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## An Ind. Run around the U.C.C.: The Use (or Abuse?) of Indemnity

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# An Ind.<sup>1</sup> Run Around the U.C.C.: The Use (or Abuse?) of Indemnity

## I. INTRODUCTION

Depending upon one's perspective, a statute of limitations may seem either a harsh roadblock on the highway to justice or a comforting assurance of limited liability. With respect to a claim for breach of warranty, however, the four-year statute of limitations under Uniform Commercial Code section 2-725 may, in certain circumstances, be neither.<sup>2</sup> Recent cases show a clear conflict in how courts interpret the U.C.C. statute of limitations when a party brings an indemnity claim in a case otherwise governed by the code.<sup>3</sup> In jurisdictions that have yet to de-

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1. The generally accepted legal abbreviation for indemnity is *indemn.* BEIBER'S DICTIONARY OF LEGAL ABBREVIATIONS 260 (3d ed. 1988).

2. U.C.C. § 2-725 (1992) provides as follows:

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
- (2) 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.
- (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

3. *Compare* Carrier Corp. v. Detrex Corp., 6 Cal. Rptr. 2d 565 (Ct. App. 1992) (holding that the statute of limitation for breach of warranty does not bar an action for indemnity) and Ameron, Inc. v. Chemische Werke Huls Ag, 760 F. Supp. 1234 (E.D. Mich. 1991) (same) with Housing & Redevelopment Auth. v. Agassiz Constr. Inc., 476 N.W.2d 781 (Minn. Ct. App. 1991) (holding that a breach of warranty limitation bars indemnity action) and Richardson v. Clayton & Lambert Mfg. Co., 634 F.

cide whether the U.C.C. limitation bars an indemnity claim, an attorney with a limitation problem may find it worthwhile to look for facts to permit such a claim and allow a client to avoid the time bar. If the recent flurry of cases on point is any indication, more state supreme courts are likely to review the question and establish definitive rules in their jurisdictions.<sup>4</sup> Before creative lawyering makes the jurisdictional split more pronounced, the reasoning behind permitting indemnity despite the U.C.C. limitation deserves a closer look.

Suppose A sells a product to B and B uses the product commercially. Five years later — or even 50 years later — the product fails, enabling C, a third party, to recover against B, the original buyer, for economic harm. May B, in turn, recover from A, the seller, under a breach of warranty claim? The plain language of the U.C.C., which starts the statute for breach of a sales contract upon delivery and prohibits any action on the breach after four years, says no.<sup>5</sup> Several courts agree.<sup>6</sup> Other courts find their way around the four-year statute of limitations through the cause of action for indemnity, under which a different limitation runs from the time a typical plaintiff discharges an allegedly common liability.<sup>7</sup> Many courts have yet to make their choice explicit, yet the conflict presents issues not only going to the heart of the U.C.C.'s purpose but significantly implicating public policy and jurisprudential concerns.

This Comment examines the history and policy behind statutes of

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Supp. 1480 (N.D. Miss. 1986) (same). See David Frisch, et al., *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 42 BUS. LAW. 1213 (1987). "The division of authority on whether U.C.C. section 2-725 is controlling when the action is for indemnity is further reinforced as more courts are called upon to decide the issue." *Id.* at 1256.

But see Debra L. Goetz et al., Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1324-29 (1987).

Section 2-725 . . . poses few problems: it simply bars a buyer from bringing an action for breach of warranty more than four years after tender of delivery. This straight-forward rule forces buyers to sue when evidence is most readily available and allows sellers to continue with their businesses without fear of suit after a reasonable definite period.

*Id.* at 1324-25.

4. The California Supreme Court, based on its recent history of limiting recovery, is likely to be one of these courts. See *infra* notes 159-60.

5. A narrow exception to the delivery rule exists when an explicit warranty extends to future performance, if the breach would not be discoverable until such future performance. See U.C.C. § 2-725(2), *supra* note 2.

6. See, e.g., *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214 (Utah 1984), *infra* notes 94-105 and accompanying text; *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413 (S.D. 1990), *infra* notes 106-118 and accompanying text.

7. See, e.g., *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565 (Ct. App. 1992); *Wood River v. Geer-Melkus Constr. Co.*, 444 N.W.2d 305 (Neb. 1989).

limitation,<sup>8</sup> the indemnity cause of action,<sup>9</sup> and U.C.C. section 2-725.<sup>10</sup> It analyzes cases on both sides of the split,<sup>11</sup> evaluates arguments for and against using indemnity to overcome the U.C.C.'s statute of limitations hurdle,<sup>12</sup> and proposes that the U.C.C. be made to live up to its name and intent with respect to uniformity in statutes of limitation.<sup>13</sup> Products liability claims brought under tort law<sup>14</sup> will be addressed to the extent that the existence of such claims supports or undermines the policy of permitting implied contractual indemnity under the U.C.C.<sup>15</sup>

Under strict products liability, the general rule is that the statute of limitations runs from the time of injury, although some jurisdictions use

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8. See *infra* notes 24-43 and accompanying text.

