when the bottle of beer he was opening for his father broke. Re-



language limits the class of potential plaintiffs to "natural persons." That means that Alternative A is no help to partnerships and corporations because they are not considered "natural persons."<sup>106</sup> Second, the statutory language limits the class of potential plaintiffs to the buyer's houseguests, household, and family members.<sup>107</sup> Thus, Alternative A is generally no help to the buyer's employees.<sup>108</sup> Third, Alternative A is no help to plaintiffs who have sustained only property damage or economic loss because the statutory language requires personal injury.<sup>109</sup> Fourth, Alternative A does not grant standing to sue remote sellers because the statutory language limits the class of potential defendants to direct sellers;<sup>110</sup> however, the Official Comment to section 2-318 states that Alter-

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versing a trial court judgment for the defendant, the court of appeals held that it was reasonable to expect that a child would be affected by the bottle of beer and, for that reason, the purchaser's son had standing to sue under Alternative A. *Id.* at 587. The state of Massachusetts later adopted a nonstandard version of Alternative C.

106. *See, e.g.,* *Fischbach & Moore Int'l Corp. v. Crane Barge R-14*, 476 F. Supp. 282 (D. Md. 1979); *United States Fidelity & Guar. Co. v. Truck & Commerce Equip. Co.*, 257 N.E.2d 380 (Ohio 1970) (corporation is not a "natural person" within the meaning of § 2-318).

107. The term "family" in Alternative A has been liberally construed and is not necessarily limited to the purchaser's nuclear family. *See, e.g.,* *Chastain v. Fuqua Indus., Inc.*, 275 S.E.2d 679 (Ga. Ct. App. 1980) (purchaser's grandson, although not dwelling in the same household as the purchaser); *Wolfe v. Ford Motor Co.*, 434 N.E.2d 1008 (Mass. 1982) (purchaser's niece, although apparently not dwelling in the same household as the purchaser); *Wolfe v. Ford Motor Co.*, 376 N.E.2d 143 (Mass. App. Ct. 1978) (same); *Westlake v. Big Town Supermart, Inc.*, No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985) (wife of the purchaser's nephew, although apparently not dwelling in the same household as the purchaser); *Browder v. Pettigrew*, 541 S.W.2d 402 (Tenn. 1976) (purchaser's mother-in-law).

108. *See, e.g.,* *Cowens v. Siemens-Elema AB*, 837 F.2d 817 (8th Cir. 1988); *Brendle v. General Tire & Rubber Co.*, 505 F.2d 243 (4th Cir. 1974); *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981); *Parzini v. Center Chem. Co.*, 214 S.E.2d 700 (Ga. 1975); *Weaver v. Ralston Motor Hotel, Inc.*, 218 S.E.2d 260 (Ga. Ct. App. 1975); *Blankenship v. Morrison Mach. Co.*, 257 A.2d 430 (Md. Ct. App. 1969); *Laclair v. Silberline Mfg. Co.*, 393 N.E.2d 867 (Mass. 1979); *Armijo v. Ed Black's Chevrolet Ctr., Inc.*, 733 P.2d 870 (N.M. Ct. App. 1987); *Fisher v. Graco, Inc.*, 440 N.Y.S.2d 380 (N.Y. App. Div. 1981); *Dickey v. Lockport Prestress, Inc.*, 384 N.Y.S.2d 609 (N.Y. App. Div. 1976); *Lee v. Wright Tool & Forge Co.*, 356 N.E.2d 303 (Ohio Ct. App. 1975); *Hester v. Purex Corp.*, 534 P.2d 1306 (Okla. 1975); *Colvin v. FMC Corp.*, 604 P.2d 157 (Or. Ct. App. 1979); *Hargrove v. Newsome*, 470 S.W.2d 348 (Tenn. 1971), *cert. denied*, 405 U.S. 907 (1972).

109. *See, e.g.,* *Johnson v. General Motors Corp.*, 502 A.2d 1317 (Pa. Super. Ct. 1986) (purchaser's wife seeking to recover damages for a defective automobile transmission did not have standing to sue under § 2-318); *see also* HAWKLAND, *supra* note 3, at 665.

110. Alternative A of § 2-318 uses the phrase "his buyer" (i.e., "A seller's warranty . . . extends to any natural person in the family or household of his buyer . . ." U.C.C. § 2-318). The term "his buyer" has been interpreted to mean the seller's immediate buyer. *See* HAWKLAND, *supra* note 3, at 665.

native A "is . . . not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."<sup>111</sup> That language has been interpreted to mean that Alternative A leaves problems of vertical privity to be resolved by the courts.<sup>112</sup> Many courts have partially or wholly abolished the vertical privity requirement.<sup>113</sup> Alternative B,<sup>114</sup> Alternative C,<sup>115</sup> and various nonstandard versions<sup>116</sup> of section 2-318 go

111. U.C.C. § 2-318 cmt. 3 (1992).

112. *See, e.g.*, *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849 (Okla. 1979); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

113. *See, e.g.*, *Fullerton Aircraft Sales & Rentals, Inc. v. Beech Aircraft Corp.*, 842 F.2d 717 (4th Cir. 1988) (applying Kansas law); *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260 (10th Cir. 1984) (applying Oklahoma law); *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982) (applying Illinois law); *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155 (9th Cir. 1980) (applying Montana law); *Walsh v. Ford Motor Co.*, 612 F. Supp. 983 (D.D.C. 1985) (applying New Jersey law); *County of Westchester v. General Motors Corp.*, 555 F. Supp. 290 (S.D.N.Y. 1983); *Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771 (D.S.D. 1982); *Shooshanian v. Wagner*, 672 P.2d 455 (Alaska 1983); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967); *Rothe v. Maloney Cadillac, Inc.*, 492 N.E.2d 497 (Ill. App. Ct. 1986); *Citizens Gas & Coke Utility v. American Economy Ins. Co.*, 477 N.E.2d 329 (Ind. Ct. App. 1985); *State Farm Auto. Ins. Co. v. Anderson-Webber, Inc.*, 110 N.W.2d 449 (Iowa 1961); *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800 (Mich. Ct. App. 1970); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977); *Groppe Co. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985); *Santor v. A and M Karagehusian, Inc.*, 207 A.2d 305 (N.J. 1965); *Old Albany Estates, Ltd.* 604 P.2d 849; *Nobility Homes of Texas, Inc.*, 557 S.W.2d 77; *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968).

114. Alternative B provides that: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." U.C.C. § 2-318 (1992). Alternative B has been adopted in the following states: Alabama, Kansas, Carolina, Vermont, and the Virgin Islands. *See HAWKLAND, supra* note 3, at 673.

115. Alternative C provides that:

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

U.C.C. § 2-318 (1992) Alternative C has been adopted in the following states: Hawaii, Iowa, Minnesota, North Dakota, South Dakota, Utah, and Wyoming. *See HAWKLAND, supra* note 3, at 675.

116. The following states have adopted "nonstandard" versions of § 2-318, or sepa-

beyond Alternative A in eroding the lack of privity defense.

Alternative B provides that "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty" may institute a breach-of-warranty action against the seller.<sup>117</sup> Alternative B is more generous than Alternative A because it expands the class of potential plaintiffs and also the class of potential defendants. For example, Alternative B potentially encompasses nonpurchasers who are not in the buyer's family or household, such as the buyer's employees and invitees. Indeed, it is conceivable that even bystanders might have standing to sue for breach of warranty under Alternative B.<sup>118</sup> In addition, Alternative B implicitly abolishes the requirement of vertical privity because the seller's warranty is not limited to "his buyer."<sup>119</sup> Thus, Alternative B expands the class of

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rate statutes that are similar in effect to § 2-318: Arkansas (similar in effect to Alternative C); California (California never adopted section 2-318, but has a separate statute that is similar in effect to Alternative C; however, California's statute also provides for treble damages and attorneys' fees); Colorado (similar in effect to Alternative C); Delaware (similar in effect to Alternative B, except that the personal injury requirement has been abolished); Florida (similar in effect to Alternative A, except that the beneficiary class specifically includes the purchaser's employees); Maine (similar in effect to Alternative C); Maryland (similar in effect to Alternative B); Massachusetts (similar in effect to Alternative C, but contains potentially significant variations); Minnesota (similar in effect to Alternative C); Mississippi (Mississippi has a separate statute, MISS. CODE ANN. § 11-7-20, which abolishes the requirement of privity "[i]n all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach-of-warranty"); New Hampshire (similar in effect to Alternative C); Rhode Island (similar in effect to Alternative C); South Carolina (modified form of Alternative B); Texas (Texas' version of 2-318 leaves matters of horizontal and vertical privity to the courts for their determination); and Virginia (see the following comments).

See HAWKLAND, *supra* note 3, at 642-76. Arkansas, Maine, Massachusetts, New Hampshire, and Virginia have similar statutes. See HAWKLAND, *supra* note 3, at 642-57. The Arkansas statute reads as follows:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller to recover damages for breach-of-warranty, express or implied, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably expect to use, consume or be affected by the goods. The manufacturer or seller may not exclude or limit the operation of this section.

ARK. CODE ANN. § 4-86-101 (Michie 1987).

117. See *supra* note 114.

118. See, e.g., Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970) (applying Vermont law); Nacci v. Volkswagen of Am., Inc., 325 A.2d 617 (Del. Super. Ct. 1974).

119. Furthermore, the Code defines the terms "buyer" and "seller" in a way that does not restrict those terms to direct buyers and direct sellers. For example, U.C.C. § 2-103(1)(a) defines the term "buyer" as "a person who buys or contracts to buy goods" and § 2-103(1)(d) defines the term "seller" as a person who sells or contracts

potential defendants to include remote sellers.<sup>120</sup> But Alternative B does not help nonprivity plaintiffs who have sustained only property damage or economic losses. The statutory language requires personal injury. Similarly, Alternative B is no help to partnerships and corporations because the statute is limited to "natural persons."

Alternative C eliminates the lack-of-privity defense the most.<sup>121</sup> It provides, in pertinent, part that: "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty."<sup>122</sup> Like Alternative A, Alternative C grants standing to the buyer's houseguests and to the buyer's family members and household. Alternative C is even more generous, however, because it expands the class of plaintiffs to potentially include other nonpurchasers like the buyer's employees and invitees, and bystanders.<sup>123</sup>

Like Alternative B, Alternative C eliminates the vertical privity requirement. However, Alternative C is more generous than Alternative B because it does not require personal injury. The statutory language simply refers to "injury." Thus, plaintiffs sustaining only property damage or economic loss may have standing to sue.<sup>124</sup>

Unlike Alternatives A and B, Alternative C is not limited to "natural persons." The statutory language refers to "any person," which is defined under the Code to include corporations, partnerships, and other types of organizations.<sup>125</sup> Hence, Alternative C permits both corporations and partnerships to sue for breach of warranty.

#### F. Defenses to Warranty Claims

As stated earlier, the most common defense that nonprivity plaintiffs encounter is the lack-of-privity defense. Plaintiffs also encounter defens-

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to sell goods." U.C.C. § 2-103(1)(a),(d) (1992).

120. See HAWKLAND, *supra* note 3, at 672-73.

121. WHITE & SUMMERS, *supra* note 3, at 463; HAWKLAND, *supra* note 3, at 674-75.

122. See *supra* note 115 for the full text of Alternative C.

123. See Draper, *supra* note 94, at §§ 5-6.

124. See, e.g., Milbank Mut. Ins. Co. v. Proksch, 244 N.W.2d 105 (Minn. 1976) (allowing purchaser's father to recover for residential property damage caused when their Christmas tree caught fire).

125. The term "person" in Alternative C includes partnerships and corporations by virtue of U.C.C. § 1-201(30) (which says that the word "person" includes an organization), and § 1-201(28) (which says that the word "organization" includes corporations, partnerships, and other types of organizations).

es based on lack of notice, warranty disclaimers, remedy limitations, and the statute of limitations. In fact, the drafters seemed to contemplate that these defenses would be available in section 2-318 litigation.<sup>126</sup> However, despite the drafters' intent,<sup>127</sup> some cases suggest that defenses based on lack of notice, warranty disclaimers, remedy limitations, and the statute of limitations are unavailable in litigation instituted under section 2-318.<sup>128</sup> Part IV.B of this Article will analyze some of the conflicting cases in which these defenses are raised. In order to follow the discussion in part IV.B, one must understand the basic law of defenses to warranty claims. The balance of this section will present a brief discussion of some of those defenses.

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126. For example, Official Comment 1 to § 2-318 states, in pertinent part, "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." U.C.C. § 2-318 cmt. 1. In addition, Official Comment 5 to § 2-607 states, in pertinent part, as follows:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach-of-warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance . . . . However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

U.C.C. § 2-607 cmt. 5 (1992). The Official Comments to the U.C.C. do not have the force of the statutory language enacted by the legislature but are regarded as a permissible and persuasive aid in determining legislative intent. *See, e.g., Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261, 262-63 (Mo. Ct. App. 1976).

127. *See supra* note 126.

128. *See, e.g., R & L Grain Co. v. Chicago Corp. E.*, 531 F. Supp. 201, 208-09 (N.D. Ill. 1981) (a seller's warranty disclaimers are effective against third-party beneficiaries); *Tomczuk v. Town of Cheshire*, 217 A.2d 71, 73-74 (Conn. Super. Ct. 1965) (notice defense is inapplicable to a section 2-318 plaintiff); *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 194 S.E.2d 513, 515 (Ga. Ct. App. 1972) (notice defense is inapplicable to a § 2-318 plaintiff); *Velez v. Craine & Clark Lumber Corp.*, 305 N.E.2d 750, 753-54 (N.Y. 1973) (disclaimer ineffective against purchaser's employees). *But see Wenner Petroleum Corp. v. Mitsui & Co. (USA)*, 748 P.2d 356, 357 (Colo. Ct. App. 1987) (seller's warranty disclaimers and remedy limitations are effective against § 2-318 plaintiffs). Some courts have ruled that the tort statute of limitations, rather than the breach of warranty statute of limitations, governs § 2-318 claims. *See, e.g., Salvador v. Atlantic Steel Boiler Co.*, 389 A.2d 1148, 1151 (Pa. Super. Ct. 1978), *aff'd.*, 424 A.2d 497 (Pa. 1981); *Kelly v. Ford Motor Co.*, 290 A.2d 607, 609-10 (R.I. 1972). *See generally* WHITE AND SUMMERS, *supra* note 3, at 481-83.

## 1. The Use of Warranty Disclaimers as a Defense

The Code gives sellers the right to modify or disclaim warranties by appropriate language.<sup>129</sup> If goods do not carry a warranty, there is obviously no legal basis for a breach-of-warranty action. However, in order to be effective, warranty disclaimers<sup>130</sup> must comply with certain Code requirements. For example, a written disclaimer of the implied warranty of merchantability generally must mention the word "merchantability" and must be conspicuous. Similarly, a disclaimer of the implied warranty of fitness generally must be written and conspicuous. However, both implied warranties can be disclaimed by expressions like "as is." Consequently, a section 2-318 plaintiff who surmounts the lack-of-privity defense may conceivably face an equally troublesome warranty-disclaimer defense.

## 2. The Use of Remedy Limitations as a Defense

The Code permits sellers to use remedy limitations to limit their liabili-

129. For example, under § 2-316(1) seller retain a limited right to disclaim or modify *express* warranties. In addition, § 2-316(2) permits seller to exclude or modify implied warranties:

[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2) (1992). Similarly, section 2-316(3) provides, in pertinent part:

Notwithstanding subsection (2)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and . . .
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

*Id.* § 2-316(3) (1992). The terms "course of dealing," "usage of trade," and "course of performance" are defined and explained in Code §§ 1-205 and 2-208.

130. In this Article, the term "warranty disclaimer" is used broadly to refer to language that limits or modifies warranty liability and also to language that disclaims or negates the existence of warranties and thereby prevents the creation of warranties.

ty for breach of warranty.<sup>131</sup> This would constitute another potential obstacle to recovery in section 2-318 breach-of-warranty actions. As the term suggests, remedy limitations protect the seller "by limiting the buyer's remedies" for breach of warranty.<sup>132</sup> However, a remedy limitation is ineffective unless it complies with certain Code requirements. For example, section 2-719(1)(b) permits a buyer to circumvent a remedy limitation unless the parties have explicitly agreed that the remedy limitation is the buyer's sole and exclusive remedy, in which case it is the plaintiff's only remedy.<sup>133</sup> Section 2-719(2) permits the courts to strike a remedy limitation in order to preserve a minimum adequate remedy for breach of contract.<sup>134</sup> Specifically, if a remedy limitation operates to de-

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131. For example, § 2-316(4) provides that "[r]emedies for breach-of-warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719)." *Id.* § 2-316(4).

Section 2-719 provides that:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement or non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

*Id.* § 2-719.

Furthermore, U.C.C. § 1-102 constitutes an additional limitation on the right to limit remedies for breach-of-warranty. The pertinent portion of Section 1-102 provides that:

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith [U.C.C. §§ 1-201(19), 1-203 and 2-103(1)(b)], diligence, reasonableness [U.C.C. § 1-204] and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

*Id.* § 1-103.

132. *Id.* § 2-719(1)(a).

133. See *supra* note 131.

134. U.C.C. § 2-719 cmt. 1 (1992).

prive the plaintiff of a minimum adequate remedy, the limitation may be avoided.

Similarly, section 2-719(2) permits the courts to strike a remedy limitation "[w]here circumstances cause [it] to fail of its essential purpose."<sup>135</sup> Section 2-719(3) provides that the exclusion or limitation of consequential damages for personal injury is prima facie unconscionable in the case of consumer goods, but not where the loss is commercial. This may allow a consumer to avoid a remedy limitation that excludes or limits a seller's liability for personal injury.<sup>136</sup>

### 3. The Defense of Lack of Notice

Under the Code, a buyer's failure to notify the seller of a breach of warranty (e.g., a defect in the goods) prior to acceptance may prevent the buyer from relying upon the breach to justify rejection of the goods<sup>137</sup> or as a basis for a breach-of-warranty action.<sup>138</sup> After acceptance of the goods, section 2-607(3)(a) provides that the failure to notify the seller of a breach of warranty may result in the waiver of the right to sue for breach of warranty and any other remedies against the seller.<sup>139</sup> Therefore, the plaintiff's failure to timely notify the seller of a breach of

135. The two most common situations are: (i) cases where the exclusive remedy is the repair or replacement of defective products or parts and the seller fails to timely repair or replace; and (ii) cases where the buyer's right to object to deficiencies is so narrowly circumscribed as to preclude meaningful objections.

136. However, courts are more willing to sustain remedy limitations that exclude or limit a seller's liability for commercial losses. This stance finds support in the plain language of § 2-719(3). See *supra* note 131.

137. U.C.C. § 2-602(1) states that "[r]ejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." U.C.C. § 2-602(1) (1992).

138. U.C.C. § 2-605(1) states:

The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach (a) where the seller could have cured it if stated seasonably; or (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

*Id.* § 2-605(1).