9. See *infra* notes 44-63 and accompanying text.

10. See *infra* notes 64-90 and accompanying text.

11. See *infra* notes 92-197 and accompanying text.

12. See *infra* notes 198-285 and accompanying text.

13. See *infra* notes 286-295 and accompanying text.

14. Although "products liability" is generally associated with tort law, breach of warranty may be regarded as simply another method of products liability recovery. See, e.g., Richard T. Farrell, *Statute of Limitations*, 418 PRAC. L. INST./LIT. 37 (1991); John E. Murray, Jr., *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 263-68 (1973); see also *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) ("Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty."), quoted in John C. Bartenstein, *Recent Developments in Commercial Warranty Law: Bay State and Canal Electric*, 35 BOSTON B.J. 4 (May-June 1991). Bartenstein also states, "The interpretation of the law of warranties applicable to strictly commercial transactions has become increasingly muddled over the past two decades as the Massachusetts courts and legislature have stretched the traditional contours of warranty law to accommodate products liability and consumer protection concerns." *Id.* at 4.

15. Authority is split about whether a cause of action for strict products liability should be subject to the U.C.C. limitation or other limitations. See, e.g., *Reid v. Volkswagen of Am., Inc.*, 512 F.2d 1294 (6th Cir. 1975) (applying Michigan law to hold that the four-year U.C.C. limitation allowed suit for personal injuries despite running of general three-year personal injury limitation; U.C.C. actually had effect of lengthening limitation period since Michigan's pre-U.C.C. holdings had enforced three-year limit). But see *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973) (holding that the U.C.C.'s limitation is inapplicable to strict liability and tort actions).

The prudence of such policies is oft-debated elsewhere. See, e.g., Jerry J. Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitation*, 56 N.C. L. REV. 663 (1978); Sheila I. Birnbaum, "First Breath's" Last Gasp: *The Discovery Rule in Products Liability Cases*, 13 FORUM 279 (1977); Benjamin N. Henszey, *Application of U.C.C. Section 2-725 (Statute of Limitations) to Products Liability Cases—Does it Make Sense?*, 9 UCC L.J. 379 (1976-77); see also *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208 (D. N.J. 1988) (holding that the U.C.C. limitation does not apply to personal injury action arising out of breach of sales contract).

the U.C.C. limitation to bar strict liability actions.<sup>16</sup> Despite the arguable convergence of tort and contract law,<sup>17</sup> courts for the most part continue to view strict products liability claims as outside U.C.C. breach of warranty claims<sup>18</sup> and recovery for economic loss stemming from the sale of goods as outside negligence and strict products liability law.<sup>19</sup>

Whether future courts will allow recovery on an indemnity theory

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16. RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 2-725:62, at 121 (3d ed. 1983) and Supp. at 80-81 (1992). See *Infante v. Montgomery Ward & Co.*, 371 N.Y.S.2d 500 (N.Y. App. Div. 1975) (holding the U.C.C. limitation inapplicable to indemnity for strict products liability). Moreover, where injury to person or property is involved, "warranty" must be given a new and different meaning if it is used in connection with" strict products liability. RESTATEMENT (SECOND) OF TORTS, § 402A cmt. m (1965). One commentator suggested, "If personal injury is the result [of an alleged breach], the only discernible trend is towards uncertainty." Fairfax Leary, Jr. and David Frisch, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 40 BUS. LAW. 1457, 1483 (1985). In the interest of focusing on the subject matter at hand, and to avoid unnecessary confusion, this Comment treats the line between warranty and strict products liability actions as bright, a legal fiction if ever there were one.

17. See, e.g., GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974) ("Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort."). But see PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 207-19, (1988) (arguing that contract law should be revived as the solution to exorbitant costs imposed on society by the existing tort liability system).

18. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95A, at 680 (5th ed. 1984).

The Uniform Commercial Code is generally regarded as the *exclusive source* for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself.

*Id.* See also RESTATEMENT (SECOND) OF TORTS, § 402A cmt. m (1965) ("The rule stated in this Section is not governed by . . . the Uniform Commercial Code, as to warranties . . ."). Legislative consideration of separate statutes of repose cutting off products liability actions supports the view that strict liability is outside the U.C.C. by demonstrating legislative understanding of the strict liability cause of action. See RESTATEMENT (SECOND) OF TORTS § 899, cmt. g (1979); see also John W. Wade, *Is 402A Preempted by the U.C.C.*, 42 TENN. L. REV. 123, 125 (1974). But see *Moorman Manufacturing Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982) (holding that the U.C.C. warranty limitation blocks a strict products liability action to recover economic loss); *Elizabeth A. Heiner, Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.: What Recovery for Economic Loss—Tort or Contract?*, 1990 WIS. L. REV. 1337 (1990) ("Most jurisdictions are reluctant to extend strict liability recovery to pure economic loss.").

19. *Moorman*, 435 N.E.2d at 450. *Moorman* notes that "the vast majority" of cases oppose negligence recovery for such economic losses and lists a column full of such cases. *Id.* at 451. The case for similar recovery under strict liability, where the defendant is subject to liability without any proof of lack of reasonable care, is even stronger. *Id.*

despite the running of the U.C.C. warranty limitation is more than a mundane technical issue. It goes to the heart of such jurisprudential concerns as fairness, equity, and efficiency.<sup>20</sup> As U.C.C. case law is refined, the courts are faced with the question more frequently.<sup>21</sup> When future courts address the issue, they should, at a minimum, realize that they are not merely looking at just another statute of limitations case. Because they are looking at the age-old question of the essence of the duty that a merchant owes a buyer, they are setting critical legal boundaries that reflect the purpose of the law.<sup>22</sup> No literature yet advocates a framework for analyzing this issue. This Comment suggests that despite strong reasons for keeping tort recovery separate from contract recovery, courts should borrow from tort law a policy approach for determining whether the U.C.C. limitation applies. In its application, however, this approach leads to a conclusion contrary to that reached by courts that favor tort-style indemnity over the repose putatively required by the Uniform Commercial Code.<sup>23</sup>

## II. RUNNING STATUTES, OWING DEFENDANTS AND SLAMMING DOORS: A BRIEF HISTORY OF STATUTORY RECOVERY LIMITATIONS

### A. *Statutes of Limitation*

Thoughtful literature on limitation statutes is surprisingly sparse.<sup>24</sup> One treatment of the subject matter,<sup>25</sup> published more than forty years ago, traces such limitations to Roman times and Biblical sources<sup>26</sup> and

20. See *infra* notes 25-43 (discussing statute of limitation policy), 51-63 (discussing indemnity law), and 198-285 (general analysis of policy concerns) and accompanying text.

21. California was only presented with the issue in 1992. See *supra* note 3 and *infra* note 83 and notes 145-160 and accompanying text. The bulk of the remainder of the cases postdate the 1984 decision of the Utah Supreme Court in *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214 (Utah 1984).

22. For a discussion of the theory that the U.C.C.'s purpose was to maintain the status quo, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 211-12 (1992).

23. See also William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731 (1990); David Knieriem, *Tort v. Contract and Damage to Goods in Missouri*, 48 J. MO. B. 194 (1992).

24. For a comprehensive treatment from a plaintiff lawyer's point of view, however, see ADOLPH J. LEVY, *SOLVING STATUTE OF LIMITATIONS PROBLEMS* (1987).

25. *Developments in the Law, Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) [hereinafter *Developments*].

26. *Id.* at 1177 (citing RUDOLF SOHM, *THE INSTITUTES OF ROMAN LAW*, 282-85 and

distinguishes between personal actions and actions relating to the recovery of property.<sup>27</sup> At early common law, stale personal actions were likely blocked by elaborate procedural requirements.<sup>28</sup>

Adverse possession, the area of law where the limitation is perhaps most critical, is also the area in which the policy behind the limitation is expressed most clearly: the passage of time should assure security to one claiming ownership.<sup>29</sup> Since the enactment of the original English Statute of Limitations in 1623,<sup>30</sup> U.S. jurisdictions show no hesitancy in writing similar legislation into law,<sup>31</sup> on the basis that “[t]here comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when ‘evidence has been lost, memories have faded, and witnesses have disappeared.’”<sup>32</sup> “[T]he disrupting effect that unsettled claims have on commercial intercourse”<sup>33</sup> has also been recognized subjectively, if not empirically. The Supreme Court held that statutes of limitation are intended to protect defendants from the deprivation “of fundamental fairness or . . . the surprise and prejudice that can result from the prosecution of stale claims.”<sup>34</sup> Justice Holmes called evidentiary concerns “secondary,”<sup>35</sup>

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318-22 (Ledlie's Transl.) (3d ed. 1907); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 81 (2d ed. 1898); cf. *Deuteronomy*, 15:1 (“At the end of every seven years you shall grant a remission of debts.”) (emphasis added)).

27. *Developments*, *supra* note 25, at 1177-78.