139. Section 2-607(3)(a) states: "Where a tender has been accepted the buyer 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." *Id.* § 2-607(3)(a).



warranty could constitute a potential obstacle to recovery in breach-of-warranty actions filed under section 2-318.<sup>140</sup>

#### 4. The U.C.C. Statute of Limitations Defense

Under U.C.C. section 2-725, the Code's four-year statute of limitations generally starts to run on the date that the goods are delivered. This is so even if the aggrieved party is unaware of the breach at that time.<sup>141</sup> Thus, the Code statute of limitations conceivably could expire before occurrence of the injury to a person not in privity (e.g., an employee of the purchaser). Thus, the statute of limitations could deprive section 2-318 plaintiffs of their breach-of-warranty actions. If so, then the Code statute of limitations could thwart the drafters' intention of providing a breach-of-warranty action for section 2-318 plaintiffs. For this reason, some courts have refused to apply the four-year Code statute of limitations to litigation under section 2-318.<sup>142</sup> However, other courts have ap-

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140. Official Comment 5 to § 2-607 provides, in pertinent part:

Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred.

*Id.* § 2-607 cmt. 5. This language suggests that § 2-318 plaintiffs are required, at a minimum, to give notice of injury as a precondition to maintaining a breach-of-warranty action. On the other hand, § 2-607(3)(a) says that the "buyer" must notify the seller of breach or be barred from any remedy; and § 2-103(1)(a) says that the term "buyer" means "a person who buys or contracts to buy goods." *Id.* § 2-607(3)(a), 2-103(1)(a). This suggests that the § 2-607(3)(a) notice requirement may be inapplicable to nonpurchasers such as § 2-318 plaintiffs. Even if § 2-318 plaintiffs are required to give notice to the seller, it is unclear whether they must give notice to a remote seller. Section 2-103(1)(d) states that "Seller" means "a person who sells or contracts to sell goods." *Id.* § 2-103(1)(d). Thus, the term "seller" is not defined with specific reference to § 2-607(3)(a). As a result, the reference to "seller" in § 2-607(3)(a) could mean the "direct" seller.

141. U.C.C. § 2-725 provides, in pertinent part:

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . . A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach-of-warranty occurs when tender of delivery is made."

*Id.* § 2-725. There are some exceptions to the four-year limitations period. For example, U.C.C. § 2-725(1) permits the parties to shorten the statute of limitations to one year (but they may not extend it). And § 2-725(2) provides that where "a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." *Id.* § 2-725(2).

142. *See, e.g.,* *Salvador v. Atlantic Steel Boiler Co.*, 389 A.2d 1148 (Pa. Super. Ct.

plied the Code statute of limitations.<sup>143</sup> Part IV.B.3 of this Article analyzes the conflicting case law in this area.

##### 5. The Use of Tort Claims to Avoid Code Defenses

The preceding Code defenses based on the privity requirement, the notice requirement, warranty disclaimers, remedy limitations, and the U.C.C. statute of limitations are generally unavailable in tort actions.<sup>144</sup> This is one reason why section 2-318 plaintiffs frequently add negligence claims<sup>145</sup> and strict liability claims<sup>146</sup> to their breach-of-warranty claims. Strict tort liability evolved as a judicial response to perceived inadequacies in warranty law regarding consumers who sustained physical injuries from defective goods.<sup>147</sup> *MacPherson v. Buick Motor Co.*<sup>148</sup> was a landmark case in the development of products liability law. In that case, a consumer's action for personal injuries and property damage caused by the negligent manufacture of an automobile was not precluded even though there was a lack of privity between the automobile manufacturer

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1978), *aff'd*, 424 A.2d 497 (Pa. 1981); *Lee v. Wright Tool & Forge Co.*, 356 N.E.2d 303 (Ohio 1975); *Bowling v. Ford Motor Co.*, 296 F. Supp. 312 (E.D. Tenn. 1968); *Parish v. B.F. Goodrich Co.*, 235 N.W.2d 570 (Mich. 1975); *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981).

143. *See, e.g.*, *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985); *Williams v. West Penn. Power Co.*, 467 A.2d 811 (Pa. 1983); *Ribley v. Harsco Corp.*, 394 N.Y.S.2d 741 (N.Y. App. Div. 1977).

144. *See* WHITE & SUMMERS, *supra* note 3, at 460, 462; *see also*, William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L.REV. 731 (1990).

145. *See, e.g.*, *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 194 S.E.2d 513 (Ga. Ct. App. 1972); *Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985); *LaClair v. Silberline Mfg. Co.*, 393 N.E.2d 867 (Mass. 1979); *McCarthy v. Bristol Lab., Div. of Bristol-Myers Co.*, 449 N.Y.S.2d 280 (N.Y. App. 1982); *Singer v. Federated Dept. Stores, Inc.*, 447 N.Y.S.2d 582 (N.Y. App. Div. 1981); *Westlake v. Big Town Supermart Inc.*, No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985); *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979).

146. *See, e.g.*, *Williams*, 695 S.W.2d 411; *Perfetti v. McGhan Medical*, 662 P.2d 646 (N.M. Ct. App. 1983); *Spring Motors Distribs., Inc.*, 489 A.2d 660; *Doulman v. Sears Roebuck and Co.*, 445 N.Y.S.2d 851 (N.Y. App. Div. 1981); *Ciampichini v. Ring Bros.*, 339 N.Y.S.2d 716 (N.Y. App. Div. 1973); *McCarthy*, 449 N.Y.S.2d 280; *Westlake*, No. 49809, 1985 WL 3982; *Hargrove v. Newsome*, 470 S.W.2d 348 (Tenn. 1971), *cert. denied*, 405 U.S. 907 (1972).

147. *See generally* William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

148. 111 N.E. 1050 (N.Y. 1916).

and the consumer.<sup>149</sup> *Henningsen v. Bloomfield Motors*<sup>150</sup> abolished privity as a defense to a personal injury action based on breach of the implied warranties of merchantability and fitness. In *Henningsen*, the plaintiff sued to recover for the damages she sustained when her husband's defective automobile crashed, injuring her and damaging the automobile. The Court affirmed a judgment for the plaintiff, ruling that "under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchaser by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser."<sup>151</sup> These early cases paved the way for the doctrine of strict liability in tort.

*Greenman v. Yuba Power Products, Inc.*<sup>152</sup> is regarded as the case that first articulated the doctrine of strict liability in tort.<sup>153</sup> In that case, the California Supreme Court recognized that many so-called "warranty actions" were really tort actions because the courts had weakened or eliminated the normal contract defenses based on lack of privity, lack of notice, and warranty disclaimers.<sup>154</sup> As a result, the California Supreme Court explicitly abandoned the fictional warranty action in favor of a strict tort liability action, stating:

Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.<sup>155</sup>

The bases of strict tort liability claims and warranty claims are different. The elements of Code warranty claims are discussed *supra* in part II.A through II.C. Compare the contrasting requirements of the cause of action for strict products liability under the Restatement (Second) Torts, Section 402A:

Special Liability of Seller of Product for Physical Harm to User or Consumer: (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

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149. *Id.*

150. 161 A.2d 69 (N.J. 1960).

151. *Id.* at 84.

152. 377 P.2d 897 (Cal. 1963).

153. See 63 AM. JUR. 2d *Products Liability* § 528 (1984).

154. *Greenman*, 377 P.2d at 901.

155. *Id.* at 901.

caused to the ultimate user or consumer or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>156</sup>

In practice, strict liability claims and Code breach-of-warranty claims are parallel remedies for personal injury and property damage. The warranty claims may be easier to prove because they do not require proof that the product was defective and unreasonably dangerous. Instead, the plaintiff only has to show that the product did not to work the way it was supposed to work. Strict liability actions are not subject to the difficult Code defenses based on lack of privity, lack of notice, warranty disclaimers, remedy limitations, and the statute of limitations. Thus, when such defenses complicate a breach-of-warranty action, a strict tort liability action may be feasible. On the other hand, a breach-of-warranty action may be feasible when a personal injury plaintiff is unable to maintain a strict liability action—for example, when a jurisdiction does not recognize the strict liability cause of action, or when the plaintiff cannot satisfy the prerequisites for that cause of action.

### III. RESEARCH HYPOTHESES

The class of nonprivity plaintiffs who have standing to sue for breach of warranty gets wider or narrower depending upon which version of section 2-318 is adopted.<sup>157</sup> This suggests that one should analyze cases decided under Alternative A separately from those decided under Alternative B, and analyze cases decided under Alternative B separately from

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

157. For example, Alternative A of § 2-318 gives a breach-of-warranty action to a comparatively narrow class of nonprivity plaintiffs: "any natural person who is in the family or household of the buyer or who is a guest in [the buyer's] home . . . and who is injured in person by breach of the warranty." U.C.C. § 2-318 (1992). By contrast, in states that have enacted Alternative "B" or "C," or some non-standard version, § 2-318 gives a breach-of-warranty action to a comparatively broader class of nonprivity plaintiffs. For example, Alternative B states that the seller's warranty extends to "any natural person who may reasonably be expected to use, consume, or be affected by the goods and who is injured in person by breach of the warranty." *Id.* Alternative "C" is even broader: the "seller's warranty . . . extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty." *Id.*

those decided under Alternative C, and so forth. Otherwise, one may engage in the frivolous exercise of comparing apples and oranges. Consequently, this Article will focus upon cases decided under Alternative A and leave the analysis of cases decided under other versions of section 2-318 to a forthcoming follow-up article.

As previously discussed, Alternative A is designed to abolish the horizontal privity bar for a limited class of nonpurchasers. As the statutory analysis in part II.E established, four factors<sup>158</sup> determine whether a nonpurchaser is in the statutorily protected group of plaintiffs who have standing to sue for breach of warranty.<sup>159</sup> First, the nonpurchaser must be a natural person. Second, the nonpurchaser must be in the purchaser's family or household or a houseguest of the purchaser. Third, the nonpurchaser must have sustained personal injury. Fourth, the defendant must be a direct seller.<sup>160</sup> Therefore, in breach-of-warranty actions decided under Alternative A, the lack-of-privity defense should fail when these four factors or variables are all present. For the sake of analysis, this proposition is formally stated as follows:

*Hypothesis 1:*

The courts will reject a lack of privity defense to a nonpurchaser's warranty action if: (1) the plaintiff is a natural person, (2) in the purchaser's family or household or a houseguest, (3) who is suing to recover for personal injury, and (4) the defendant is a direct seller.

Hypothesis 1 simply operationalizes the statutory language. The corollaries of Hypothesis 1 are more interesting. For example, Hypothesis 1 implies that in warranty actions decided under Alternative A, the lack-of-privity defense should prevail when the plaintiff is a nonpurchaser who is not in the buyer's family, household or a houseguest; or when a nonprivity plaintiff is not a natural person; or when a nonprivity plaintiff is not attempting to recover for personal injury (but rather for economic losses or property damage); or when the defendant is not a direct seller. For clarity of analysis, these corollaries will be stated in the form of four additional hypotheses:

*Hypothesis 2:*

The courts will dismiss a nonpurchaser's breach-of-warranty action on the grounds of lack of privity if the plaintiff is not in the purchaser's family or household or a houseguest.

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158. As previously stated, the foreseeability requirement rarely, if ever, operates as a limitation upon the right to sue for breach-of-warranty under Alternative A. See 1 ROBERT ANDERSON, UNIFORM COMMERCIAL CODE § 2-318:10 (1983).

159. U.C.C. § 2-318 (1992).

160. *Id.*

*Hypothesis 3:*

The courts will dismiss a nonprivity plaintiff's breach-of-warranty action on the grounds of lack of privity if the plaintiff has not sustained personal injury.

*Hypothesis 4:*

The courts will dismiss a nonprivity plaintiff's breach-of-warranty action, on the grounds of lack of privity, if the defendant is a not a direct seller.

*Hypothesis 5:*

The courts will dismiss a nonprivity plaintiff's breach-of-warranty action on the grounds of lack of privity if the plaintiff is not a natural person.

The results of the analysis of cases pertaining to the preceding hypotheses are presented *infra* part IV.A. The results of the analysis of cases involving defenses based on the notice requirements, warranty disclaimers, remedy limitations, and the statute of limitations are presented *infra* part IV.B.

#### IV. RESEARCH RESULTS

##### A. *The Lack of Privity Defense*

###### 1. The Support for Hypothesis 1

The support for Hypothesis 1 is very strong. Recall that Hypothesis 1 says that the courts will reject a lack-of-privity defense to a nonpurchaser's warranty claim when: (1) the plaintiff is a natural person, (2) in the buyer's family or household or a houseguest, (3) who is suing to recover for personal injury, and (4) the defendant is a direct seller. In each of five cases where all four factors were present, the direct seller's lack-of-privity defense failed,<sup>161</sup> and there is no case involving all four factors where the direct seller's lack-of-privity defense prevailed. *Westlake v.*

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161. *Chastain v. Fuqua Indus., Inc.*, 275 S.E.2d 679 (Ga. Ct. App. 1980); *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 194 S.E.2d 513 (Ga. Ct. App. 1972); *Wolfe v. Ford Motor Co.*, 434 N.E.2d 1008 (Mass. 1982); *Westlake v. Big Town Supermart Inc.*, No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985); *Miller v. Preitz*, 221 A.2d 320 (Pa. 1966), *overruled in part on other grounds by* *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968).

*Big Town Supermart*<sup>162</sup> and *Miller v. Preitz*<sup>163</sup> are illustrative of this line of decisions. In *Westlake*, the plaintiff's uncle purchased industrial tape from the defendant Big Town Supermart and gave it to the plaintiff, Westlake.<sup>164</sup> The plaintiff and his wife claimed that the tape gave off toluene fumes when used,<sup>165</sup> and that the plaintiff's wife sustained brain damage and memory loss when she inhaled the fumes.<sup>166</sup> The plaintiffs instituted an action for breach of express warranty and breach of implied warranty against Big Town Supermart.<sup>167</sup> The court of appeals concluded that the plaintiffs were section 2-318 third-party beneficiaries of Big Town's warranties to the purchaser and, as such, had standing to sue Big Town for breach of warranty.<sup>168</sup>

In *Miller v. Preitz*, the decedent's aunt purchased a vaporizer from the defendant pharmacy.<sup>169</sup> The vaporizer was made by the co-defendant, Northern Electric Company.<sup>170</sup> The decedent was using the device at his residence when it suddenly ejected boiling water and killed him.<sup>171</sup> The Pennsylvania Supreme Court decided that the decedent's estate had standing to sue the pharmacy for breach of warranty under section 2-318,<sup>172</sup> but that the decedent's breach-of-warranty action against the manufacturer should be dismissed on grounds of lack of privity.<sup>173</sup>

To summarize, the cases decided under Alternative A suggest that a direct seller's lack-of-privity defense will fail when nonpurchaser plaintiffs are clearly within the statutorily protected group. In other words, the courts have no difficulty interpreting and applying Alternative A when the plaintiff is a natural person in the buyer's family or household or a houseguest who is suing to recover for personal injury, and the defendant is a direct seller. But does the lack of privity defense prevail, in accordance with Hypotheses 2, 3, 4 and 5, when one or more of these factors is absent?

## 2. The Support for Hypothesis 2

There is strong support for Hypothesis 2. Recall that Hypothesis 2 says

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162. No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985).

163. 221 A.2d 320.

164. *Westlake*, No. 49809 1985 WL 3982 at \*7.

165. *Id.*

166. *Id.* at \*2.

167. *Id.*

168. *Id.* at \*7.

169. *Miller*, 221 A.2d at 321-22.

170. *Id.* at 322.

171. *Id.*

172. *Id.* at 323.

173. *Id.* at 324.

that under Alternative A the lack of privity defense will prevail when the plaintiff is a nonpurchaser who is not in the buyer's family or household or the buyer's house guest. *Crews v. W.A. Brown & Son, Inc.*,<sup>174</sup> supports this hypothesis. In *Crews*, the lack-of-privity defense prevailed when a thirteen-year-old girl filed suit against the company that sold a walk-in freezer to her church.<sup>175</sup> The plaintiff, who was working as a volunteer at the church, sought to recover for the injuries she sustained while she was trapped inside the freezer when the freezer door malfunctioned.<sup>176</sup> As a result of the accident, the plaintiff sustained severe frostbite to her feet, legs, and buttocks.<sup>177</sup> Her injuries were so severe that she was hospitalized for two months and eventually lost nine of her toes.<sup>178</sup> Her complaint alleged breach of express warranty and breach of implied warranty.<sup>179</sup> The superior court entered summary judgment for the seller, and the plaintiff appealed.<sup>180</sup> The court of appeals affirmed the lower court's judgment, holding that the plaintiff was not a member of church's "family" or "household" (or its "houseguest") and, therefore, lacked standing to maintain a breach-of-warranty action against the seller.<sup>181</sup>

Hypothesis 2 is also supported by *Moss v. Polyco*,<sup>182</sup> *Miller v. Sears, Roebuck & Co.*,<sup>183</sup> and *Steckal v. Haughton*<sup>184</sup> because the lack-of-privity defense prevailed in each of those cases where the claimant was the purchaser's customer or invitee. For example, in *Moss*, the plaintiff was injured in the restroom of the restaurant where she was din-

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174. 416 S.E.2d 924 (N.C. Ct. App. 1992).

175. *Id.* at 927.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 929.

180. *Id.* at 926.

181. *Id.* at 930. *See also* First Nat'l Bank of Dwight v. Regent Sports Corp., 619 F. Supp. 820 (N.D. Ill. 1985) (hostess' social guest who was injured by a dart purchased by hostess' mother was not a house guest of the purchaser for purposes of § 2-318); *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988) (airplane passenger lacked standing to sue airplane manufacturer for breach of implied warranty); *Curlee v. Mock Enters., Inc.*, 327 S.E.2d 736 (Ga. Ct. App. 1985) (guest on the boat of a handgun purchaser lacked standing to sue under § 2-318 to recover for personal injury caused by allegedly defective handgun).

182. 522 P.2d 622 (Okla. 1974).

183. 500 N.E.2d 557 (Ill. App. Ct. 1986), *overruled in part on other grounds by* Whitaker v. Lian Feng Mach. Co., 509 N.E.2d 591 (Ill. App. Ct. 1987).

184. 449 N.E.2d 1264 (N.Y. 1983).



ing.<sup>185</sup> Her injuries occurred when a bottle of drain cleaner fell from a shelf and spilled onto her.<sup>186</sup> The plaintiff sued the manufacturer and the supplier of the drain cleaner for breach of the implied warranty of merchantability, alleging that the defendants had defectively constructed the container and its cap.<sup>187</sup> The state supreme court decided that the plaintiff was not a section 2-318 third-party beneficiary of the defendants' warranties and, consequently, lacked standing to sue for breach of warranty.<sup>188</sup>

Similarly, in *Miller*, the plaintiff was a customer of a transmission shop who was waiting to get his car repaired.<sup>189</sup> During the visit, a service technician turned on an air compressor, which caused an explosion that injured the plaintiff.<sup>190</sup> The compressor was manufactured by Doerr Electric Corporation and Melben Products Company, Inc., and sold to the transmission shop by Sears Roebuck Company.<sup>191</sup> The plaintiff subsequently filed suit against Doerr, Melben, and Sears. The complaint included claims for breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness.<sup>192</sup> The circuit court dismissed the breach-of-warranty claims, and the plaintiff appealed.<sup>193</sup> Affirming a lower court judgment, the appellate court dismissed the warranty claims on the grounds that under Alternative A the plaintiff was not a section 2-318 third-party beneficiary and, therefore, lacked standing to sue.<sup>194</sup>

In *Steckal*, the plaintiff filed a breach-of-warranty action against an elevator manufacturer to recover for injuries sustained in an elevator accident that occurred while the plaintiff was a passenger in the elevator.<sup>195</sup> Affirming lower court judgments for the defendant, the court of appeals decided that the plaintiff was not a section 2-318 third-party beneficiary of the manufacturer's warranties and, therefore, lacked standing to sue.<sup>196</sup>

A number of other cases also support Hypothesis 2: *Colvin v. FMC*

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185. *Moss*, 522 P.2d at 624.