28. *Id.* at 1178. As for foreign jurisdictions, Swiss and German codes contain short limitations that begin to run when the injured party discovers the damage and the identity of the wrongdoer and long limitations that run from the time of the wrong; the French civil code contains a 30-year limitation. *Id.*

29. RICHARD R. POWELL & PATRICK J. ROHAN, *THE LAW OF REAL PROPERTY* ¶ 1012[1] (1992). Whether one holds a property right in land or in other property, e.g. assets being claimed in a cause of action for indemnity, the security of property rights argument would seem to apply.

30. *Developments*, *supra* note 25, at 1192 (citing 21 JAC. I, C. 16 (1623)).

31. *See id.* at 1179-81. “So firmly have statutes of limitations become embedded in our law in the course of the centuries that legislatures seldom consider them in light of the various functions that they actually perform . . . .” *Id.* at 1185. For a more modern idea of the prevalence of limitations, one need only go to a code index. In West's GENERAL INDEX TO THE ANNOTATED CALIFORNIA CODES (1992), for example, there are eight pages of entries under the heading “Limitations.”

32. *Developments*, *supra* note 25, at 1185 (citing Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944)).

33. *Id.*

34. *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 372 (1977) (rejecting the application of California's one-year statute of limitation to a sex discrimination suit brought under Title VII of the Civil Rights Act of 1964). In dissent, Chief Justice Burger and Justice Rehnquist argued that the decision was grossly inconsistent with precedent requiring the use of state limitations unless the United States sues in its sov-

and emphasized the defendant's "deepest instincts" with respect to possession of property as the best rationale for the existence of statutes of limitation.<sup>36</sup> Holmes's example related to real property, but in a society where the alienability of real property approaches the alienability of personal property, there is little reason to distinguish between instincts respecting land and instincts concerning other assets, such as money possessed by a defendant in a warranty suit based on an old transaction.<sup>37</sup> Blackstone understood that in a warranty action, a defendant could only be held liable for the condition of chattels at the time of sale.<sup>38</sup> Hence, the common law rule that the statute begins to run from delivery was established.<sup>39</sup> Blackstone's understanding may be reconciled with modern products liability law on the basis that if the condition at time of sale is such that the product is subject to deterioration, change, or use making the product dangerous, liability may be found on that basis.<sup>40</sup>

Before the U.C.C. was adopted, the central question in breach of warranty cases concerning the statute of limitations was usually not prejudice to the defendant, but whether the court characterized the warranty as present or prospective.<sup>41</sup> The American Law Report Annotation summarized the law in 1931 as follows:

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foreign capacity. *Id.* at 374 (Rehnquist, J., dissenting).

35. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1905).

36. *Id.* at 477.

37. See generally, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 76 (4th ed. 1992). "The history of English land law is a history of efforts to make land more easily transferrable and hence to make the market in land more efficient." *Id.* Judge Posner uses the concept of property rights broadly to refer to much more than land, and notes that such property rights should be made freely transferable to maximize efficiency. *Id.* at 75. The potential of surviving indemnity claims certainly leads to uncertainty (i.e., risk) and discourages the transfer, for example, of firms that sell goods with the potential to create claims indefinitely, because risk has a cost. See *id.* at 195.

38. E.J. Caldecott, Note, *Sales—Warranties—Limitation of Actions—Statute of Limitations Applicable to Action for Breach of Warranty*, 21 S. CAL. L. REV. 429, 429 (citing 3 WILLIAM BLACKSTONE, *COMMENTARIES* 166 (9th ed. 1783)).

39. *Id.*

40. See ROBERT A. HILLMAN ET AL., *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* ¶ 8.06[2] at 8-59 (1985) (comparing and contrasting U.C.C. breach of warranty of merchantability with strict products liability).

41. Annotation, *When Statute of Limitations Commences to Run Against Action for Breach of Warranty on Sale of Chattels*, 75 A.L.R. 1086, 1086 (1931). "The question as to when the Statute of Limitations begins to run . . . depends largely upon the nature of the warranty, i.e., whether it is present or prospective." *Id.*



Some courts have construed the warranty as present and broken as soon as made, if at all, so that the statute begins to run at once; other courts have construed somewhat similar warranties as prospective, or as relating to some future event, and not broken until the happening of that event. Assuming, however, that the warranty is present, and not prospective, the general rule appears to be, in the case of a warranty of quality, kind, or condition, that the warranty is broken as soon as made and the Statute of Limitations begins to run from that time, although the breach is not, and, as it often appears, could not by reasonable diligence have been, discovered until a subsequent date.<sup>42</sup>

While 20th-century commercial law carries the adjective “uniform” with the title of its codification,<sup>43</sup> one aspect of the underlying issue addressed in this 1931 Annotation, whether loss incurred by a party that would otherwise be barred by the apparent breach of warranty statute of limitation is subject to an action for indemnity, remains irregular.