186. *Id.*

187. *Id.*

188. *Id.* at 625.

189. *Miller v. Sears, Roebuck & Co.*, 500 N.E.2d 557, 558 (Ill. App. Ct. 1986), *overruled in part on other grounds by Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987).

190. *Id.*

191. *Id.*

192. *Id.* As is common in this type of litigation, the plaintiff also sought recovery under theories of negligence and strict liability.

193. *Id.*

194. *Id.* at 559.

195. *Steckal v. Haughton*, 449 N.E.2d 1264 (N.Y. 1983).

196. *Id.* at 1265.

Corp.;<sup>197</sup> *Dickey v. Lockport Prestress, Inc.*,<sup>198</sup> *Weaver v. Ralston Motor Hotel, Inc.*,<sup>199</sup> *Hester v. Purex Corp.*,<sup>200</sup> *Hargrove v. Newsome*,<sup>201</sup> *Lee v. Wright Tool & Forge Co.*,<sup>202</sup> *Laclair v. Silberline Mfg. Co.*,<sup>203</sup> *Fisher v. Graco Inc.*,<sup>204</sup> *Armijo v. Ed Black's Chevrolet Center, Inc.*,<sup>205</sup> and *Cowens v. Siemens-Elema AB*.<sup>206</sup> The lack of privity defense prevailed in each of those Alternative A cases where the plaintiff was an "employee" who was injured by a defective product in the course of employment.<sup>207</sup> For example, in *Hester*, the plaintiff's injury was allegedly caused by the use of a cleaning compound that the defendant sold to the plaintiff's employer.<sup>208</sup> The plaintiff sued for breach of the implied warranties of merchantability and fitness.<sup>209</sup> The Oklahoma Supreme Court dismissed the warranty claims because the plaintiff was not in the class of section 2-318 third-party beneficiaries of the seller's warranties.<sup>210</sup>

Similarly, *Colvin* was brought to recover for personal injuries the plaintiff sustained in the factory where she worked.<sup>211</sup> The factory regularly used insecticides for insect control and the plaintiff claimed that she had been injured by exposure to the insecticides.<sup>212</sup> The complaint included a breach-of-warranty claim.<sup>213</sup> The defendant was the company that manufactured the insecticide and sold it to the factory where the

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197. 604 P.2d 157 (Or. Ct. App. 1979).

198. 384 N.Y.S.2d 609 (N.Y. App. Div. 1976).

199. 218 S.E.2d 260 (Ga. Ct. App. 1975).

200. 534 P.2d 1306 (Okla. 1975).

201. 470 S.W.2d 348 (Tenn. 1971), *cert. denied*, 405 U.S. 907 (1972).

202. 356 N.E.2d 303 (Ohio Ct. App. 1975) (characterizing the cause of action as tort because of lack of contract privity and thus dismissing case on statute of limitations grounds).

203. 393 N.E.2d 867, 874 n.15 (Mass. 1979)(dicta noting "likely" privity problem).

204. 440 N.Y.S.2d 380 (N.Y. App. Div. 1981) (denying claim of plaintiff out of privity because sale occurred before U.C.C. amendment permitting nonprivity actions).

205. 733 P.2d 870 (N.M. Ct. App. 1987) (truck driver not in privity with truck seller).

206. 837 F.2d 817, 822 (8th Cir. 1988) (applying Missouri law) (a purchaser's employee lacks statutory authority to sue for breach-of-warranty).

207. In addition, the dicta in other cases address Hypothesis 2. *See, e.g.*, *Boddie v. Litton*, 455 N.E.2d 142, 151 (Ill. App. Ct. 1983) (rejecting liability because plaintiff was employee of incidental beneficiary rather than contracting party).

208. *Hester v. Purex Corp.*, 534 P.2d 1306 (Okla. 1975).

209. *Id.* at 1307.

210. *Id.* at 1308.

211. *Colvin v. FMC Corp.*, 604 P.2d 157, 157-59 (Or. Ct. App. 1979).

212. *Id.*

213. *Id.* at 159.

plaintiff worked.<sup>214</sup> The plaintiff's complaint was dismissed on the grounds of lack of privity.<sup>215</sup>

In *Weaver*, the plaintiff was involved in a traffic accident when his truck broke down because of water contamination in the gasoline.<sup>216</sup> The plaintiff subsequently sued the service station where he filled his truck.<sup>217</sup> The complaint included claims for breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness.<sup>218</sup> The court of appeals held that the plaintiff was not a section 2-318 third party beneficiary of the service station's warranties to the plaintiff's employer and, consequently, lacked standing to sue the service station for breach of warranty.<sup>219</sup>

Federal courts applying state law have generally ruled that nonpurchasers such as employees, passengers, and bystanders lack standing to sue for breach of warranty under Alternative A.<sup>220</sup> For example, in *LaGorga v. Kroger Co.*<sup>221</sup> the plaintiff was a small child who survived burns covering eighty percent of his body.<sup>222</sup> The injuries were sustained when his jacket caught fire while he and two other children were playing around a metal barrel in which trash was burning.<sup>223</sup> The plaintiff's second cousin had purchased the jacket at the Kroger store where she worked, and had given it to the plaintiff as a Christmas present.<sup>224</sup> The cousin was not in the plaintiff's nuclear family, did not live

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214. *Id.* at 158.

215. *Id.* at 160-61.

216. *Weaver v. Ralston Motor Hotel, Inc.*, 218 S.E.2d 260, 261 (Ga. Ct. App. 1975).

217. *Id.*

218. *Id.*

219. *Id.* at 262.

220. *See, e.g.*, *Puckett v. Comet Mfg. Corp.*, 892 F.2d 80 (6th Cir. 1989) (per curiam) (unpublished disposition; text available in WESTLAW) (applying Kentucky law); *Errichiello v. Eli Lilly & Co.*, 618 F. Supp. 484 (D. Mass. 1985); *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W.D. Pa. 1967); *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963). *But see* *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961) (applying Pennsylvania law) (in a confusing opinion, the district court in *Thompson* rejected the lack-of-privity defense and ruled that an auto purchaser's passenger could sue direct and remote sellers for breach-of-warranty to recover for personal injuries sustained as a result of a defective accelerator pedal. Two years later, however, the Pennsylvania Supreme Court restored the vitality of the lack-of-privity defense in *Hochgertel v. Canada Dry Corp.*, 187 A.2d 575 (Pa. 1963). In 1974, the Pennsylvania Supreme Court, in *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974), overruled *Hochgertel*, claiming that the *Hochgertel* decision had become outdated. The court stated that although, at the time, *Hochgertel* was the proper accommodation between tort and contracts law, *Hochgertel* became outdated in light of the developments in products liability law. *Salvador*, 319 A.2d at 908).

221. 275 F. Supp. 373 (W.D. Pa. 1967).

222. *Id.* at 377.

223. *Id.*

224. *Id.* at 375 n.7 and 377.

near him, and did not even personally deliver the jacket to him.<sup>225</sup> Accordingly, the district court dismissed the plaintiff's breach-of-warranty action against Kroger Company on the ground of lack of privity.<sup>226</sup>

In *In re Johns-Manville Asbestosis Cases*,<sup>227</sup> a federal district court, interpreting Illinois's version of section 2-318,<sup>228</sup> held that the right to recover for breach of warranty is limited to purchasers and the narrow class of persons listed in section 2-318.<sup>229</sup> Since that section does not mention the purchaser's employees, the court dismissed suits brought by employees of ultimate purchasers for the seller's breach of implied warranties.<sup>230</sup> Similarly, in *Hemphill v. Sayers*,<sup>231</sup> the federal district court held that a college football player whose injuries were allegedly caused by a defective football helmet could not sue the company that manufactured the team's helmets for breach of warranty.<sup>232</sup> Other federal courts have also indicated that a purchaser's employees lack a remedy under Alternative A.<sup>233</sup>

The preceding cases suggest that courts apply Alternative A literally and uphold the lack-of-privity defense when a plaintiff nonpurchaser is not a member of the buyer's family or household or the buyer's houseguest. However, a minority line of authority to the contrary indicates that the lack-of-privity defense fails despite the fact that the plaintiff nonpurchaser is not in the buyer's family or household or the buyer's houseguest.<sup>234</sup> As the following discussion will demonstrate, the expla-

225. *Id.*

226. *Id.* at 376.

227. 511 F. Supp. 1235 (N.D. Ill. 1981).

228. Illinois has adopted Alternative A. ILL. ANN. STAT. ch. 810, ¶ 5/2-318 (Smith-Hurd 1993).

229. *In re Johns-Manville*, 511 F. Supp. at 1239-40.

230. *Id.*

231. 552 F. Supp. 685 (S.D. Ill. 1982).

232. *Id.* at 694.

233. *See, e.g.*, *Vincent v. United Technologies Corp.*, 854 F.2d 1318 (4th Cir. 1988) (*per curiam*) (unpublished disposition; text available in WESTLAW) (applying Connecticut law); *Maynard v. General Elec. Co.*, 486 F.2d 538, 539 (4th Cir. 1973); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1017 (5th Cir. 1969, *reh'g denied*, 424 F.2d 549 (5th Cir. 1970); *Hise v. John Does, Inc.*, 669 F. Supp. 1026, 1028 (D. Idaho 1986) (remanded for lack of diversity); *Teel v. American Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981); *Haragan v. Union Oil Co.*, 312 F. Supp. 1392, 1396 (D. Alaska 1970) (denying recovery to survivor of employee of independent contractor used by buyer); *Klimas v. International Tel. & Tel. Corp.*, 297 F. Supp. 937, 938-40 (D.R.I. 1969).

234. *See, e.g.*, *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967) (dis-

nation of this conflicting line of authority is that, in a few jurisdictions, the courts have judicially abolished the privity bar to warranty claims by nonpurchasers who fall outside the protected class of plaintiffs described in section 2-318 (Alternative A).<sup>235</sup>

For example, the Illinois Court of Appeals and the Pennsylvania Supreme Court reject the privity bar to warranty claims by a purchaser's employees.<sup>236</sup> *Whitaker v. Lian Feng Machine Co.*<sup>237</sup> illustrates their position. In *Whitaker*, the plaintiff sued to recover for personal injuries he sustained while working with a bandsaw belonging to his employer, DuPage Precision Products Company.<sup>238</sup> Lian Feng Machine Company manufactured the bandsaw and sold it to an importer, who in turn resold it to Valley Supply & Tool Company. Valley Supply sold it to DuPage.<sup>239</sup> The plaintiff claimed the saw cut his left hand, amputating three fingers,<sup>240</sup> and alleged breach of the implied warranties of merchantability and fitness for a particular purpose.<sup>241</sup> The circuit court granted the defendants' motions to dismiss the breach-of-warranty counts for lack of

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cussing Oklahoma law) (employee injured in stud-gun accident); *Hoffman v. A. B. Chance Co.*, 346 F. Supp. 991, 993 (M.D. Pa. 1972) (applying Pennsylvania law) (employee alleged injury in brake-lock malfunction; court predicts Pennsylvania would not read § 2-318 to preclude strict liability); *Hart v. Goodyear Tire & Rubber Co.*, 214 F. Supp. 817, 819 (N.D. Ind. 1963) (employee sustains claim because privity extends to successor in interest); *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 595 (Ill. App. Ct. 1987) (purchaser's employee may sue for breach of warranty if employee safety was implicit in the bargain); *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903, 905 (Pa. 1974) (citing *Hoffman* and fulfilling its prediction); *Ciampichini v. Ring Bros.*, 339 N.Y.S.2d 716, 720 (N.Y. App. Div. 1973) (permitting an automobile passenger injured in a traffic accident to sue the manufacturer of the *other* vehicle for breach of warranty). *But see* *Hester v. Purex Corp.*, 534 P.2d 1306 (Okla. 1975). The *Hester* Court rejected the dicta in *Speed Fastners* and stated:

Our legislature, since 1966, has had several opportunities to adopt alternatives B or C enlarging the coverage of the U.C.C. It has not chosen to do so.

Thus, until the Legislature elects to change this statute, we hold that the U.C.C. section 2-318 does not extend the coverage of its implied warranty of merchantability to employees of the purchaser.

*Id.* at 1308. In this Article, cases that run contrary to any of the Hypotheses *supra* part III.A are occasionally referred to as "nonconforming cases."

235. Occasionally, these case-law developments required overruling well-established precedents. For example, in *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903, 908 (Pa. 1974), the Pennsylvania Supreme Court explicitly overruled *Hochgertel v. Canada Dry Corp.*, 187 A.2d 575 (Pa. 1963), a leading case dismissing warranty claims by a purchaser's employees on the grounds of lack of privity.

236. *See, e.g., Whitaker*, 509 N.E.2d 59; *Salvador*, 319 A.2d 903.

237. 509 N.E.2d 591 (Ill. App. Ct. 1987).

238. *Id.* at 592.

239. *Id.*

240. *Id.*

241. *Id.*

privity, and the employee appealed.<sup>242</sup> The question before the appellate court was whether an employee of the ultimate purchaser of a product could recover for personal injury in a breach-of-warranty action against any or all of the sellers in the chain of distribution.<sup>243</sup>

Although conceding *arguendo* that Illinois's section 2-318<sup>244</sup> might not present an obstacle to remote purchasers,<sup>245</sup> the defendants argued that the statute clearly delimited the class of nonpurchasers with standing to sue for breach of warranty.<sup>246</sup> Since the plaintiff did not fall within the class of persons listed in section 2-318, the defendants argued that the plaintiff could not recover for breach of warranty.<sup>247</sup>

In interpreting Official Comment 3<sup>248</sup> to Code section 2-318, the *Whitaker* court decided that "where the Comment speaks of 'developing case law' it includes developing case law regarding persons in horizontal privity with sellers."<sup>249</sup> The *Whitaker* court subsequently ruled that a

242. *Id.*

243. *Id.*

244. Illinois adopted Alternative A. The Illinois statute provides:

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

ILL. REV. STAT. ch. 26, para. 2-318 (1985), *construed in Whitaker*, 509 N.E.2d at 595 (Ill. App. Ct. 1987).

245. In *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550 (Ill. 1974), the Illinois Supreme Court had previously abolished the vertical privity bar to Code breach-of-warranty actions for personal injury.

246. *Whitaker*, 509 N.E.2d at 593.

247. *Id.*

248. Illinois adopted the text of the Official Comments to U.C.C. § 2-318. Official Comment 3 to § 2-318 states in pertinent part:

The first alternative [Alternative A] . . . is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second alternative [Alternative B] is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative [Alternative C] goes further, following the trend of modern decisions as indicated by *Restatement of Torts* 2d § 402A in extending the rule beyond injuries to the person.

U.C.C. § 2-318 cmt. 3 (1992) (citation omitted). ILL. REV. STAT. ch. 26, para. 2-318 (1992); *see also Whitaker*, 509 N.E.2d at 595.

249. *Whitaker*, 509 N.E.2d at 594. At least one commentator believes that common-law developments on the horizontal plane are contrary to the clear language of Alter-

seller's warranty extends to an employee of the ultimate "purchaser who is injured in the use of the goods, as long as the safety of that employee . . . was either explicitly or implicitly part of the basis of the bargain when the employer purchased the goods."<sup>250</sup> The facts in evidence convinced the court that the safety of the plaintiff was indeed part of the basis of the bargain when the employer purchased the goods.<sup>251</sup> Accordingly, the *Whitaker* court ruled that the plaintiff had standing to sue the defendants for breach of warranty.<sup>252</sup>

The Pennsylvania Supreme Court reached the same conclusion in *Salvador v. Atlantic Steel Boiler Co.*<sup>253</sup> The plaintiff, Ahmed Salvador, lost approximately seventy-seven percent of his hearing following as a result of a steam-boiler explosion at his workplace.<sup>254</sup> The plaintiff employee filed suit against the company that sold the boiler to his employer and the remote sellers who manufactured the boiler.<sup>255</sup> The complaint alleged breach of the implied warranty of fitness and also raised a tort claim.<sup>256</sup> The trial court dismissed the breach-of-warranty claim on the grounds of lack of privity, and the plaintiff appealed.<sup>257</sup> The superior court reversed and reinstated the breach-of-warranty claim.<sup>258</sup> The manufacturers appealed.<sup>259</sup>

The Pennsylvania Supreme Court affirmed the superior court's decision to reinstate the warranty claim.<sup>260</sup> Although noting that an employee was not one of the third-party beneficiaries to whom Alternative A granted standing to sue, the state supreme court interpreted Official Comment 3 to allow the courts to abolish the privity bar to nonpurchasers other than the class of beneficiaries enumerated in Alternative A.<sup>261</sup> The court subsequently held that a purchaser's employees

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native A. See Alex Devience, Jr., *The Developing Line Between Warranty and Tort Liability Under the Uniform Commercial Code: Does 2-318 Make A Difference?*, 2 DEPAUL BUS. L.J. 295 (1990). For a discussion of the various judicial approaches to this subject, see John F. Kamin, Note, *The Extension of Implied Warranty Protection to Employees of a Purchaser*, 14 S. ILL. U. L.J. 123 (1989).

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

251. *Id.* *Whitaker's* employer purchased a bandsaw from Lian Feng Machine Co. The court ruled, "Insofar as [the employer] bargained for a bandsaw that was as safe to use as any merchantable bandsaw, it sought the safety on behalf of its employees who were to use the saw." *Id.*

252. *Id.*

253. 319 A.2d 903, 904 (Pa. 1974).

254. *Id.* at 904.

255. *Id.*

256. *Id.* at 904 n.2.

257. *Id.*

258. *Id.* at 904-05.

259. *Id.* at 905.

260. *Id.*

261. *Id.* at 905-06. To justify this conclusion, the court pointed to language in Offi-

have standing to sue the suppliers in the chain of distribution for breach of warranty.<sup>262</sup>

The *Salvador* court's decision was influenced by the fact that other jurisdictions had extended warranty protection to a purchaser's employees. For example, the court pointed out that "[t]he Supreme Court of California . . . on analogous facts, held an employee to be part of the employer's industrial 'family.'<sup>263</sup>

In addition, the court believed that public policy and legal symmetry favored allowing a purchaser's employees to sue for breach of warranty to recover for personal injury.<sup>264</sup> The *Salvador* court summarized the policy reasons for abolishing the privity requirement as follows:

First, the public interest in the protection of human life justifies the imposition upon consumer products suppliers of full responsibility for harm resulting from

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cial Comment 3, which states that "[Alternative A] is not intended to enlarge or restrict the developing case law." *Id.* at 906 n.12.

262. *Id.* at 904.

263. *Id.* at 906 n.7 (citing *Peterson v. Lamb Rubber Co.*, 353 P.2d 575 (Cal. 1960); accord *Hart v. Goodyear Tire & Rubber Co.*, 214 F. Supp. 817 (N.D. Ind. 1963)).