### B. Indemnity

Indemnity, in its earliest 15th-century use, meant “[s]ecurity or protection against contingent hurt, damage, or loss; safety.”<sup>44</sup> Later, it came to mean “exemption from the penalties or liabilities incurred by any course of action” and then “[c]ompensation for loss or damage incurred.”<sup>45</sup> Blackstone and Hume used the term to describe a discharge of a legal liability.<sup>46</sup> Prosser’s treatise continues to use the word in such a sense today, defining indemnity as “an order requiring another to reimburse in full one who has discharged a common liability.”<sup>47</sup> Indemnity is thus distinguished from contribution, which provides for partial reimbursement for the discharge of a liability.<sup>48</sup> Despite Prosser’s concise definition of

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42. *Id.* For an example of the statute running from delivery, see *Provident Loan Trust Co. v. Walcott*, 47 P. 8, 9 (Kan. Ct. App. 1895) (holding that the cause of action against a title abstracter for making a mistake in a certificate of title accrues at delivery of title and not when it is discovered or when consequential damages arise and is thus extinguished by the operation of a three-year statute of limitations though the plaintiff was ignorant during that time of any mistake). See also 2 SIMON GREENLEAF, GREENLEAF ON EVIDENCE § 435, at 411-12 (16th ed. 1899) (“[T]hough special damage has resulted, yet the limitation is computed from the time of the breach, and not from the time when the special damage arose.”) Until the recent flurry of cases addressing the issue presented in this Comment, the common thread running through pre- and post-U.C.C. commentary was not a concern with the distinction between indemnity and warranty, but rather a concern with when the warranty limitation starts to run.

43. See *infra* notes 64-90 for a discussion of the history of and policy behind the U.C.C. statute of limitations for breach of warranty.

44. OXFORD ENGLISH DICTIONARY 196 (1933).

45. *Id.*

46. *Id.*

47. KEETON ET AL., *supra* note 18, § 51 at 341.

48. See, e.g., 18 C.J.S. *Contribution* § 2 (1990).

indemnity, Calamari refers to the problems raised by the concept as "vast and complicated."<sup>49</sup> Calamari, however, devotes only seven paragraphs of his hornbook to indemnity, focusing instead on promises of insurance and third party beneficiary contracts involving municipalities.<sup>50</sup> If any general conclusion can be drawn about the concept of indemnity, it is only that it will continue to be the subject of judicial conflict because "it is an observation, as true as it is trite, that there is nothing men so readily differ about as the payment of money."<sup>51</sup>

Insurance indemnifies insureds, but indemnity is not insurance.<sup>52</sup> Insurance is intended to reduce the risk of loss, but indemnity merely imposes the cost of an occurrence on the party that should rightfully bear that cost.<sup>53</sup> In the past, indemnity among joint tortfeasors was disfavored because it was premised on the wrong of the party seeking relief.<sup>54</sup> This Comment is not concerned with express indemnity,<sup>55</sup> or joint and several liability,<sup>56</sup> which are the subject of much indemnity-related literature, but with implied indemnity as a method of establishing a claim that would otherwise fail because of the statute of limitations. Tort indemnity is a long-recognized concept with origins in express contractual indemnity.<sup>57</sup>

49. JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 17-8, at 706 (3d ed. 1987).

50. *Id.*

51. THE FEDERALIST NO. 7, at 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. See Joan T. Schmit, *Insurance Versus Indemnification: An Argument for Stare Decisis*, 34 DEF. L. J. 125, 126 (1985).

53. *See id.*

54. Mary Elizabeth Phelan, Comment, *Rawson v. City of Omaha: Contribution, Indemnity and Subrogation—Sharing and Shifting the Loss Under Nebraska Law*, 17 CREIGHTON L. REV. 323, 332 (1984).

55. See 42 C.J.S. *Indemnity* §§ 5-28 (1991). These sections of the C.J.S. entry covering express indemnity are replete with statements contradictory to sections 29 through 51, dealing with implied indemnity. Compare § 13(d) ("An agreement will not be construed as indemnifying against strict liability unless the language of the agreement specifically shows that this is the intent of the parties.") with § 32 ("The only limitation on indemnity should be the traditional contract rule which completely bars indemnity to those whose active participation in the injury has gone beyond simple negligence."). Express indemnity would be consistent with § 2-725(2) as a warranty extending to future performance.

56. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 190-227 (1987).

57. See Daniel Waltz, Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?*, 74 CALIF. L. REV. 1057, 1062 (1986). In the tort setting, Waltz concludes that courts must adopt a policy-based approach over a textu-

Perhaps the most general definition of indemnity is "that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party."<sup>58</sup> One practitioner, noting that indemnity could be used to get around either a contract or tort action otherwise barred,<sup>59</sup> distinguished between implied-in-law indemnity and implied-in-fact indemnity in analyzing whether such an approach is allowed.<sup>60</sup> Implied-in-law indemnity is established when the indemnitee recovers from an indemnitor who is also the tortfeasor.<sup>61</sup> Implied-in-fact indemnity is contract-based and is permitted "only in exceptional circumstances."<sup>62</sup> In one sense, whether the running of the U.C.C. breach of warranty statute of limitations should be considered such an exceptional circumstance is the subject of this Comment, because unless the statute has run, plaintiffs have no reason to plead indemnity.<sup>63</sup>

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al or historical analysis to find a solution to the problem posed by his title that both encourages settlements and allocates loss fairly. *Id.* at 1101. If such is the case with respect to the historically accepted and proven (albeit "arcane and poorly understood," *id.* at 1102) doctrine of equitable indemnity, it certainly is true in connection with the application of indemnity as an innovative way to get around the sale of goods statute of limitations.

58. *Winnsboro v. Wiedeman-Singleton, Inc.*, 398 S.E.2d 500, 502 (S.C. Ct. App. 1990) (citing *State Ins. Fund v. Taron*, 333 P.2d 508, 512 (Or. 1958)). The *Winnsboro* opinion includes a rare, detailed explanation of the different forms of indemnity. *Id.*

59. Thomas A. Leggette, *When Can an Implied Indemnity Cause of Action be Used to End-Run a Limitations Bar?*, 42 FED'N OF INS. & CORP. COUNS. Q. 33, 33 (1991).

60. *Id.* at 35-40.

61. *Id.* at 35. Indemnitee and indemnitor must owe "common or identical duties" to the third party. *Id.*

62. *Id.* at 37 (citing *International Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*, 838 F.2d 124, 127-28 (4th Cir. 1988) (denying contractual indemnity because there was no "special contractual relationship" between an insurance company and its broker; such a finding could make "every insurance broker . . . an insurer" and "would do violence to existing indemnity law"))).

63. This is because protection broader than, or at least equivalent to, indemnity is available under the U.C.C.'s consequential damages provisions. See U.C.C. § 2-715(2) ("Consequential damages . . . include . . . any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . ."). On the other hand, the elements of indemnity are more difficult to establish:

In actions for indemnity, courts universally require proof of three elements:

- (1) the payor (prospective indemnitee) must discharge a legal obligation the payor owes to a third person;
- (2) the prospective indemnitor must also be liable to the third person; and
- (3) as between the claimant payor and the prospective indemnitor, the obligation ought to be discharged by the indemnitor.

*Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 218 (Utah 1984) (citing *Ore-Ida Foods, Inc. v. Indian Head Cattle Co.*, 627 P.2d 469, 475 (Or. 1981)).

### C. *The U.C.C.*

The first attempt to develop uniform laws to help exploit the "gigantic free-trade area" that the United States had become during the Nineteenth Century was the Negotiable Instruments Law,<sup>64</sup> based on the 1882 English Bills-of-Exchange Act.<sup>65</sup> Ironically, the Negotiable Instruments Law was written "with something of a nod to the California code,"<sup>66</sup> the interpretation of which raised the issue of whether indemnity survives the breach of warranty statute of limitations in California.<sup>67</sup> The Negotiable Instruments Law was recommended for enactment by the Commissioners on Uniform State Laws in 1906 and adopted by every state before the Uniform Commercial Code replaced it in the 1950's and 1960's.<sup>68</sup> The Uniform Sales Act, also promulgated in 1906, was widely adopted but subject to criticism helping spark the adoption of the U.C.C.<sup>69</sup>

Section 2-725 of the Uniform Commercial Code, now the law in all 50 states, was intended

[t]o 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 [were previously] . . . governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four-year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.<sup>70</sup>

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64. See THE LAW OF NEGOTIABLE INSTRUMENTS (Ernest W. Huffcut & Frederick D. Colson, eds., 2d ed. 1910). The Negotiable Instruments Law did not contain a limitation period. See *id.*

65. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 408 (2d ed. 1985); Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 562 (1950).

66. Williston, *supra* note 65, at 562.

67. See *id.* The case that brought the conflict to light in California was *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565 (Ct. App. 1992). For a discussion of this case, see *infra* notes 145-60 and accompanying text.

68. FRIEDMAN, *supra* note 65, at 408; WILLISTON, *supra* note 65, at 563.

69. See Grant Gilmore, *Codifying Commercial Law*, 57 YALE L. J. 1341, 1347 (1948).

70. Official Comment, American Law Institute/National Conference of Commissioners on Uniform State Laws, May 1949 Draft. The rationale is repeated in U.C.C. § 2-725, 1B U.L.A. 525 (1989). *Uniform Laws Annotated* is perhaps the most useful publication available for research into how various jurisdictions have treated conflicting interpretations of the code.