264. In an earlier case, *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968), the Pennsylvania Supreme Court abolished the vertical privity bar. *Id.* at 852. The question presented in *Salvador* concerned whether the horizontal privity bar should also be abolished. The court in *Salvador* decided that it should be. In reaching that result, the *Salvador* court explicitly overruled one earlier decision, an established precedent, *Hochgertel v. Canada Dry Corp.*, 187 A.2d 575 (Pa. 1963). In *Hochgertel*, the Pennsylvania Supreme Court ruled that a purchaser's employee lacked standing to sue for breach-of-warranty under Alternative A because employees were not in the statutorily protected group. *Id.* at 577. In a later case, *Yentzer v. Taylor Wine Co.*, 199 A.2d 463 (Pa. 1964), the Pennsylvania Supreme Court made an unconvincing effort to distinguish the *Hochgertel* decision. The plaintiff in *Yentzer* was a hotel manager who purchased four bottles of champagne on behalf of the hotel. *Id.* at 464. The manager sustained serious injury after a cap from one of the champagne bottles unexpectedly ejected and struck him in the eye. *Id.* The manager subsequently sued the bottling company for breach of the implied warranty of merchantability. *Id.* The lower court dismissed the complaint for lack of privity, on the authority of the *Hochgertel* decision. *Id.* The Pennsylvania Supreme Court reversed, ruling that the manager had standing to sue as a "purchaser" because he purchased the champagne. *Id.* at 464. The court tried to distinguish *Hochgertel* as a case involving a nonpurchaser. *Id.* However, the undisputed facts state that the *Yentzer* plaintiff bought the wine in the course of employment on behalf of his employer for consumption by the hotel guests. *Salvador*, 319 A.2d at 906. The hotel purchased the wine, and the plaintiff was the purchaser's employee. As a result, the *Yentzer* court's attempt to distinguish *Hochgertel* is unconvincing. *Yentzer* should be viewed as a case where the Pennsylvania Supreme Court signaled a retreat from the *Hochgertel* decision. This retreat culminated in the *Salvador* decision, which explicitly overruled *Hochgertel*. *Id.* at 908.



use of the products. Second, as we have stated, the manufacturer by marketing and advertising the product impliedly represents that it is safe for the intended use and society should not allow him to avoid responsibility. Finally, multiplicity of actions will be avoided by permitting a direct action by the injured party against the manufacturer.<sup>265</sup>

As regards legal symmetry, the court stated that the concerns that once made it reluctant to abolish the horizontal privity bar—the possibility that this might expose manufacturers to strict liability—was mooted by the advent of strict liability.<sup>266</sup> The court further stated:

Today . . . a manufacturer by virtue of section 402A is effectively the guarantor of his products' safety. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect. He may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process. Neither may the manufacturer defeat the claim by arguing that the purchaser has no contractual relation to him. Why then should the mere fact that the injured party is not himself the purchaser deny recovery?

Because the manufacturer is now a guarantor, the "harsh and unjust result" is worked on the plaintiff who may recover for his injury or loss if his complaint is in trespass, but on identical facts would be denied relief if the pleading is captioned "Complaint in Assumpsit." This anomalous situation is certainly to be avoided. Thus (w)ith Pennsylvania's adoption of Restatement 402, the same demands of legal symmetry which once supported privity now destroy it.<sup>267</sup>

Cases similar to *Salvador* involve public policy arguments broad enough to apply to other types of nonpurchasers. For example, the public policy arguments used in the *Salvador* case to justify abolishing the privity requirement for employees could be used to justify abolishing the privity bar to claims by bystanders who suffer personal injury as a result of a breach of warranty. Indeed, courts in other jurisdictions have abolished the privity requirement for bystanders on the basis of policy arguments reminiscent of those made in *Salvador*.<sup>268</sup>

In *Ciampichini v. Ring Bros. Inc.*,<sup>269</sup> the court held that a bystander could maintain a breach-of-warranty action against a remote seller to recover for personal injuries.<sup>270</sup> In that case, a traffic accident occurred when the coupling hook attaching a trailer to a truck broke.<sup>271</sup> The trailer became detached from the truck, crossed onto the wrong side of the

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265. *Salvador*, 319 A.2d at 908 n.15 (citations omitted) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97 at 650-51 (4th ed. 1971)).

266. *Id.* at 907-08 (citations omitted) (citing *Webb v. Zern*, 220 A.2d 853 (Pa. 1966)).

267. *Id.* (citations omitted).

268. See *infra* notes 269-281 and accompanying text.

269. 339 N.Y.S.2d 716 (N.Y. App. Div. 1973).

270. *Id.* at 720.

271. *Id.* at 717.

road, and collided with a car operated by Emilio Ciampichini, killing him.<sup>272</sup> The plaintiff, Frieda Ciampichini, a passenger in the car, sustained severe injuries.<sup>273</sup> She subsequently sued Ring Brothers Corporation, the manufacturer of the coupling hook for breach of the implied warranty of merchantability.<sup>274</sup> Ciampichini alleged that the trailer hook was defective.<sup>275</sup>

The New York lower court granted the defendant's motion to dismiss the breach-of-warranty claim on the grounds of lack of privity.<sup>276</sup> The New York Supreme Court reversed, ruling that Alternative A does not prevent the courts from abolishing the horizontal privity bar to warranty claims by nonpurchasers who are outside of the statutory class of third-party beneficiaries described in Alternative A. The *Ciampichini* court explained that:

The Official Comment to Uniform Commercial Code, § 2-313 states that "Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may provide useful guidance in dealing with further cases as they arise."<sup>277</sup>

Moving to the policy arguments that favor expanding Alternative A to include "bystanders," the *Ciampichini* court pointed out:

It is both reasonable and just to extend to bystanders the protection against a defective manufactured article. To restrict recovery to those who are users is

272. *Id.*

273. *Id.*

274. *Id.* at 717-18.

275. *Id.*

276. Like the lower courts in the *Salvador* case, the lower courts in *Ciampichini* were confronted with a decision of their supreme court that compelled dismissal of the plaintiff's complaint on the grounds of lack of privity. The New York Supreme Court had ruled in *Berzon v. Don Allen Motors, Inc.*, 256 N.Y.S.2d 643 (N.Y. App. Div. 1965), that no action exists in favor of a non-user. *Id.* at 644. In *Ciampichini*, the New York Supreme Court reconsidered *Berzon* and overruled it on the grounds that it supported "a principle [the horizontal privity requirement] which we believe outmoded and no longer adaptable to the rights of individuals in contemporary society." *Ciampichini*, 339 N.Y.S.2d at 717. Two years after the New York Supreme Court's decision in *Ciampichini*, New York replaced Alternative A with a nonstandard version of Alternative B. See HAWKLAND, *supra* note 3, at 653-54.

277. *Ciampichini*, 339 N.Y.S.2d at 719-20.

unrealistic in view of the fact that bystanders have less opportunity to detect any defect than either purchasers or users. Our decision is one of policy but is mandated by both justice and common sense. We should not and do not hesitate to extend the ambit of implied warranty to include bystanders.<sup>278</sup>

In addition, courts in other jurisdictions have also abolished the horizontal privity bar to warranty claims by nonpurchasers outside the statutory class of third-party beneficiaries described in Alternative A.<sup>279</sup> The usual beneficiaries of such common law developments are the purchaser's employees,<sup>280</sup> however, courts have protected other nonpurchasers.<sup>281</sup>

To summarize, the courts in a minority of jurisdictions have abolished the horizontal privity bar to warranty actions by nonpurchasers outside of the statutory class of third-party beneficiaries described in Alternative A. This explains why the lack-of-privity defense occasionally fails in cases where the plaintiff is a nonpurchaser who is not in the statutorily protected class described in Alternative A. An unanswered question is why some courts find in the language of Alternative A the authority to

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278. *Id.* at 720.

279. *See, e.g.,* *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395, 398 (10th Cir. 1967) (employee entitled to sue on theory of breach of implied warranty and not express warranty); *Hoffman v. A. B. Chance Co.*, 346 F. Supp. 991, 993 (M.D. Pa. 1972); *Hart v. Goodyear Tire & Rubber Co.*, 214 F. Supp. 817, 819 (N.D. Ind. 1963); *Dippel v. Sciano*, 155 N.W.2d 55, 58 (Wis. 1967) ("majority of jurisdictions . . . no longer adhere to the concept of no liability without privity of contract"). *But see* *Hester v. Purex Corp.*, 534 P.2d 1306, 1308 (Okla. 1975) (rejecting as dicta the statements in *Speed Fastners, Inc. v. Newsom* that section 2-318 grants standing to purchaser's employees).

280. *See, e.g., Hoffman*, 346 F. Supp. 991 (applying Pennsylvania law). In *Hoffman*, the employee suffered injuries when a brake failed and he was thrown from a mobile platform. *Id.* at 992. The court refused to dismiss the complaint, reasoning that section 2-318 would not prevent an employee from recovering for a product-related injury. *See also Hart*, 214 F. Supp. 817; *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987) (court rejected remote seller's lack of privity defense, thus giving the purchaser's injured employee standing to sue for breach-of-warranty); *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974); *Yentzer v. Taylon*, 199 A.2d 463 (Pa. 1964); *Speed Fastners*, 382 F.2d 395 (discussing Oklahoma law). In *Speed Fastners*, an employee filed suit for injuries suffered when a stud manufactured by defendant split and ricocheted. *Id.* at 396. The Court stated in dicta:

"We believe that the injured employee stands in the shoes of his employer and that his cause of action based on implied warranty is not barred by the shield of privity. The manufacturers know that most businesses are carried on through employees who will actually use the product purchased by their employers."

*Id.* at 398. *But see Hester*, 534 P.2d 1306, 1308 (Oklahoma Supreme Court held that employees of purchaser may not claim breach of implied warranty of merchantability).

281. *See, e.g., Ciampichini*, 339 N.Y.S.2d 716 (protection extended to third persons who are non-users falling in the path of harm).

abolish the horizontal privity bar, when other courts interpret Alternative A as a restriction that prohibits common-law developments in this area. The answer to the question is that a crucial portion of Official Comment 3 to section 2-318 is ambiguous. The pertinent part of the comment reads as follows:

This section [Alternative A] expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.<sup>282</sup>

Some courts interpret the first sentence of Official Comment 3 as an exhaustive list of the nonpurchasers whom the drafters have freed from the privity requirement. Courts that read the statute this way find in Alternative A an implicit restriction on case-law developments abolishing horizontal privity and, therefore, decline to free those other types of nonpurchasers from privity requirements.<sup>283</sup>

Other courts<sup>284</sup> focus on the first six words of the second sentence of Official Comment 3 ("Beyond this, the section in this form is neutral."<sup>285</sup>), and find therein the authority to free other types of nonpurchasers from privity requirements. In particular, the "additional persons which [the] developing case law determines deserve the benefit

282. U.C.C. § 2-318 cmt. 3 (1992).

283. See, e.g., *Cowens v. Siemens-Elcoma AB*, 837 F.2d 817 (8th Cir. 1988) (applying Missouri law); *Weaver v. Ralston Motor Hotel, Inc.*, 218 S.E.2d 260 (Ga. Ct. App. 1975); *LaClair v. Silberline Mfg. Co.*, 393 N.E.2d 867 (Mass. 1979); *Armijo v. Ed Black's Chevrolet Ctr., Inc., v. Stuart Truck Equip., Inc.*, 733 P.2d 870 (N.M. Ct. App. 1987); *Fisher v. Graco, Inc.*, 440 N.Y.S.2d 380 (N.Y. App. Div. 1981); *Dickey v. Lockport Prestress, Inc.*, 384 N.Y.S.2d 609 (N.Y. App. Div. 1976); *Lee v. Wright Tool & Forge Co.*, 356 N.E.2d 303 (Ohio Ct. App. 1975); *Hester*, 534 P.2d 1306; *Colvin v. FMC Corp.*, 604 P.2d 157 (Or. Ct. App. 1979); *Hargrove v. Newsome*, 470 S.W.2d 348 (Tenn. 1971), *cert. denied*, 405 U.S. 907 (1978). In addition, some commentators have expressed the view that common law developments abolishing horizontal privity run counter to the clear language of Alternative A. See, e.g., Alex Devience, Jr., *The Developing Line Between Warranty and Tort Liability Under the Uniform Commercial Code: Does 2-318 Make A Difference?*, 2 DEPAUL BUS. L.J. 295 (1990); John F. Kamin, Note, *The Extension Of Implied Warranty Protection To Employees Of A Purchaser*, 14 S. ILL. U. L.J. 123 (1989). Professors White and Summers may belong in this camp as well: "Some courts have taken Comment 3 to 2-318 to be a license to exceed the limits of Alternative A's language on horizontal privity, and to provide a cause of action to parties other than those specifically mentioned." WHITE & SUMMERS, *supra* note 3, at 460 n.8.

284. See, e.g., *Whitaker*, 509 N.E.2d 591; *Salvador*, 319 A.2d 903.

285. U.C.C. § 2-318 cmt. 3 (1992).

of the purchaser's warranty.<sup>286</sup> Viewed from this perspective, Official Comment 3 establishes a minimum class of third-party beneficiaries but does not restrict case-law developments in the areas of horizontal (or vertical) privity.<sup>287</sup> This interpretation appears reasonable because the word "this" in the second sentence of Alternative A clearly intends to modify the word "includes" in the first sentence. Furthermore, the Code does not define the term "distributive chain,"<sup>288</sup> so it seems possible to read the term "distributive chain" in Official Comment 3<sup>289</sup> as a reference to both purchasers and nonpurchasers in the chain of distribution.<sup>290</sup> Indeed, this interpretation of the term "distributive chain" finds support in Official Comment 2 to section 2-313, which states in pertinent part:

[T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . . The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.<sup>291</sup>

Thus, some of the Code's Official Comments seem to authorize the courts to extend warranty protection beyond the class of third-party beneficiaries enumerated in section 2-318. It is understandable why the courts that read the Code this way believe Alternative A gives them the authority to wholly or partially abolish the horizontal privity bar.<sup>292</sup> Of course, that does not explain how the courts decide whether any particular group of nonpurchasers deserves warranty protection.

In that connection, some courts have justified the decision to extend warranty protection to the purchaser's employees by considering the employees "functionally equivalent" to the purchaser's family members.<sup>293</sup> In fact, courts have referred to employees as the purchaser's

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

287. Some commentators agree with the view that Official Comment 3 lacks any implicit restriction that prevents the courts from abolishing the horizontal privity requirement. See, e.g., Swartzkopf, *supra* note 286, at 451.

288. U.C.C. § 2-103 (1992).

289. "Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the *distributive chain*." U.C.C. § 2-318 cmt. 3 (1992) (emphasis added).

290. Indeed, the term is used this way in a leading case. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

291. U.C.C. § 2-313 cmt. 2 (1992).

292. See, e.g., *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 59 (Ill. App. Ct. 1987); *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974).

293. See, e.g., *Boddie v. Litton Unit Handling Sys., Inc.*, 455 N.E.2d 142 (Ill. App. Ct.

"industrial family."<sup>294</sup> Indeed, similarities exist between the two groups. For example, a purchaser's nuclear family and a purchaser's "industrial family" both have a relationship to the purchaser. This fact makes it easier to view both as intended beneficiaries for purposes of third-party beneficiary doctrine, on the theory that the purchaser implicitly or explicitly bargains for their safety.<sup>295</sup> Thus, the decision to grant standing to the purchaser's employees and the purchaser's family members does not necessarily compromise third-party beneficiary theory.<sup>296</sup>

On the basis of third-party beneficiary theory, however, one could question the propriety of granting bystanders standing to sue under section 2-318. Unlike the purchaser's family members and employees, bystanders are generally "strangers" who have no familial or contractual relationship to the purchaser or the seller.<sup>297</sup> This fact seems a potentially significant distinction for purposes of third-party beneficiary theory, making it difficult to view bystanders as intended beneficiaries. Furthermore, a purchaser's family members and employees are users, but bystanders are usually non-users. This also seems a potentially significant distinction for purposes of public policy, because users are obviously foreseeable injury victims, but nonusers may or may not be. A seller knows or has reason to know of users' harm if the seller's products are defective, thus providing a rational basis for extending warranty protection to employees and family members. By contrast, the basis for extend-

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1983); *Knox v. North Am. Car Corp.*, 399 N.E.2d 1355 (Ill. App. Ct. 1980), *overruled on other grounds*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 491, 594 (Ill. App. Ct. 1987).

294. *See, e.g.*, *Peterson v. Lamb Rubber Co.*, 353 P.2d 575, 581 (Cal. 1960).

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

296. Despite the similarities, important differences exist between these two groups of nonpurchasers. For example, they obtain their derivative warranty rights from different types of purchasers. Family members generally obtain their rights through a consumer purchaser. By comparison, employees generally obtain their rights through a commercial purchaser. Alternative A seems to envision that the buyer is a consumer purchaser. This perhaps rests on the belief that commercial purchasers are more likely to have bargaining power comparable to the vendors with whom they do business. Thus, commercial purchasers remain in a better position to bargain for the protection of their "industrial family" or to protect them through indemnity agreements with their vendors, insurance, and so forth. By comparison, consumer purchasers seem less well situated to protect their family members from injuries caused by defective products. As a result, the policy considerations that favor extending warranty protection to a consumer purchaser's family members seem less applicable to a commercial purchaser's "industrial family."

297. *See, e.g.*, *Clampichini v. Ring Bros.*, 339 N.Y.S.2d 716 (N.Y. App. Div. 1972).

ing warranty protection to bystanders appears less certain. Of course, the *Ciampichini* court had no trouble viewing bystanders as foreseeable injury victims. Indeed, the court found support for this position in the commentaries:

Such injury is often a perfectly foreseeable risk of the maker's enterprise, and the considerations for imposing such risks on the maker without regard to his fault do not stop with those who undertake to use the chattel. Such a restriction is only the distorted shadow of a vanishing privity which is itself a reflection of the habit of viewing the problem as a commercial one between traders, rather than as part of the accident problem.<sup>298</sup>

Furthermore, the *Ciampichini* court argued that "[t]o restrict recovery to those who are users is unrealistic in view of the fact that bystanders have less opportunity to detect any defect than either purchasers or users."<sup>299</sup> The court might also have argued that bystanders need statutory protection even more than the purchaser's family members and employees because bystanders are completely outside the chain of distribution and, therefore, probably have the least "leverage" over anyone in the distribution chain. Yet, none of these arguments necessarily support an extension of warranty protection to bystanders because they still have tort remedies available.

To summarize, strong support exists for Hypothesis 2. Under Alternative A, the lack-of-privity defense usually prevails when the plaintiff nonpurchaser is not in the purchaser's family, household, or a house guest. However, in a number of cases the lack-of-privity defense fails despite the fact that the nonpurchaser plaintiff is not in the buyer's family or household or the buyer's houseguest. The explanation for this is that some courts have abolished the horizontal privity bar and extended warranty protection beyond the class of third-party beneficiaries enumerated in Alternative A. The ambiguities present in Official Comment 3 have led courts to different conclusions concerning the propriety of this type of case-law development. Some courts find in Official Comment 3 an implicit restriction on case-law developments abolishing horizontal privity. Courts that interpret the Official Comment in that manner decline to extend warranty protection beyond the class of beneficiaries enumerated in Alternative A. Other courts instead focus upon a different portion of the Official Comment and find in Alternative A the authority to expand the statutorily protected class to include other nonpurchasers whom the courts determine deserve warranty protection. If the drafters

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298. *Ciampichini*, 339 N.Y.S.2d at 721 (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 1572 n.6 (1956)) (questioning why bystanders are prevented from recovering on a warranty theory).

299. *Id.*

or the legislatures would clarify Official Comment 3, beneficial results would follow.<sup>300</sup>

### 3. The Support for Hypothesis 3

Hypothesis 3 suggests that in breach-of-warranty actions instituted under Alternative A, the lack-of-privity defense will prevail when a nonprivity plaintiff sues to recover for property damage or economic losses rather than personal injury. The following cases support the hypothesis: *Mt. Holly Ski Area v. U.S. Elec. Motors*,<sup>301</sup> *Ridge Co., Inc. v. NCR Corp.*,<sup>302</sup> *Gross v. Systems Engineering Corp.*,<sup>303</sup> *Rothe v. Maloney Cadillac, Inc.*,<sup>304</sup> *Szajna v. General Motors Corp.*,<sup>305</sup> *Bagel v. American Honda Motor Co., Inc.*,<sup>306</sup> *Dutton v. International Harvester Co.*,<sup>307</sup> *Johnson v. General Motors Corp.*,<sup>308</sup> and *Prairie Production Inc. v. Agchem Division-Pennwalt Corp.*<sup>309</sup> For example, *Johnson v. General Motors Corp.*<sup>310</sup> was a case where the nonprivity plaintiff sued to recover for property damage or economic losses. In *Johnson*, the plaintiff's husband purchased a new car shortly before he died. The plaintiff's widow subsequently experienced problems with the transmission and instituted an action against the auto manufacturer for breach of express warranty and breach of implied warranty, in an unsuccessful attempt to recover damages for the allegedly defective transmission.<sup>311</sup>

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300. Some states have already taken steps in this direction. For example, Florida has a nonstandard version of Alternative A that reads as follows:

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

FLA. STAT. ANN. § 672.318 (West 1966 & Supp. 1993).

301. 666 F. Supp. 115 (E.D. Mich. 1987).

302. 597 F. Supp. 1239 (N.D. Ind. 1984).

303. 36 U.C.C. Rep. Serv. (Callaghan) 42 (E.D. Pa. 1983).

304. 518 N.E.2d 1028 (Ill. 1988).

305. 503 N.E.2d 760 (Ill. 1986).

306. 477 N.E.2d 54 (Ill. App. Ct. 1985).

307. 504 N.E.2d 313 (Ind. Ct. App. 1987).

308. 502 A.2d 1317 (Pa. Super. Ct. 1986).

309. 514 N.E.2d 1299 (Ind. Ct. App. 1987).

310. 502 A.2d 1317 (Pa. Super. Ct. 1986).

311. *Id.* at 1318.



The court dismissed the complaint on the grounds that it lacked privity, ruling instead that the plaintiff was not a third-party beneficiary to the defendant's warranties and therefore lacked standing to sue the defendant for breach of warranty.<sup>312</sup>

Although the claimant was a nonprivity plaintiff in *Johnson*, the defendant was a remote seller. As a result, it is difficult to decide whether the type of injury, i.e., property damage or economic loss, controlled the outcome of this case, in accordance with Hypothesis 3. Similarly, in other property damage or economic loss cases, where the lack of privity defense prevailed,<sup>313</sup> the defendants were "remote" sellers. It is, thus, difficult for purposes of Hypothesis 3, to determine whether the type of injury controlled the outcome of those cases. It is clear, however, that the lack-of-privity defense virtually always prevails when the nonprivity plaintiff has sustained only property damage or economic loss.<sup>314</sup> By con-

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312. *Id.* at 1318-19.

313. *Mt. Holly Ski Area v. U.S. Elec. Motors*, 666 F. Supp. 115 (E.D. Mich. 1987); *Ridge Co., v. NCR Corp.*, 597 F. Supp. 1239 (N.D. Ind. 1984) (buyer pursuing remote seller for breach of implied warranty to recover for economic losses was barred by lack of privity); *Gross v. Sys. Eng'g Corp.*, 36 U.C.C. Rep. Serv. (Callaghan) 42 (E.D. Pa. 1983) (buyer pursuing remote seller for breach of implied warranty to recover for economic losses is barred by lack of privity); *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028 (Ill. 1988) (same); *Szajna v. General Motors Corp.*, 503 N.E.2d 760 (Ill. 1986) (privity required to recover for economic losses on a breach of implied warranty claim); *Bagel v. American Honda Motor Co., Inc.*, 477 N.E.2d 54 (Ill. App. Ct. 1985) (privity required to recover for economic losses on a breach of implied warranty claim); *Dutton v. International Harvester Co.*, 504 N.E.2d 313 (Ind. Ct. App. 1987) (buyer pursuing remote seller for breach of implied warranty to recover for economic losses was barred by lack of privity); *Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987) (buyer pursuing remote seller for breach of implied warranty to recover for economic losses is barred by lack of privity).

314. The lack-of-privity defense failed in *Milbank Mutual Ins. Co. v. Proksch*, 244 N.W.2d 105 (Minn. 1976). In that case, the plaintiff's home was damaged when a Christmas tree purchased by his daughter caught fire. The plaintiff homeowner eventually filed a breach-of-warranty action against the Christmas tree vendor. The district court entered judgment in favor of the homeowner and the vendor appealed. The Minnesota Supreme Court affirmed the lower court and ruled that the homeowner had standing to sue under section 2-318. Although the fire that triggered the lawsuit occurred at a time when Minnesota was governed by Alternative A, by the time the case came to trial Minnesota had adopted Alternative C. For various reasons, the court applied Alternative C retroactively. Thus, *Milbank* can be distinguished as a case decided under Alternative C. It is more difficult to explain the failure of the lack-of-privity defense in *Tamura, Inc. v. Sanyo Elec., Inc.*, 636 F. Supp. 1065 (N.D. Ill. 1986). The plaintiffs in *Tamura* were a restaurant named "Schino's" and an unrelated recording company next door named "Audio Mixers." Schino's restaurant purchased a tape deck that caught fire, damaging real and personal property in both buildings. The plaintiffs filed suit against the tape deck manufacturers to recover the losses. The complaints raised various theories of liability including breach of the implied warranty of merchantability. The defendants moved to dismiss the warranty

trast, it is easy to find cases where the lack-of-privy defense fails when the defendant is a remote seller.<sup>315</sup> This suggests that the type of injury may be controlling the outcome in cases involving both property damage or economic loss and remote sellers. In other words, the lack-of-privy defense may prevail in such cases because the plaintiff has sustained the "wrong" type of injury. Nevertheless, the preceding decisions are all consistent with Hypothesis 3 because in each case the nonprivy plaintiff sustained only property damage or economic loss and in each case the lack-of-privy defense was successful.

#### 4. The Support for Hypothesis 4

There is strong support for Hypothesis 4. Hypothesis 4 signifies that in breach-of-warranty actions decided under Alternative A, the lack-of-privy defense will prevail when a nonprivy plaintiff is suing a remote seller for breach of warranty. The following cases support this hypothesis: *Chaffin v. Atlanta Coca-Cola Bottling Co.*;<sup>316</sup> *Miller v. Preitz*;<sup>317</sup> *Westlake v. Big Town Supermart*;<sup>318</sup> *Chastain v. Fuqua Indust.*;<sup>319</sup> *Williams v. Fulmer*;<sup>320</sup> *Lane v. Barringer*;<sup>321</sup> *McCarthy v. Bristol Labora-*

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claims on the grounds that the plaintiffs lacked privy because Schino's' complaint presented a vertical privy problem and nonpurchaser Audio Mixers' complaint presented a horizontal privy problem. In dicta, the court hinted that it could have rejected the vertical privy defense on the grounds that the direct seller was an "agent" of the "remote" seller. *Id.* at 1070. The court actually rejected the lack-of-privy defenses on the authority of *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550 (Ill. 1974). *Tamura*, 636 F. Supp. at 1070. However, *Berry* abolished the vertical privy bar to warranty actions for personal injury and, therefore, provides no firm basis for rejecting the lack-of-privy defense in a case where the plaintiffs sustained only property damage, especially the horizontal nonprivy plaintiff Audio Mixers. *Berry*, 309 N.E.2d at 556. At least one commentator questions whether the *Tamura* case was correctly decided. See John F. Kamin, Note, *The Extension of Implied Warranty Protection To Employees of a Purchaser* (*Whitaker v. Lian Feng Machine Co.*), 14 S. ILL. U. L.J. 123 (1989).

315. See, e.g., *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974); *Ciampichini v. Ring Bros.*, 339 N.Y.S.2d 716 (N.Y. App. Div. 1973). Each of these cases is discussed *supra* part II.A.2.

316. 194 S.E.2d 513 (Ga. Ct. App. 1972).

317. 221 A.2d 320 (Pa. 1976), (*overruled in part on other grounds by Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968).

318. No. 49809, 1985 WL 3982 (Ohio Ct. App. Nov. 27, 1985).

319. 275 S.E.2d 679 (Ga. Ct. App. 1980).

320. 695 S.W.2d 411 (Ky. 1985).

321. 407 N.E.2d 1173 (Ind. Ct. App. 1980).

tories;<sup>322</sup> *Thomaston v. Fort Wayne Pools, Inc.*;<sup>323</sup> and *Anderson v. Dreis & Krump Manufacturing Co.*<sup>324</sup> In each case, the defendant remote seller's lack-of-privy defense prevailed. Thus, these decisions support Hypothesis 4. *Preitz*, *Westlake*, *Chastain*, and *Chaffin* are interesting examples. Each involves two defendants: a direct seller and a remote seller. Moreover, in each case the remote seller's lack-of-privy defense prevailed and the direct seller's lack-of-privy defense failed. *Chaffin* is typical.<sup>325</sup> *Chaffin* involved a personal injury action against a supermarket (direct seller) and a soft drink bottler (remote seller). The plaintiff's daughter had purchased a soft drink from the supermarket's vending machine.<sup>326</sup> The plaintiff testified that a foreign "soapy-like" substance in the soft drink made her sick.<sup>327</sup> The plaintiff's complaint included a claim for breach of the implied warranty of merchantability.<sup>328</sup> The court ruled that the plaintiff was a section 2-318 third-party beneficiary of the supermarket's warranties to the purchaser, and therefore had standing to sue that defendant for breach of implied warranty. However, because the plaintiff was not a section 2-318 third-party beneficiary of the bottling company's warranties, the plaintiff lacked standing to sue the bottling company for breach of implied warranty.<sup>329</sup>

A contrary line of authority holds that the lack-of-privy defense fails even though the defendant is a remote seller. For example, in *Whitaker v. Lian Feng Machine Co.*,<sup>330</sup> and *Salvador v. Atlantic Steel Boiler Co.*,<sup>331</sup> a purchaser's employee sued a remote seller for breach of warranty and the remote seller's lack-of-privy defense failed. However, the discussion *supra* in Part IV.A.2 explained that these cases were decided in jurisdictions where the courts have judicially abolished the privy bar to warranty claims in personal injury cases.<sup>332</sup> This is the typical explanation of the personal injury cases where the lack-of-privy defense fails

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322. 449 N.Y.S.2d 280 (N.Y. App. Div. 1982).

323. 352 S.E.2d 794 (Ga. Ct. App. 1987).

324. 739 P.2d 1177 (Wash. Ct. App. 1987).

325. *Chaffin*, 194 S.E.2d 513.

326. *Id.* at 518.

327. *Id.*

328. *Id.* at 514.

329. *Id.* at 515-16.

330. 509 N.E.2d 591 (Ill. App. Ct. 1987).

331. 319 A.2d 903 (Pa. 1974).

332. As discussed *supra* part IV.A.2: 1) in *Berry v. G.D. Searle*, 309 N.E.2d 550 (Ill. 1974), the Illinois Supreme Court abolished the vertical privy bar to warranty actions in personal injury cases, and 2) in *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968), the Pennsylvania Supreme Court abolished the vertical privy bar to warranty actions for personal injury in that state. Part IV.A.2 also explains that the *Whitaker* case and the *Salvador* case abolished the horizontal privy bar to warranty actions for personal injury in Illinois and Pennsylvania respectively.

even though the defendant is a remote seller. Other non-conforming cases<sup>333</sup> where a remote seller's lack-of-privity defense fails can be explained on the basis of well-established common-law exceptions to the privity requirement.<sup>334</sup> For example, in some states lack-of-privity is not a viable defense when an express warranty is breached.<sup>335</sup> The express warranty may arise from the defendant's advertising, product literature, or product labels.<sup>336</sup> Of course, the plaintiff has to prove reliance on the express warranty and that she is someone whom the defendant should reasonably have expected to use, consume or be affected by the product.<sup>337</sup> Cases like *Tirino v. Kenner Products*<sup>338</sup> fit comfortably within the express warranty exception.

##### 5. The Support for Hypothesis 5

There is less compelling support for Hypothesis 5. Recall that Hypothesis 5 asserts that in breach-of-warranty actions decided under Alternative A, the lack-of-privity defense will prevail when the nonprivity plaintiff is not a natural person. Cases such as *Spiegel v. Sharp Electronics Corp.*,<sup>339</sup> *Hardesty v. Andro Corp.*,<sup>340</sup> and *Monsanto Co. v. Alden Leeds, Inc.*<sup>341</sup> provide support for Hypothesis 5 because in each case the nonprivity plaintiff was a corporation, and the lack-of-privity defense prevailed. However, the plaintiffs in these cases were suing to recover for commercial losses and the defendants were remote sellers, and that

333. See, e.g., *Tirino v. Kenner Prods.*, 341 N.Y.S.2d 61 (N.Y. Civ. Ct. 1973).

334. The "express warranty exception" is discussed later in this Article. There is also a traditional common-law exception for "intimate body products." That exception comes up in cases where personal injury is caused by the use of defective food, beverages, drugs, or cosmetics. See WHITE & SUMMERS, *supra* note 3, at 463. Thus, such cases can be explained and distinguished on the basis of the "intimate body product" exception. See, e.g., *Perfetti v. McGhan Medical*, 662 P.2d 646 (N.M. Ct. App. 1983) (mammary prosthesis); *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979) (bottle of soda pop); *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550 (Ill. 1974) (oral contraceptive). Section 2-318 changes prior case law by making an across-the-board exception to the privity requirement for all types of products.

335. See WHITE & SUMMERS, *supra* note 3, at p. 467-68.

336. *Id.*

337. *Id.*

338. 341 N.Y.S.2d 61 (N.Y. Civ. Ct. 1973). Alternatively, since the case involved a cosmetic product, it is possible to explain and distinguish the decision on the basis of the type of product that was involved.

339. 466 N.E.2d 1040 (Ill. App. Ct. 1984).

340. 555 P.2d 1030 (Okla. 1976).

341. 326 A.2d 90 (N.J. Super. Ct. Law Div. 1974).

makes it difficult to determine whether the plaintiff's status as a corporation controlled the outcome of these cases in accordance with Hypothesis 5.<sup>342</sup> Furthermore, there is a contrary line of authority where the lack-of-privity defense fails even though the nonprivity plaintiff is a corporation.

For example, in *Spring Motors Distributors, Inc. v. Ford Motor Co.*,<sup>343</sup> plaintiff Spring Motors sued Ford Motor Company, a Ford dealer known as Turnpike Ford Truck Sales, and Clark Equipment Company, a company that manufactured and sold truck transmissions to Ford.<sup>344</sup> Spring Motors was in vertical privity with both Ford and Turnpike but was not in privity of contract with Clark because Spring Motors had not purchased anything from that company.<sup>345</sup>

The transaction which triggered the lawsuit occurred when Spring Motors entered a contract to purchase 14 additional trucks from Turnpike for the price of \$265,029.00<sup>346</sup> The complaint alleged that the trucks had defective transmissions and that Spring Motors had sustained economic losses in the form of the costs of repair, towing, and replacement parts, lost profits, and the diminished value of the trucks.<sup>347</sup> The plaintiff sought to recover for those losses on theories of breach of express and implied warranty, strict liability, and negligence.<sup>348</sup> The trial court dismissed the tort claims on the grounds that the Code provided the plaintiff's exclusive remedies for economic losses.<sup>349</sup>

The trial court also ruled that lack-of-privity barred the action between Spring Motors and Clark and that the Code's four-year statute of limitations barred any action against Ford and Turnpike.<sup>350</sup> Accordingly, the trial court dismissed the complaint against all defendants.<sup>351</sup> The appellate division affirmed the dismissal of the breach-of-warranty claim, but it reinstated the strict liability claim by ruling that strict liability entitled a commercial purchaser to recover for economic losses.<sup>352</sup> On appeal, the New Jersey Supreme Court ruled that the Code provides a commercial

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342. On the other hand, these cases provide support for Hypothesis 3 because the corporate plaintiffs sought to recover for economic losses and the lack-of-privity defense prevailed in accordance with Hypothesis 3. In addition, *Spiegel* and *Hardesty* support Hypothesis 4 because the warranty claims were filed against "remote" sellers and the lack-of-privity defense prevailed in accordance with Hypothesis 4.

343. 489 A.2d 660 (N.J. 1985).

344. *Id.* at 662.

345. *Id.*

346. *Id.*

347. *Id.* at 664.

348. *Id.*

349. *Id.*

350. *Id.* at 663.

351. *Id.*

352. *Id.*

purchaser's exclusive remedies for economic loss, and that lack-of-privity is not a defense to a breach-of-warranty action based on economic loss.<sup>353</sup>

The supreme court's justification for restricting commercial buyers to the Code remedies was that the Code provides a "more appropriate framework" for resolving disputes between commercial entities than the principles of strict liability.<sup>354</sup> The court explained that "tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident."<sup>355</sup> The court also pointed out that the Code is a "comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods."<sup>356</sup> Additionally, the court noted that the express purpose of the Code, as stated in section 1-102, is to "clarify and make uniform throughout the United States the law governing commercial transactions."<sup>357</sup> The court further stated:

Allowing Spring Motors to recover from Ford under tort principles would dislocate major provisions of the Code. For example, application of tort principles would obviate the statutory requirement that a buyer give notice of a breach of warranty [under Code Section 2-607(3)], and would deprive the seller of the ability to exclude or limit its liability [under Section 2-316]. In sum, the U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce, and courts should pause before extending judicial doctrines that might dislocate the legislative structure.<sup>358</sup>

Acknowledging that its decision in *Santor v. A & M Karagheusian, Inc.*<sup>359</sup> permitted a consumer to recover for economic losses on a strict liability theory in an action against a remote seller, the *Spring Motors* Court reiterated:

Insofar as indirect economic losses arising out of a commercial transaction between business entities are concerned, we believe that the U.C.C., not tort law, provides the more appropriate analytical framework. By recognizing the supervening role of the U.C.C. in that context, we come closer to fulfilling the expectations of the parties and the intent of the Legislature. The intended effect of our decision is to satisfy the combined, if occasionally contending, goals of simplifying the law

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353. *Id.* at 672, 674.

354. *Id.* at 676.

355. *Id.* at 672.

356. *Id.* at 665 (citing *Ramirez v. Autosport*, 440 A.2d 1345, 1349-52 (N.J. 1982)).

357. U.C.C. § 1-102(2)(a)(1992).

358. *Spring Motors Distribs., Inc.*, 489 A.2d at 671.