The Code's framers<sup>71</sup> made clear their preference for uniformity, ignoring the fact that states had already set their own limitation periods by statute.<sup>72</sup> The framer's preference belies a fundamental conflict among approaches to uniform law making. Whether uniform laws should simply reflect existing law or should serve policy goals is the divisive issue. Grant Gilmore argued for the former purpose.<sup>73</sup> However, the very title of the U.C.C. betrays its goal of uniformity, itself a policy objective. Chief Justice Rehnquist wrote that uniform laws permit "the supreme courts of the states to retain their authority as to what a state uniform law means, but they have every incentive to interpret it to conform to the holdings of other courts construing the same law."<sup>74</sup> Exactly what those incentives are remains largely unarticulated. Disparate laws no doubt lead to a certain degree of inefficiency in interstate commerce,<sup>75</sup> but empirical

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71. The U.C.C.'s "chief intellectual parent" was Professor Karl Llewellyn. FRIEDMAN, *supra* note 65, at 675.

72. *See, e.g.*, CAL. CIV. PROC. CODE § 339 (West 1992) (setting a two-year limitation for actions on contracts not in writing, but amended to provide an exception when § 2-725's four-year limitation is applicable).

73. Gilmore, *supra* note 69, at 1341. "The principal objects of draftsmen of general commercial legislation . . . are to be accurate and not be original." *Id.* *See also* HORWITZ, *supra* note 22, at 211 ("It has now become a familiar criticism of Llewellyn that in drafting the Uniform Commercial Code to reflect mercantile custom, he endowed economically dominant commercial practices with undeserved normativity.").

74. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1 (1991). The Uniform Contribution Among Tortfeasors Act contains a provision explicitly calling for it to be "interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 5, 12 U.L.A. 106 (1975 & Supp. 1992). The U.C.C., on the other hand, seems to invite varying interpretations by calling for it to "be liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102 (1992).

75. Variations in laws may be analogized to non-tariff trade barriers in international trade. *See infra* note 263 and accompanying text; *see also* Anita F. Hill, *A Comparative Study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2-725 of the Uniform Commercial Code*, 25 TEX. INT'L L.J. 1, 17 (1990). Professor Hill cites a Texas case, *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex. 1986), as support for the proposition that with respect to a breach of warranty claim, the "U.C.C. rejected the common law 'discovery rule' for accrual of claims, which states that the limitation period commences when the defect is or should have been discovered." *Id.* (footnotes omitted). The Texas case stands firmly for rejection of the discovery rule, *id.* at 546, but it is not at all clear that the discovery rule was, in fact, the common law rule. The earlier rule was that the statute ran from tender, not from discovery. *See supra* text accompanying notes 39-42; *see also* Annotation, *When Statute of Limitations Commences to Run Against Action for Breach of Warranty on Sale of Chattels*, 75 A.L.R. 1086 (1931):

Assuming . . . that the warranty is present, and not prospective, the general rule appears to be, in the case of a warranty of quality, kind, or condition,

measurements of such inefficiency are difficult to discern.<sup>76</sup>

In California, the current split about whether the U.C.C. limitation bars indemnity can be traced to the adoption of the Code. For pre-code and current non-code transactions, the California limitation for contract actions is two years for oral contracts<sup>77</sup> and four years for written contracts.<sup>78</sup> California courts hold that although the statute normally runs from delivery, in cases in which a defect was not immediately discoverable, the statute could run from "the earliest possible time the breach could have been discovered."<sup>79</sup> When proposed, section 2-275(2) limited the discovery rule to situations "where a warranty explicitly extends to future performance of the goods."<sup>80</sup> One commentator suggested that

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that the warranty is broken as soon as made and the Statute of Limitations begins to run from that time, although the breach is not, and, as it often appears, could not by reasonable diligence have been, discovered until a subsequent date.

*Id.*

Even in negligence cases, common law courts were reluctant to impose a discovery rule. KEETON ET AL., *supra* note 18, § 30, at 165-68. With respect to intentional torts, many courts remain too reluctant to impose a realistic discovery rule. Such reluctance even extends to cases of childhood sexual abuse. See Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1390 (1993).