359. 207 A.2d 305 (N.J. 1965).

pertaining to business transactions and providing a system of compensation that responds to the needs of the commercial world.<sup>360</sup>

The court justified its decision to abolish the vertical privity requirement and permit a commercial buyer to sue a remote seller by pointing out that Alternative A is neutral, and the courts are allowed to determine whether vertical privity should be required in a warranty action between a buyer and a remote seller.<sup>361</sup> The court then presented a variety of arguments favoring the abolition of the vertical privity bar.<sup>362</sup>

Courts in other jurisdictions have also abolished the vertical privity bar and extended warranty protection to remote corporate purchasers.<sup>363</sup> The decisions that permit such purchasers to sue for property damage or economic loss are firmly rooted in the "case law" clause of Official Comment 3 to section 2-318.<sup>364</sup> However, there is an interesting paradox involved in this line of cases. For example, in *Spring Motors*, the court justified the decision to abolish the vertical privity requirement by pointing out that Alternative A is neutral and the courts are allowed to determine whether vertical privity should be required.<sup>365</sup> The court then offered a variety of policy arguments favoring the abolition of the vertical privity bar.<sup>366</sup> However, earlier arguments favoring recognition of the supervening role of the Code undercut the *Spring Motors* court's reasoning.<sup>367</sup> In other words, after presenting a forceful argument favoring the supervening role of the Code in commercial transaction, and disfavoring "judicial doctrines that might dislocate the legislative structure,"<sup>368</sup> the court reversed direction and tried to justify its decision to abolish the

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360. *Spring Motors Distribs., Inc.*, 489 A.2d at 675-76.

361. *Id.* at 675.

362. *Id.*

363. See, e.g., *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. Ct. App. 1981) (holding that Alternative A is neutral on vertical privity; thus, the commercial purchaser is entitled to sue a remote seller on a breach-of-warranty theory to recover for economic losses). The *Groppel* case is discussed *infra* part IV.B.2.

364. "[Alternative A] . . . is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." U.C.C. § 2-318 cmt. 3 (1992) (emphasis added).

365. *Id.*

366. *Id.* at 674 (citing *Herbstman v. Eastman Kodak Co.*, 342 A.2d 181, 185 (N.J. 1975); *Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 426 (N.J. 1972)).

367. *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 671 (N.J. 1985).

368. *Id.* at 675.

Code's implicit privity requirement.<sup>369</sup> The court appeared aware of this paradox:

We conclude that the absence of privity between a remote supplier and an ultimate purchaser should not preclude the extension to the purchaser of the supplier's warranties made to the manufacturer. We reach that conclusion notwithstanding our recognition that the Code generally applies to parties in privity . . . and that no privity exists between Spring Motors and Clark.<sup>370</sup>

## 6. Summary and Conclusions: The Lack-of-Privity Defense

In summary, the following propositions emerge from the preceding discussion regarding over-arching legal principles that explain case-law developments concerning Alternative A of U.C.C. section 2-318:

- (1) The courts will dismiss a *nonpurchaser's* warranty claim against a seller for lack of privity unless:
  - (a) The plaintiff is a natural person in the purchaser's family or household, or a houseguest, is suing to recover for personal injury, and the defendant is a direct seller; or
  - (b) The plaintiff is an employee of the purchaser, is suing to recover for personal injury, and the claim is filed in a minority jurisdiction where the courts have abolished the horizontal or diagonal privity bars to warranty claims by a purchaser's employees; or
  - (c) One of the traditional common-law exceptions to the privity requirement is available (e.g., the express warranty exception or the "intimate body product" exception).

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369. The Code does not impose an explicit requirement of privity. See, e.g., John M. Conley, *Non-Contract Theories of Recovery Against Vendors of Defective Software*, 230 PLI/Pat 473 (1986). However, the Code generally requires privity because the net effect of the constant references to "buyer" and "seller" is to impose an implicit requirement of privity. In addition, various Code provisions impose an implicit privity requirement. For example, the section 2-607(3)(a) notice requirement is triggered by the buyer's acceptance of the "tender" of goods. U.C.C. § 2-607(3)(a). Section 2-503(1) states that tender "requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." *Id.* § 2-503(1). In addition, the discussion of "tender" in the Official Comment to section 2-503 states that the term "contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed." *Id.* § 2-503 cmt. 1. Hence, "tender" connotes a transaction between parties who are in privity.

370. *Spring Motors Distribs., Inc.*, 489 A.2d at 674 (citations omitted).



- (2) The courts will dismiss a *purchaser's* warranty claim against a remote seller to recover for personal injury for lack of privity unless:
  - (a) The claim is filed in a jurisdiction where the courts have abolished the vertical privity bar to personal injury claims; or
  - (b) One of the traditional common-law exceptions to the privity bar is available.
- (3) The courts will dismiss a *purchaser's* warranty claim for only property damage or economic loss against a remote seller for lack of privity unless the claim is filed in a jurisdiction where the courts have abolished the vertical privity bar to claims for economic loss or property damage.

*B. Defenses Based On Notice Requirements, Warranty Disclaimers, Remedy Limitations, and the Statute of Limitations*

As mentioned earlier, the Code provides a variety of potential defenses to warranty claims including defenses based on warranty disclaimers,<sup>371</sup> remedy limitations, notice requirements, and the statute of limitations. There is no question that such defenses are potentially available against direct purchasers because the pertinent Code statutes and Official Comments use terms such as "the buyer."<sup>372</sup> However, there is a question whether such defenses are available in section 2-318 litigation because the plaintiffs are not direct purchasers and may even be nonpurchasers. However, the drafters seemed to envision that the defenses would be available in section 2-318 litigation. For example, Official Comment 1 to section 2-318 states in pertinent part: "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section."<sup>373</sup> Similarly, section 2-607 is the source of a lack-of-notice defense, and Official Com-

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371. In this Article, the term "warranty disclaimer" refers both to language that limits or modifies warranty liability and to language that disclaims warranties.

372. For example, section 2-316(3)(a) states that sellers can disclaim all implied warranties "by expressions like 'as is,' 'with all faults' or other language which in common understanding call the *buyer's* attention to the exclusion of warranties." *Id.* § 2-316(3)(a) (emphasis added). Similarly, section 2-719, entitled "Contractual Modification or Limitation of Remedy," provides that "the agreement may . . . limit or alter the measure of damages recoverable under this Article, as by limiting the *buyer's* remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." *Id.* § 2-719(1)(a) (emphasis added). Furthermore, section 2-725 provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . . A cause of action accrues when the breach occurs, regardless of the aggrieved *party's* lack of knowledge of the breach." *Id.* § 2-725(1), (2) (emphasis added).

373. *Id.* § 2-318 cmt. 1.

ment 5 to section 2-607 states: "Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred . . . even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation."<sup>374</sup> Thus, the drafters seemed to contemplate that the Code's defenses would be potentially available in warranty actions instituted under section 2-318.

In addition, the courts have made policy arguments to the same effect. For example, the *Spring Motors* court made a forceful argument for judicial deference to the Code on the grounds that the Code is a "comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods."<sup>375</sup> In this connection, the court cautioned against judicial implementation of decisions that "would dislocate major provisions of the Code" like "the statutory requirement that a buyer give notice of a breach of warranty," or the seller's "ability to exclude or limit its liability."<sup>376</sup> Thus, the *Spring Motors* court seemed to contemplate that the Code's defenses should be available in section 2-318 litigation.

However, the court in *Salvador v. Atlantic Steel Boiler Co.*<sup>377</sup> seemed to reach the opposite conclusion. At one point in *Salvador*, the court appeared to indicate that a section 2-318 personal injury claim is only a tort claim:

[V]irtually all jurists and scholarly commentators recognize that this [section 2-318 claim] . . . is purely a fiction created to reach a desirable social policy, the theory of recovery sounds in tort . . . . If the theory sounds in tort rather than contract, [then] it follows that the appropriate statute of limitations should be that which would be applied if the plaintiff's complaint were captioned "Trespass."<sup>378</sup>

At another point in the opinion, the court stated that "it takes a very strained reading of section 2-725 to conclude that it was ever meant to

374. *Id.* § 2-607 cmt. 5.

375. *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 665 (N.J. 1985) (citing *Ramirez v. Autosport*, 440 A.2d 1345, 1349-52 (N.J. 1982)).

376. *Id.* at 671.

377. 389 A.2d 1148 (Pa. Super. Ct. 1978), *aff'd*, 424 A.2d 497 (Pa. 1981).

378. *Id.* at 1154 (citations omitted).

apply to persons other than the contracting parties in breach-of-warranty actions.<sup>379</sup> In addition, the *Salvador* court pointed out that the courts (not the legislatures) had expanded the statutorily protected class to allow a purchaser's employees to sue for breach of warranty, and, therefore, "the remedy for such persons is entirely one of judicial creation. That being the case, the courts should be free to choose and apply that statute of limitations most likely to accommodate the purposes of extending Code protection to such persons."<sup>380</sup> This type of reasoning leads to the conclusion that the Code's defenses are unavailable in section 2-318 litigation. The following subsections of part IV.B of this Article will examine some of the Alternative A cases that discuss the vitality of Code defenses in section 2-318 litigation.<sup>381</sup>

### 1. The Lack-of-Notice Defense

Some cases suggest that the courts are reluctant to permit defendants to use the lack-of-notice defense against an injured consumer,<sup>382</sup> even if the plaintiff is a purchaser<sup>383</sup> and even if the plaintiff purchased the product directly from the defendant.<sup>384</sup> On the other hand, when the plaintiff is suing to recover for economic losses, courts seem more willing to permit the defense—at least when a defendant is a remote seller.<sup>385</sup>

In *Tomczuk v. Town of Cheshire*,<sup>386</sup> the court held that a remote seller's section 2-607(3)(a) lack-of-notice defense is ineffective against a nonpurchaser suing for breach of warranty.<sup>387</sup> The plaintiff in that case was the playmate of a child whose parents had purchased a bicycle from a retail store.<sup>388</sup> The plaintiff sustained personal injuries as a result of an alleged defect in the bicycle and subsequently brought a breach-of-warranty action against the bicycle manufacturer.<sup>389</sup> The manufacturer raised the section 2-607(3)(a) lack-of-notice defense. Although noting that

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379. *Id.* (citations omitted).

380. *Id.*

381. A follow-up article will expand the investigation to include jurisdictions that have adopted other versions of section 2-318.

382. *See, e.g., Morgan v. Sears, Roebuck & Co.*, 693 F. Supp. 1154, 1162 (N.D. Ga. 1988), *aff'd*, 893 F.2d 348 (11th Cir. 1989); *Goldstein v. G.D. Searle & Co.*, 378 N.E.2d 1083, 1087-88 (Ill. App. Ct. 1978); *Chaffin v. Atlanta Coca-Cola Bottling Co.*, 194 S.E.2d 513, 515 (Ga. Ct. App. 1972); *Tomczuk v. Town of Cheshire*, 217 A.2d 71, 73-74 (Conn. Super. Ct. 1965). *See also* WHITE & SUMMERS, *supra* note 3, at 481-84.

383. *See, e.g., Goldstein*, 378 N.E.2d 1083.

384. *See, e.g., Chaffin*, 194 S.E.2d 513.

385. *See, e.g., Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976).

386. 217 A.2d 71 (Conn. Super. Ct. 1965).

387. *Id.* at 73-74.

388. *Id.* at 72.

389. *Id.*

section 2-607(3)(a) does indeed give sellers a potential lack-of-notice defense to warranty claims, the court decided that only immediate sellers could take advantage of the defense.<sup>390</sup> The practical result of this ruling was that the manufacturer's lack-of-notice defense failed. Thus, the issue was resolved and the court could have justified its decision on that basis. The court, however, went on to say that section 2-607(3)(a) imposed the notice obligation upon buyers and that the plaintiff in the *Tomczuk* case was not a buyer, so the lack-of-notice defense failed for that reason too.<sup>391</sup>

The court in *Morgan v. Sears, Roebuck & Co.*<sup>392</sup> also held that a remote seller's section 2-607(3)(a) lack-of-notice defense is ineffective against a nonpurchaser suing for breach of implied warranty.<sup>393</sup> That case was a products liability action instituted against a garment manufacturer on behalf of a three-year-old burn victim.<sup>394</sup> The little girl was seriously injured when the garment she was wearing caught fire while she was playing with matches. The plaintiff's complaint rested on the theories of strict liability, negligence, and breach of implied warranty.<sup>395</sup> The manufacturer raised the section 2-607(3)(a) lack-of-notice defense to the warranty claim and moved for summary judgment.<sup>396</sup> However, the summary judgment motion failed because the district court ruled that nonpurchasers are not required to give the section 2-607(3)(a) notice of breach.<sup>397</sup> The Court explained:

[B]y its terms the notice requirement [section 2-607(3)(a)] applies only to the buyer and not to a third-party beneficiary such as the plaintiff. The official comment to section 2-607 of the Uniform Commercial Code apparently would impose the notice requirement on third-party beneficiaries, but the authority in Georgia is to the contrary.<sup>398</sup>

Similarly, *Chaffin v. Atlanta Coca-Cola Bottling Co.*<sup>399</sup> held that a direct seller's section 2-607(3)(a) lack-of-notice defense is ineffective against a nonpurchaser suing for breach of implied warranty.<sup>400</sup> In

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390. *Id.* at 73.

391. *Id.*

392. 693 F. Supp. 1154 (N.D. Ga. 1988).

393. *Id.* at 1162.

394. *Id.* at 1155.

395. *Id.* at 1156.

396. *Id.*

397. *Id.* at 1161.

398. *Id.* at 1162.

399. 194 S.E.2d 513 (Ga. Ct. App. 1972).

400. *Id.* at 515.

*Chaffin*, the plaintiff's daughter bought two bottles of Coca-Cola from a supermarket vending machine while the two women were shopping.<sup>401</sup> The complaint alleged that the plaintiff sustained personal injuries as a result of consuming a foreign substance in the Coca-Cola.<sup>402</sup> The plaintiff sued both the supermarket and the Coca-Cola bottling company for breach of warranty. The breach-of-warranty claim against Coca-Cola was dismissed on the grounds of lack of privity of contract, but section 2-318 (Alternative A) made it impossible for the supermarket to successfully raise the lack-of-privity defense.<sup>403</sup> Instead, the supermarket relied on the lack-of-notice defense, arguing that the plaintiff could not sue for breach of implied warranty due to failure to give notice of the breach as required by section 2-607(3)(a). However, the court rejected the lack of notice defense, stating:

These notice provisions of the breach cannot apply to plaintiff, a third party beneficiary, under U.C.C. § 2-318, for as to the third party there has been no tender of the goods by the seller Big Apple [supermarket] and no acceptance by plaintiff. She had nothing to do with the acceptance as she was not the buyer.<sup>404</sup>

In *Goldstein v. G.D. Searle & Co.*,<sup>405</sup> the court held that a remote seller's lack-of-notice defense is ineffective against a sub-purchaser who gives notice to the immediate seller or the remote seller.<sup>406</sup> The plaintiff in that case had purchased an oral contraceptive at a drug store. Events led her to believe that the contraceptive was defective, so she sued the drug manufacturer for breach of implied warranty.<sup>407</sup> The defendant manufacturer raised the section 2-607(3)(a) lack-of-notice defense on the grounds that the plaintiff had not given notice of the injury to the remote seller. The court rejected the defense, ruling that the notice requirement applied to the purchaser's immediate seller rather than to a remote seller such as the defendant.<sup>408</sup>

The court reasoned that section 2-607(3)(a) requires a buyer to give notice of breach to the seller "[w]here a tender has been accepted" and that the term "tender" connotes a transaction between parties who are in privity (e.g., the plaintiff and the drug store).<sup>409</sup> The court pointed to various Code provisions and comments that supported this interpretation of the word "tender" and subsequently decided that the use of the word

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401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. 378 N.E.2d 1083 (Ill. App. Ct. 1978).

406. *Id.* at 1087.

407. *Id.* at 1085.

408. *Id.* at 1086.

409. *Id.*

"tender" in section 2-607(3)(a) indicates that a buyer must give notice of breach only to his immediate seller.<sup>410</sup>

However, other courts have decided that section 2-607(3)(a) requires a purchaser to give timely notice to a remote seller.<sup>411</sup> For example, *Morrow v. New Moon Homes, Inc.*<sup>412</sup> involved a married couple, the plaintiffs, who purchased a defective mobile home from a retailer, Golden Heart Mobile Homes.<sup>413</sup> The defendant, New Moon Homes, Inc., was the manufacturer.<sup>414</sup> The vehicle was plagued by chronic problems. Failing to obtain any satisfactory response from the retailer or the manufacturer, the plaintiffs finally sought to return the vehicle to the retailer.<sup>415</sup> Shortly thereafter, the retailer went out of business and the plain-

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410. *Id.* Appellate courts in Texas and Kansas have reached the same conclusion. See, e.g., *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886 (Tex. Civ. App. 1979); *Carson v. Chevron Chem. Co.*, 635 P.2d 1248 (Kan. Ct. App. 1981). The *Goldstein* court was confident that its ruling would not reduce the chances that remote sellers would learn about defective products:

[T]he Code envisions that when the consumer's notice of breach is given to his immediate seller, such person to preserve any right of action he may have for breach of implied warranty will give notice to his immediate seller, and so on upstream until the seminal point of the distributive chain is reached.

*Goldstein*, 378 N.E.2d at 1087.

*Prutch v. Ford Motor Co.*, 618 P.2d 657 (Colo. 1980), seems to justify the *Goldstein* court's faith that remote sellers will receive notice through the chain of distribution. In *Prutch*, the court decided that direct notice from the consumer to the manufacturer was not required because the consumer had given notice to his immediate seller, who in turn had notified the manufacturer. *Id.* at 660-61.

In addition, section 2-607(5) makes it likely that remote sellers will ultimately receive notice through the chain of distribution. That statute provides, in pertinent part:

Where the buyer is used for breach-of-warranty . . . for which his seller is answerable over (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

U.C.C. § 2-607(5) (1992).

411. See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976). In addition, WHITE AND SUMMERS, *supra* note 3, at 484, takes the position that notice to a remote seller is required.

412. 548 P.2d 279 (Alaska 1976).

413. *Id.* at 281.

414. *Id.*

415. *Id.* at 282.

tiffs filed suit against the manufacturer.<sup>416</sup> The plaintiffs sought to recover for direct economic losses stemming from an alleged breach of the implied warranties of merchantability and fitness for particular purpose.<sup>417</sup>

The superior court dismissed the breach-of-warranty claim on the grounds that the plaintiffs were not in privity of contract with the remote seller.<sup>418</sup> The Alaska Supreme Court reversed, ruling that a remote seller can be held liable for direct economic loss attributable to a breach of its implied warranties without regard to privity of contract between the manufacturer and the ultimate purchaser.<sup>419</sup> The Court explained that "by expanding warranty rights to redress this form of harm, we preserve . . . the well developed notion that the law of contract should control actions for purely economic losses and that the law of tort should control actions for personal injuries."<sup>420</sup>

Thus, the Alaska Supreme Court justified the decision to abrogate the vertical privity bar on the grounds that commercial disputes should be resolved under the Code. Like the New Jersey Supreme Court in the *Spring Motors* case, the Alaska Supreme Court understood that recognizing the pre-eminence of the Code in commercial transactions means recognizing the seller's right to use warranty disclaimers, remedy limitations and other Code defenses to limit her liability for breach of warranty. In this regard, the court stated that

Our decision today preserves the statutory rights of the manufacturer to define his potential liability to the ultimate consumer, by means of express disclaimers and limitations, while protecting the legitimate expectation of the consumer that goods distributed on a wide scale by the use of conduit retailers are fit for their intended use. The manufacturer's rights are not, of course, unfettered. Disclaimers and limitations must comport with the relevant statutory prerequisites and cannot be so oppressive as to be unconscionable within the meaning of [U.C.C. sections 2-302 and 2-719(3)]. On the other hand, under the Code the consumer has a number of responsibilities if he is to enjoy the right of action we recognize today, not the least of which is that he must give notice of the breach of warranty to the manufacturer pursuant to [U.C.C. section 2-607(3)(a)].

The warranty action brought under the Code must be brought within the statute of limitations period prescribed in [U.C.C. section 2-725].<sup>421</sup>

One discerns in this excerpt from the *New Moon* decision the notion that a section 2-318 third-party beneficiary to a contract may not selectively enforce provisions of the contract, but is subject to the whole contract. That same theme is reflected in other cases,<sup>422</sup> and also in the

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416. *Id.*

417. *Id.*

418. *Id.* at 283.

419. *Id.* at 291.

420. *Id.*

421. *Id.* at 292 (footnote omitted).

422. *See, e.g.,* R & L Grain Co. v. Chicago E. Corp., 531 F. Supp. 201, 209 (N.D. Ill.

Official Comments to section 2-318.<sup>423</sup> Thus, the approach taken by the Alaska Supreme Court in the *New Moon* case seems consistent with the legislative history of section 2-318. However, the drafters would probably agree with the views expressed in cases like *Tomczuk*, *Morgan*, and *Chaffin* that the Code defenses cannot be taken at face value in section 2-318 litigation. Indeed, Official Comment 5 to section 2-607 reflects that viewpoint:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance.<sup>424</sup>

On the other hand, the drafters would disagree with *Tomczuk*, *Morgan*, and *Chaffin* to the extent that the cases suggest that Code defenses based on the notice requirement, warranty disclaimers, or remedy limitations are totally ineffective in section 2-318 litigation. Official Comment 5 to section 2-607 clearly demonstrates that the drafters contemplated that the lack-of-notice defense would be available. For example, "[T]he reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. [E]ven a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation."<sup>425</sup> The Official Comments are generally regarded as a permissible and persuasive aid in determining legislative intent.<sup>426</sup> Therefore, in cases like *Tomczuk*, *Morgan*, and *Chaffin*, the courts may be ignoring the drafters' intent to preserve the vitality of Code defenses in section 2-318 litigation. In *Spring Motors*, the New Jersey Supreme Court cautioned the courts against taking stances that might eviscerate Code defenses.<sup>427</sup>

It may be possible to read cases like *Tomczuk*, *Morgan*, and *Chaffin* in a way that poses no threat to the integrity of the Code as a "carefully-

1989). The *R & L Grain* case is discussed more fully *infra* part IV.B.2.

423. Official Comment to section 2-318 states, in pertinent part, "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." U.C.C. § 2-318 cmt. 1 (1992) (emphasis added).

424. *Id.* § 2-607 cmt. 5.

425. *Id.*

426. *Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261-63 (Mo. Ct. App. 1976) (quoting language from the Official Comments as evidence of the drafters' intent).

427. *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 674 (N.J. 1985).



conceived system of rights and remedies to govern commercial transactions."<sup>428</sup> First, the Official Comment to section 2-607 does not indicate whether notice must be given to remote sellers. Thus, it may be possible to explain the failure of the lack-of-notice defense in cases like *Tomczuk* and *Morgan* on the grounds that those cases involved defendants who were remote sellers.<sup>429</sup> Second, *Tomczuk*, *Morgan*, and *Chaffin* can be viewed as cases where the courts decided that other important Code policies should take priority over the policies underlying the notice requirement. One commentary discerned the following policies underlying the notice requirement:

The first and most important reason for requiring notice is to enable the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer . . . . The second policy behind the notice requirement is to afford the seller an opportunity to arm himself for negotiation and litigation . . . . A final, and less important policy behind the notice requirement is to give the defendant that same kind of mind balm he gets from the statute of limitations. There is some value in allowing a seller, at some point, to close his books on goods sold in the past and to pass on to other things.<sup>430</sup>

These policies potentially conflict with the Code's implicit policy favoring the protection of consumers against personal injury caused by a breach of warranty. The consumer protection policy is arguably reflected in U.C.C. sections 2-715(2)(b)<sup>431</sup> and 2-719(3).<sup>432</sup> For example, section 2-715(2)(b) expressly permits buyers to recover for personal injury or property damage resulting from a breach of warranty. Furthermore, section 2-719(3) disfavors exculpatory contract clauses that limit or exclude a seller's liability for personal injury. In effect, section 2-719(3) favors personal injury claimants with a rebuttable presumption that such clauses are unconscionable and unenforceable. When the notice defense is raised in personal injury litigation under section 2-318, the potentially conflicting policies underlying the notice requirement in section 2-607(3)(a) and other Code provisions such as sections 2-715(2)(b) and 2-719(3) are manifest. Thus, when courts reject the notice defense in sec-

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428. *Id.* at 671.

429. Of course, one cannot explain on that basis the failure of the lack-of-notice defense in *Chaffin*, where the defendant was a direct seller.

430. WHITE & SUMMERS, *supra* note 3, at 481.

431. U.C.C. section 2-715(2)(b) provides that "[c]onsequential damages resulting from the seller's breach includes injury to person or property proximately resulting from any breach-of-warranty." U.C.C. § 2-715(2)(b) (1992).

432. U.C.C. section 2-719(3) provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. *Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.*" *Id.* § 2-719(3) (emphasis added).

tion 2-318 litigation, they may be reconciling potentially conflicting Code policies by favoring the consumer protection policy.

## 2. Warranty Disclaimers and Remedy Limitations

There are cases that suggest courts are reluctant to permit defenses based on warranty disclaimers or remedy limitations to be used against a remote purchaser,<sup>433</sup> even when the plaintiff is a commercial purchaser<sup>434</sup> and when there have been significant commercial transactions between the remote purchaser and the defendant seller.<sup>435</sup> For example, in *Groppel Co. v. United States Gypsum Co.*,<sup>436</sup> a remote purchaser encountered the lack-of-privity defense and a defense based upon the defendant's warranty disclaimer. In that case, the Missouri Court of Appeals permitted a commercial buyer, Groppel, to sue a remote seller, U.S. Gypsum, for breach of warranty to recover for economic losses. The court rejected Gypsum's lack-of-privity defense and ruled that the defendant's implied warranty extended to remote purchasers like Groppel.<sup>437</sup> Next, the court considered Gypsum's defense based on its warranty disclaimer. Gypsum argued that the warranty disclaimer in the contract between Gypsum and its immediate purchaser should be equally effective against a remote purchaser like Groppel. However, the court rejected this argument, stating:

The U.C.C. provides for the exclusion or modification of implied warranties in [section 2-316]. This Code section is intended to ensure that the buyer is adequately apprised of the disclaimers and contemplates a contractual relationship between the two parties who are agreeing to limit the implied warranties. [section 2-318], however, which extends implied warranty protection for personal injuries to a class of persons not in privity with the seller, provides that the 'seller may not exclude or limit the operation of this section.' Therefore, the ability to disclaim granted in [section 2-316] is explicitly limited by [section 2-318]. Further-

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433. See, e.g., *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1252 (10th Cir. 1988) (holding that numerical controls manufacturer's disclaimer was not binding on ultimate buyer); *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 60-61 (Mo. Ct. App. 1981) (holding that manufacturer's disclaimer in a contract with a middleman does not apply to ultimate consumer); *Spagnol Enters., Inc. v. Digital Equip. Corp.*, 568 A.2d 948, 951 (Pa. Super. Ct. 1989) (holding that ultimate purchaser of computer equipment could sue manufacturer even in the absence of privity).

434. See, e.g., *Patty Precision Prods. Co.*, 846 F.2d 1247; *Groppel Co.*, 616 S.W.2d 49; *Spagnol Enters., Inc.*, 568 A.2d 948.

435. See, e.g., *Spagnol Enters., Inc.*, 568 A.2d 948.

436. 616 S.W.2d 49 (Mo. Ct. App. 1981).

437. *Id.* at 60-61.

more, when an unreasonably dangerous product is marketed, the manufacturer's and seller's ability to disclaim is totally eliminated because of the strict liability in tort doctrine . . . . The foregoing illustrates that disclaimer power is not absolute. And we hold that a manufacturer may not disclaim the implied warranty of merchantability to an ultimate consumer by merely including a disclaimer in a contract with a middleman or buyer who holds for resale only. To hold otherwise would permit unfair circumvention of the manufacturer's duty.<sup>438</sup>

Similarly, in *Patty Precision Products Co. v. Brown & Sharpe Manufacturing Co.*,<sup>439</sup> the Tenth Circuit held that a manufacturer's warranty disclaimers and remedy limitations were ineffective against a remote purchaser.<sup>440</sup> In that case, Patty Precision Products Company was appealing a district court order awarding General Electric attorney fees in the amount of \$170,421.54.<sup>441</sup> Patty Precision had been awarded a defense contract to manufacture bomb racks and subsequently entered into a contract with Marusco Company to purchase Brown & Sharpe equipment capable of producing the bomb racks.<sup>442</sup> The machines were equipped with numerical controls manufactured by General Electric. Problems with the machines led Patty Precisions to sue the sellers. The suit against General Electric alleged breach of implied warranty.<sup>443</sup> In defense, General Electric pointed to the warranty disclaimers and remedy limitation clauses in its contract with Brown & Sharpe and argued that those exculpatory clauses were also binding on a remote purchaser like Patty Precisions.<sup>444</sup> However, the court ruled that General Electric's disclaimers and remedy limitations had been disclosed only to Brown & Sharpe and could not be considered effective against remote purchasers like Patty Precision, which had purchased without notice of them.<sup>445</sup>

Similarly, in *Spagnol Enterprises, Inc. v. Digital Equipment Corp.*,<sup>446</sup> the Pennsylvania Supreme Court ruled that a remote purchaser was entitled to sue a computer manufacturer for breach of warranty to recover for economic losses despite warranty disclaimers and remedy limitations in the contract between the manufacturer and its immediate purchas-

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438. *Id.* (footnotes omitted). The court pointed out that "[a] manufacturer still may properly disclaim liability expressly to the consumer via prominent package markings or otherwise in some manner calculated to give proper notice as contemplated by section 2-316." *Id.* at 61 n.13. In addition, the court stated, "Our holding does not restrict the right of a manufacturer and middleman to contract for indemnification. It merely provides the consumer the option of suing the manufacturer directly in circumstances such as presented in this case." *Id.* at 61.

439. 846 F.2d 1247 (10th Cir. 1988).

440. *Id.* at 1252-54.

441. *Id.* at 1247.

442. *Id.*

443. *Id.* at 1248.

444. *Id.* at 1248-51.

445. *Id.* at 1252.

446. 568 A.2d 948 (Pa. Super. Ct. 1989).

er.<sup>447</sup> In *Spagnol Enterprises*, the plaintiff purchased computer equipment from a distributor who purchased the equipment from the manufacturer, Digital Equipment Corporation.<sup>448</sup> The plaintiff experienced problems with the equipment and continually placed service calls to Digital Equipment. Eventually, Spagnol Enterprises sued Digital Equipment for breach of warranty to recover for economic losses allegedly caused by the defective computer equipment.<sup>449</sup> In the lower courts, Spagnol Enterprises won \$40,000 in damages, and Digital Equipment appealed.<sup>450</sup> The Pennsylvania Supreme Court rejected Digital's lack-of-privity defense on the authority of *Kassab v. Central Soya*,<sup>451</sup> and rejected Digital's defenses based on the remedy limitations and warranty disclaimers in the sales contract between Digital and its customer. The court stated:

[T]he appellant [Digital Equipment] argues that the trial court erred by ignoring disclaimers of warranty and limitations of liability present in the contract of sale. This issue ignores the fact that . . . "there was no written agreement between DEC and [the plaintiff] and therefore none of the disclaimers or limitations of liability contained in the contract referred to which was entered between DEC and [the distributor] have any application to the Appellees [Spagnol Enterprises]. Therefore, the warranties . . . apply and provide a proper basis for the Trial Court's determination of liability."<sup>452</sup>

However, *R & L Grain Co. v. Chicago Eastern Corp.*,<sup>453</sup> reached the opposite result on facts strikingly similar to the facts in *Spagnol Enterprises*.<sup>454</sup> After consultation with the plaintiff, R & L Grain Company, Porter Grain Systems purchased materials for a grain storage bin from the defendant, Chicago Eastern, the company that manufactured the bin.<sup>455</sup> The purchase price was \$311,738.<sup>456</sup> Porter subsequently assem-

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447. *Id.* at 952.

448. *Id.* at 949. The plaintiff was involved in every stage of the transaction between the distributor and the manufacturer and even met with the manufacturer's sales manager. *Id.*

449. *Id.* at 950.

450. *Id.*

451. 246 A.2d 848 (Pa. 1968).

452. *Spagnol Enters., Inc.*, 568 A.2d at 952.

453. 531 F. Supp. 201 (N.D. Ill. 1981).

454. Like the plaintiff in the *Spagnol Enterprises* case, the plaintiff in the *R & L Grain* case was intimately involved in the transaction between the manufacturer and the distributor. *Id.* at 203-04.

455. *Id.* at 203.

456. *Id.*

bled the bin and sold it to R & L Grain.<sup>457</sup> R & L Grain eventually sued Chicago Eastern for \$700,000 to recover for both direct and consequential economic losses allegedly suffered as a result of defects in the grain storage bin.<sup>458</sup> The complaint alleged that the defects made the bin unsafe and unsuitable for its intended purpose.<sup>459</sup> The plaintiff's theories of recovery included breach of express warranty and breach of the implied warranties of merchantability and fitness.

The remote seller, Chicago Eastern, raised defenses that were very similar to those raised in *Spagnol Enterprises*, including the lack-of-privity defense and defenses based on warranty disclaimers and remedy limitations in the contract between Chicago Eastern and Porter.<sup>460</sup> The district court rejected the lack-of-privity defense, stating:

Generally, privity of contract is a necessary element in Illinois for an action on a warranty for economic losses. Notwithstanding, the Court finds that plaintiff's amended complaint alleges claims based upon implied warranties of merchantability and fitness for a particular use that are sufficient to overcome the privity requirement. The absence of privity will not bar an action upon an implied warranty in Illinois when the circumstances attendant the sales transaction make the remote purchaser a third-party beneficiary of the contract.<sup>461</sup>

The court explained that a remote purchaser will be considered a third-party beneficiary of an implied warranty when "the manufacturer (1) was aware of the purpose for which the product was to be put, and (2) knew of the third-party users' reliance that the product would be fit for the purpose intended."<sup>462</sup> The district court decided that the circumstances of the sales transaction between Porter and Chicago Eastern<sup>463</sup> made the remote purchaser, R & L Grain, a third-party beneficiary of the manufacturer's warranties.<sup>464</sup> As a result, the court ruled that "the absence of privity of contract does not bar plaintiff from stating implied warranty claims . . ."<sup>465</sup> That meant that R & L Grain had standing to sue to enforce any warranties Porter received under the sales contract with Chicago Eastern. Accordingly, Chicago Eastern's ability to avoid liability hinged on the vitality of the warranty disclaimers and remedy limitations in its contract with Porter.

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457. *Id.*

458. *Id.* at 204.

459. *Id.* at 203-04.

460. *Id.* at 207-08.

461. *Id.* at 208 (citations omitted).

462. *Id.* (quoting *Rhodes Pharmacal Co. v. Continental Can Co.*, 219 N.E.2d 726, 732 (Ill. App. Ct. 1966)).

463. As previously stated, the plaintiff in R & L Grain was very involved in the transactions between the manufacturer, Chicago Eastern, and the distributor, Porter. *Id.* at 203-04.

464. *Id.* at 206.

465. *Id.*

Like the plaintiff in *Spagnol*, R & L Grain took the position that Chicago Eastern's disclaimers and remedy limitations were not binding because R & L had purchased without notice of them. The district court disagreed, holding that

a third-party beneficiary to a contract may not selectively enforce provisions of the contract, but is subject to the whole contract as formed by the parties thereto. Accordingly, the Court finds that the warranty exclusion is an effective exclusion of implied warranties as to plaintiff [R & L Grain] and therefore grants defendant's [Chicago Eastern's] motion insofar as it seeks dismissal of plaintiff's implied warranty claims.<sup>466</sup>

In effect, the district court ruled that a third-party beneficiary takes subject to the benefits and the burdens of the contract. That seems like a sound application of third-party beneficiary theory.

By comparison, the *Groppel* court's decision to reject a remote seller's defenses based on the warranty disclaimers in the sales contract between the remote seller and its customer seems questionable. First, the *Groppel* court reasoned by analogy to strict tort liability. Why should the vitality of a defense in a warranty action be affected by the fact that the defense is unavailable in a strict liability action? Despite the common origins of the strict liability cause of action and the implied warranty action, they are independent, albeit overlapping, causes of action.<sup>467</sup> Second, the

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466. *Id.* at 209 (citations omitted). The district court also rejected the plaintiff's argument that neither it nor Porter were ever actually aware of the warranty exclusion. The court stated:

Section 2-316 . . . provides that warranty exclusions must be conspicuous in order to be effective. The instant warranty is reasonably noticeable, especially to a business entity participating in an arms length transaction. The exclusion appears . . . in boldface type. Thus, the Court finds the exclusion to be conspicuous within the meaning of section 2-316. The exclusion in the sales contract mentions merchantability and contains language virtually tracking that suggested by section 2-316(2) to exclude implied warranties of fitness for a particular use . . . . [T]he well-settled body of Illinois law pertaining to third-party beneficiaries leads the Court to conclude that the exclusion is effective to exclude all implied warranties.

*Id.* at 208-09 (citations omitted).

467. Strict liability evolved from the implied warranties of fitness and merchantability. Those warranties originated as a matter of social policy to compensate consumers who sustained personal injuries from defective food. WILLIAM L. PROSSER & W. PAGE KEETON, *HANDBOOK OF THE LAW OF TORTS* § 97 at 690 (5th ed. 1984). But there are important differences between warranty theories and the theory of strict liability in tort. For example, under the U.C.C., a seller is permitted to disclaim warranties or limit remedies for breach of warranty. However, there are no such defenses to an action based on strict liability in tort. As noted earlier, the section 2-607(3)(a) notice

*Groppel* court may have misconstrued the language in Alternative A, which says, "A seller may not exclude or limit the operation of this section."<sup>468</sup> The court evidently misunderstood this language to mean that section 2-318 makes a seller's warranty disclaimers or remedy limitations ineffective in section 2-318 litigation.<sup>469</sup> Such an interpretation is incorrect. Official Comment 1 to section 2-318 states:

The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries in any manner provided in Sections 2-718 or 2-719. To the extent that the contract contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made would extend under this section.<sup>470</sup>

The third sentence of Official Comment 1 deserves special attention.<sup>471</sup> In effect, it provides that third-party beneficiaries are entitled to enforce whatever warranties are provided under the contract. To the extent the contract excludes or modifies warranties or limits remedies for breach of warranty, those provisions are equally operative against the third-party beneficiaries. The *Chicago Eastern* court reached this same conclusion. Official Comment 1 does not answer the question whether remote purchasers are bound by the seller's warranty disclaimers and remedy limitations. The court in *Chicago Eastern* held that remote purchasers are bound by the seller's warranty disclaimers and remedy limitations, at least when they get heavily involved in the transactions between the seller and the immediate purchaser. By contrast, *Groppel*, *Patty Precision Products*, and *Spagnol Enterprises* say just the opposite. Both

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requirement can provide a defense to a breach-of-warranty action under the U.C.C., but there is no such defense to an action based on strict liability in tort. An action for breach-of-warranty is usually governed by the four-year Code statute of limitation, which generally starts to run on the day that the goods are delivered. By contrast, a strict liability claim is governed by a tort statute of limitations, which generally starts to run later when the injury is discovered or should have been discovered. For a history of the theory of strict liability in tort, see William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

468. U.C.C. § 2-318 (1992).

469. *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d at 49, 60-61 (Mo. Ct. App. 1981).

470. U.C.C. § 2-318 cmt. 1 (1992). In effect, the last sentence of section 2-318 prevents a seller from treating a section 2-318 plaintiff worse than a customer. For example, section 2-318 prevents sellers from using warranty disclaimers or remedy limitations that only apply to third-party beneficiaries.

471. *Id.*

views are possible because Official Comment 1 does not address the question. Cases like *Chicago Eastern* arguably promote the discernible policy of Official Comment 1 to preserve the seller's right to limit her liability for breach of warranty. On the other hand, cases like *Groppel*, *Patty Precision Products*, and *Spagnol Enterprises* arguably promote the potentially conflicting policy of Official Comment 2 "to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale."<sup>472</sup> Thus, certain conflicts in the section 2-318 case law may be attributable to, and may reflect, the potentially conflicting policies underlying section 2-318.

### 3. The Code Statute of Limitations

Jurisdictions are divided over whether the Code statute of limitations or the tort statute of limitations applies to a personal injury action tried on a breach-of-warranty theory.<sup>473</sup>

In *Ribley v. Harsco Corp.*,<sup>474</sup> the New York Supreme Court's appellate division decided that the four-year Code statute of limitations governs a nonpurchaser's breach-of-warranty claim.<sup>475</sup> In *Ribley*, a minor instituted a personal injury action against a farm equipment manufacturer for breach of the implied warranty of merchantability. The plaintiff sustained serious injuries when her hair got caught in the drive shaft of the farm equipment she was operating.<sup>476</sup> The equipment was manufactured by the defendant in 1961 and, following an initial sale and repossession, was sold to the plaintiff's parents in 1966.<sup>477</sup> The plaintiff sustained her injuries in 1973 and commenced her breach-of-warranty action approximately

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472. Official Comment 2 to section 2-318 states, in pertinent part: "The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale." *Id.* § 2-318 cmt. 2.

473. See *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747, 750 (S.D. Ala.), *aff'd*, 560 F.2d 1022 (5th Cir. 1977); *Ribley v. Harsco Corp.*, 394 N.Y.S.2d 741 (N.Y. App. Div. 1977); *Salvador v. Atlantic Steel Boiler Co.*, 389 A.2d 1148 (Pa. Super. Ct. 1978) *aff'd*, 424 A.2d 497 (Pa. 1981); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985); *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981); *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Bowling v. Ford Motor Co.*, 296 F. Supp. 312 (E.D. Tenn. 1968); *Lee v. Wright Tool & Forge Co.*, 356 N.E.2d 303 (Ohio Ct. App. 1975). See also, WHITE AND SUMMERS, *supra* note 3, at 416-17.

474. 394 N.Y.S.2d 741 (N.Y. App. Div. 1977).

475. *Id.* at 744.

476. *Id.* at 743.

477. *Id.*



seven months later in 1974.<sup>478</sup> The New York Supreme Court ruled that the four-year Code statute of limitations<sup>479</sup> barred the breach-of-warranty claim, explaining:

[B]reach of warranty causes of action under the Code are primarily related to the sales contract and are subject to all the limitations and requirements imposed by the Code, and they are separate and distinct from a strict products liability cause of action for injury to person or property arising out of tortious conduct on the part of the manufacturer. Uniform Commercial Code section 2-725 . . . provides that an action for breach of a sales contract must be commenced within four years of the breach.<sup>480</sup>

By contrast, *Salvador v. Atlantic Steel Boiler Co.*<sup>481</sup> held that the tort statute of limitations governs a nonpurchaser's breach-of-warranty claim. As previously discussed,<sup>482</sup> the plaintiff was injured when a boiler exploded. The plaintiff subsequently filed a breach-of-warranty action against the company that manufactured the boiler and the company that sold it to his employer. The defendants argued that the plaintiff could not sue for breach of warranty because he was not in privity of contract with the defendants. The Pennsylvania Supreme Court rejected the lack-of-privity defense. The case hinged, therefore, upon a disputed question of Pennsylvania law: Which statute of limitations applies to a section 2-318 claim, the two-year tort statute of limitations for personal injury actions or the four-year Code statute of limitations?<sup>483</sup> If the four-year Code statute of limitations was applied, the plaintiff's claim would be time-barred.

The plaintiff argued that it would be counterproductive to strictly construe the Code statute of limitations because that would virtually eviscerate section 2-318. In this connection, the plaintiff explained that "in many cases, the statute of limitations will have run before the injury to a third party has occurred."<sup>484</sup> Thus, the plaintiff urged the court to use a limitations period that preserved the vitality of section 2-318. In particular, the plaintiff urged the court to rule that section 2-725 begins to run on

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478. *Id.*

479. It was unclear whether the Code statute of limitations started running at the time of the first sale and delivery, sometime between 1961 and 1966, or when the equipment was resold and delivered to the Ribleys in 1966. However, the *Ribley* court did not have to decide that question because the plaintiff's breach-of-warranty action was untimely no matter which date the statute of limitations started to run, since the plaintiff's claim was filed eight years after the equipment was delivered to her parents. Under section 2-725, the Code statute of limitations starts to run when the goods are "tendered," which can be loosely translated as "delivered."

480. *Ribley*, 394 N.Y.S.2d at 743 (citations omitted).

481. 389 A.2d 1148 (Pa. Super. Ct. 1978), *aff'd*, 424 A.2d 497 (Pa. 1981).

482. *See supra* part IV.A.2.

483. *Salvador*, 389 A.2d at 1150.

484. *Id.* at 1151.

the date of injury.<sup>485</sup> Naturally, the defendants favored a literal interpretation of section 2-725 because the plaintiff's warranty action would be time-barred.

Surprisingly, the court rejected both positions and ruled that the state's two-year tort statute of limitations applied to section 2-318 breach-of-warranty claims. The court offered a variety of justifications for this decision. For example, at one point in the opinion, the court seemed to be saying that a personal injury claim filed under section 2-318 is basically just a tort claim, and it is, therefore, appropriate to apply the tort statute of limitations. The court stated:

[V]irtually all jurists and scholarly commentators recognize that this [section 2-318 claim] . . . is purely a fiction created to reach a desirable social policy, the theory of recovery sounds in tort . . . . If the theory sounds in tort rather than contract, [then] it follows that the appropriate statute of limitations should be that which would be applied if the plaintiff's complaint were captioned "Trespass." In Pennsylvania that statute is two years and runs from the date of the injury.<sup>486</sup>

The court also pointed out that judges, rather than the state legislators, had expanded the statutorily protected class to allow a purchaser's employees to sue for breach of warranty, and as a result "the remedy for such persons is entirely one of judicial creation."<sup>487</sup> "That being the case, the courts should be free to choose and apply the statute of limitations most likely to accommodate the purposes of extending Code protection to such persons."<sup>488</sup> In addition, the court explained, "[I]t takes a very strained reading of section 2-725 to conclude that it was ever meant to apply to persons other than the contracting parties in breach-of-warranty actions."<sup>489</sup> Having determined that the two-year tort statute of limitations applied, the court dismissed the section 2-318 breach-of-warranty claim on the grounds that it was time-barred.<sup>490</sup>

By contrast, in *Spring Motors*,<sup>491</sup> the New Jersey Supreme Court ruled that the four-year Code statute of limitations governs a remote purchaser's breach-of-warranty claim. As mentioned above,<sup>492</sup> in *Spring Motors*, the plaintiff, Spring Motors Distributors, entered into contract with the defendant Turnpike Ford Truck Sales, to purchase fourteen

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485. *Id.*

486. *Id.* (citations omitted).

487. *Id.* at 1154.

488. *Id.*

489. *Id.* at 1156 (citations omitted).

490. *Id.*

491. 489 A.2d 660 (N.J. 1985).

492. *See supra* part IV.A.5.

trucks made by the defendant Ford Motor Company.<sup>493</sup> The trucks were equipped with transmissions made by Clark Equipment Company, a supplier to Ford.<sup>494</sup> Spring Motors took delivery of the trucks in November 1976, and subsequently leased them to its customers.<sup>495</sup> Under those leases, Spring Motors assumed responsibility for servicing the trucks. Shortly thereafter, Spring Motors began experiencing problems with the performance of the Clark transmissions. The problems persisted and, after unsuccessfully attempting to get Clark to fix the transmissions, Spring Motors sued Ford, Turnpike, and Clark for breach of warranty.<sup>496</sup> However, four years and one month had elapsed between the date of the delivery of the trucks and the institution of the plaintiff's breach-of-warranty actions, and the court decided that Spring Motors' lawsuit was time-barred.<sup>497</sup> Thus, *Spring Motors* stands for the proposition that the Code statute of limitations is an effective defense to a remote purchaser's breach-of-warranty action.<sup>498</sup>

Similarly, in *Teel v. American Steel Foundries*,<sup>499</sup> a federal district court decided that the four-year Code statute of limitations governed a nonpurchaser's breach-of-warranty claim.<sup>500</sup> The complaint in that case alleged that the plaintiff was injured during the course of employment when a wheel of his tractor-trailer truck came loose and caused him to

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493. *Spring Motors Distribs., Inc.*, 489 A.2d at 663.

494. *Id.*

495. *Id.* at 664.

496. *Id.*

497. *Id.*

498. *Id.* at 663. The Court's ruling on the remote seller's lack of privity defense is discussed *supra* part IV.A.5. The force of its arguments concerning the supremacy of the Code evidently led the New Jersey Supreme Court to conclude that the Code statute of limitations should be applied against a remote purchaser. Unfortunately, the court gave no indication whether other Code defenses are effective against a remote purchaser. In this connection, the court stated:

[W]e need not determine the outer limits of a suit by an ultimate purchaser against a remote supplier for economic loss. Therefore, we reserve determination on the effectiveness of a remote manufacturer's disclaimer or [remedy] limitation on express and implied warranties to an ultimate purchaser that did not have the opportunity to negotiate over the terms of the agreement . . . . We also leave unreviewed the Code requirement that a purchaser notify the seller about the defective condition of the product.

*Id.* Nevertheless, the logic of the court's position that the Code provides the appropriate analytical framework for commercial transactions leads to the conclusion that, in an appropriate situation, the warranty disclaimers and remedy limitations in a manufacturer's contract with its immediate customer could be raised against a remote purchaser.

499. 529 F. Supp. 337 (E.D. Mo. 1981).

500. *Id.* at 342-43.

lose control of the truck and crash.<sup>501</sup> The plaintiff subsequently instituted a personal injury action against the wheel manufacturer, American Steel Foundries, and the company, White Motor, that sold the truck to his employer.<sup>502</sup> The complaint alleged breach of express warranty and breach of the implied warranties of merchantability and fitness.<sup>503</sup>

The defendants moved to dismiss the complaint on the grounds of both lack of privity and that the complaint was time-barred by the state's one-year statute of limitations for personal injury actions.<sup>504</sup> The plaintiff argued logically that the Code statute of limitations should be applied to a breach-of-warranty claim filed under Code section 2-318.<sup>505</sup> The defendants argued that the state's one-year statute of limitations for personal injury actions should be applied because the complaint was basically a personal injury claim.<sup>506</sup> Lacking any pertinent state court decisions, the district court chose to apply the Code statute of limitations because it was longer.<sup>507</sup> This decision did not dispose of the case, however, because the Court had to decide when the four-year Code statute of limitations started running.<sup>508</sup> Ironically, the plaintiff took the position that section 2-725 begins to run on the date of injury.<sup>509</sup> The court rejected the plaintiff's argument as contrary to the plain language of section 2-725.<sup>510</sup> Taking the statute at face value, the court decided that the Code statute of limitations began to run on the date that the truck was delivered to the plaintiff's employer.<sup>511</sup>

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501. *Id.* at 340.

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 341.

506. *Id.*

507. *Id.* at 342.

508. *Id.*

509. *Id.* at 342.

510. *Id.* Section 2-725(2) states:

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach-of-warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

U.C.C. § 2-725(2) (1992).

511. *Teel*, 529 F. Supp. at 343. The plaintiff's complaint failed to state when the tractor was delivered to plaintiff's employer and, as a result, the court was unable to dismiss the complaint on the basis of the statute of limitations. The court then

To summarize, there is a split of authority concerning the appropriate statute of limitations to apply to a personal injury action that is tried on a breach-of-warranty theory. Some jurisdictions apply the Code statute of limitations.<sup>512</sup> Others rule that when personal injuries are sustained from a breach of warranty, the action is subject to the tort statute of limitations for personal injuries.<sup>513</sup> In the final analysis, these conflicts in the case law suggest that the courts may be struggling to reconcile the consumer protection policies underlying U.C.C. section 2-318 with the potentially conflicting policies underlying U.C.C. section 2-725.<sup>514</sup>

#### 4. Summary and Conclusions: Defenses Based On Notice Requirements, Warranty Disclaimers, Remedy Limitations, and the Statute of Limitations

Although the Code provides defenses based on notice requirements, warranty disclaimers, remedy limitations, and the statute of limitations, there are conflicts among the jurisdictions regarding the availability of such defenses in section 2-318 litigation. For example, the preceding cases indicate that some jurisdictions reject the lack-of-notice defense in personal injury cases. But when the plaintiff is suing to recover for economic losses, the courts seem to be more willing to permit the defense.

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moved to the lack-of-privity defense. Since the plaintiff was not in the statutorily protected group, the lack-of-privity defense prevailed and the Court dismissed the complaint, stating, "Had the legislature intended employees of buyers to obtain the benefits of a warranty, they could have enacted either Alternative B or C." *Id.* at 345.

512. *See, e.g.,* Ribley v. Harsco Corp., 394 N.Y.S.2d 741 (N.Y. App. Div. 1977); Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985); Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981).

513. *See, e.g.,* Salvador v. Atlantic Steel Boiler Co., 389 A.2d 1148 (Pa. Super. Ct. 1978), *aff'd*, 424 A.2d 497 (Pa. 1981); Hahn v. Atlantic Richfield Co., 625 F.2d 1095 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); Bowling v. Ford Motor Co., 296 F. Supp. 312 (E.D. Tenn. 1968); Lee v. Wright Tool & Forge Co., 356 N.E.2d 303 (Ohio Ct. App. 1975).

514. The policy of section 2-725 is to establish a reasonable and uniform limitations period for breach-of-warranty claims beyond which merchants may destroy their business records without weakening their ability to defend themselves against products liability claims. Thus, the Official Comment states, in pertinent part, that the purpose of Code § 2-725 is as follows:

To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article . . . selects a four-year period as the most appropriate to modern business practice. This is within the normal commercial record-keeping period.

U.C.C. § 2-725 cmt. 1 (1992).

In addition, the preceding discussion demonstrates that some jurisdictions reject defenses based on warranty disclaimers or remedy limitations when the plaintiff is a remote purchaser. Finally, the discussion above shows that the jurisdictions are divided over the question whether the Code statute of limitations or the tort statute of limitations applies to litigation under U.C.C. section 2-318.

#### V. CONCLUSION

The courts apparently have no difficulty applying Code section 2-318, Alternative A, in cases where the plaintiff is a nonpurchaser in the buyer's family or household, or is a houseguest who is suing a direct seller on a breach-of-warranty theory to recover for personal injury. Those cases are clearly within the statutory language and the courts uniformly grant the plaintiffs standing to sue. Conversely, the lack-of-privity defense generally prevails when a nonpurchaser plaintiff is not a member of the purchaser's family or household,<sup>515</sup> or when a nonprivity plaintiff is suing to recover for property damage or economic losses,<sup>516</sup> or is not a natural person,<sup>517</sup> or the defendant is a remote seller.<sup>518</sup>

However, there are non-conforming cases where the lack-of-privity defense fails despite the fact that the nonpurchaser plaintiff is not in the purchaser's family or household. That happens when jurisdictions selectively abolish the privity bar and extend warranty protection beyond Alternative A's statutorily protected class to other types of nonpurchasers.<sup>519</sup> Purchasers' employees tend to be the primary beneficiaries of this type of common-law development abolishing horizontal privity.<sup>520</sup> There are other non-conforming cases where the lack-of-privity defense fails when the defendant is not a direct seller but rather a remote seller. That happens when the jurisdictions have abolished the vertical privity bar and extended warranty liability to remote sellers,<sup>521</sup> or because of well-established common-law exceptions to privity requirements.<sup>522</sup>

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515. *See supra* part IV.A.2.

516. *See supra* part IV.A.3.

517. *See supra* part IV.A.5.

518. *See supra* part IV.A.4.

519. *See supra* part IV.A.2.

520. *See supra* part IV.A.2.

521. *See supra* part IV.A.4.

522. *See supra* part IV.A.4.

To some extent, the perceived confusion in the section 2-318 case law is the result of ambiguity in the governing statute and the Official Comments interpreting the statute. For example, the ambiguity of Official Comment 3 has permitted the courts to reach contradictory conclusions concerning the propriety of abolishing the horizontal privity bar in order to extend warranty protection to nonpurchasers who are not in the statutorily protected class described in Alternative A. Similarly, the “neutrality” of Alternative A on questions of vertical privity has permitted the courts to reach different conclusions concerning the propriety of expanding the class of potential defendants to include remote sellers.

In addition, the perceived confusion in the case law is to some degree the result of the potentially conflicting policies underlying section 2-318. And, to some extent, it is the result of the potential policy conflicts between section 2-318 and other Code provisions such as the statute of limitations or the notice defense. For example, Official Comment 1 to section 2-318 reflects a concern for preserving the seller’s right to limit her liability for breach of warranty through the use of warranty disclaimers and remedy limitations. By contrast, Official Comment 2 reflects the potentially conflicting policy decision “to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale.”<sup>523</sup> *Chicago Eastern* arguably promoted the policy of Official Comment 1 by dismissing a remote purchaser’s breach-of-warranty action as barred by the warranty disclaimers and remedy limitations in the contract between the seller and the immediate purchaser. By contrast, *Groppel*, *Patty Precision Products*, and *Spagnol Enterprises* arguably favored the conflicting policy of Official Comment 2 by rejecting defenses based on the warranty disclaimers and remedy limitations. One result of the policy conflicts in this area is that the courts may be uncertain about which set of policies to favor.

There is an even more basic explanation of the perceived confusion in this body of case law—a class of nonprivity plaintiffs has been given asylum in the last citadel of privity. In other words, various types of nonprivity plaintiffs have been granted standing to enforce derivative rights in a carefully conceived and well-integrated system of rights and remedies that takes privity for granted. The courts seem to be struggling to determine how to integrate section 2-318 nonprivity plaintiffs into the Code’s framework without eviscerating major provisions of the Code such as the notice requirement, or the statute of limitations, or the

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523. U.C.C. § 2-318 cmt. 1 (1992).

seller's ability to exclude or limit its liability. In the final analysis, the state legislatures may have to help the courts solve this dilemma.<sup>524</sup>

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524. Some states have taken steps to address some of these problems. For example, Massachusetts has adopted the following non-standard version of section 2-318:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach-of-warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume, or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West Supp. 1993). Notice that the Massachusetts statute resolves several problems. For example, it clearly and specifically states that lack of privity is not a defense in a breach-of-warranty action against a manufacturer, seller, supplier, or lessor. In addition, it establishes a rebuttable presumption that weakens the vitality of the notice defenses. Furthermore, it resolves the question of what the applicable statute of limitations should be.