76. See POSNER, *supra* note 37, at 587-88. Judge Posner notes that in the choice of law context, the proper statute of limitations depends on the purpose of the limitation. If the purpose is "to reduce the error costs associated with the use of stale evidence," the limitation should be that of the forum state because the forum state presumably knows best how well its courts can deal with such evidence. *Id.* If the purpose is "to enable people to plan their activities with greater certainty," the limitation should be that of the injurer's state because it is the injurer who is subject to uncertainty. *Id.* It seems rather unlikely that different courts will have significantly different competence with respect to the use of stale evidence. However, the uncertainty of litigation is no doubt a real cost, at least having much to do with the cost of insurance. What is uncertain here, however, is whether a shorter limitation reduces litigation by cutting off remedies or increases litigation by encouraging suits as a method of protecting plaintiffs' rights. See James A. Gash, Comment, *Rethinking Principles of Comparative Fault in Light of California's Proposition 51*, 19 PEPP. L. REV. 1495, 1498-99 (1992) (discussing controversy about the economic effect of imposing liability on consumer prices and tax rates in the context of joint and several liability).

77. CAL. CIV. PROC. CODE § 339 (West 1982 & Supp. 1992).

78. CAL. CIV. PROC. CODE § 337 (West 1982 & Supp. 1992).

79. Mitchel J. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 UCLA L. REV. 281, 333-34 (1961).

80. U.C.C. § 2-725(2).

the legislature drop the word "explicitly" from section 2-725(2) so that California case law would survive adoption of the U.C.C.<sup>81</sup> At a minimum, such a rule would have been more likely to allow plaintiffs to claim implied indemnity based on implied warranties. The legislature failed to accept the recommendation and retained the word "explicitly" when it adopted the Code in 1967.<sup>82</sup> In 1992, however, in *Carrier Corp. v. Detrex Corp.*,<sup>83</sup> a state appeals court might finally have given effect to what was originally suggested in 1961, at least with respect to situations in which the breach results in liability to a third party.<sup>84</sup>

From a national perspective, White and Summers summarized the issue of how courts look at statute of limitations problems under the Code:

[w]e can do little more than warn the lawyer not to make hasty judgments about the applicable statute of limitations or about when it will commence to run. Section 2-725 offers a sane and workable statutory scheme, but it is one the courts will infrequently follow when the plaintiff's blood has been spilled or when the defendant is a remote seller. To courts, these cases look like tort, not contract, particularly when the tort statute of limitations favors the plaintiff.<sup>85</sup>

They suggest a uniform rule that contract law be applied to all cases except those involving physical or personal injury, and thus that the U.C.C. limitation govern breach-of-warranty cases and that state tort law be restricted to tort cases.<sup>86</sup> While problems might remain in distinguishing physical injury from economic harm,<sup>87</sup> this proposed solution is

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81. Ezer, *supra* note 79, at 334.

82. See CAL. COM. CODE § 2725(2) (West Supp. 1993).

83. 6 Cal. Rptr. 2d 565 (Ct. App. 1992).

84. *Id.* at 569 (holding Cal. Com. Code § 2725(2) inapplicable to cases "involving indemnification for damages under express or implied warranty based on a sales contract"). For further discussion of *Carrier*, see *infra* notes 145-60 and accompanying text.

85. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 479-80 (3d ed. 1988) (footnotes omitted).

86. *Id.* at 477.

87. If property is physically injured but can be repaired by making a simple payment in a standard commercial transaction, is the damage genuine physical injury or simply economic harm? For illustrations of the conundrum faced by courts in distinguishing economic loss from property damage, see James E. Moore, Comment, *Agristor Leasing v. Spindler: Economic Loss, Strict Liability and the U.C.C.—What a Mess*, 34 S.D. L. REV. 101, 118-19 (1989). In Minnesota, property loss—except the mere loss of the good itself—is enough to get a plaintiff around the U.C.C. limitation. See *Lloyd F. Smith Co. v. Den-Tal-Ez*, 491 N.W.2d 11 (Minn. 1992). The story of a dentist named Vukodinovich, and his burning dental chair, is compellingly told at 2 U.C.C. BULL. 5, 5-6 (Feb. 1992). In that case, a state appeals court held that the U.C.C. limitation had run because the chair was purchased sometime before 1975, and the fire it allegedly caused did not occur until 1988; thus, Dr. Vukodinovich and his fellow tenants had no remedy against the manufacturer. *Lloyd F. Smith Co. v. Den-Tal-Ez*, 478 N.W.2d 510, 514-15 (Minn. Ct. App. 1991). The supreme court agreed

more forthright in its rationale than many of the cases, which tend to simply cite an arguably applicable rule favoring one outcome over the other and avoid establishing a full rationale for the chosen general rule.<sup>88</sup> Moreover, there is not even agreement as to whether the U.C.C. applies to personal injury actions.<sup>89</sup> Therefore, any hope for a quick solution is probably misplaced; uniformity must await the opportunity for more states to pass on the indemnity issue.<sup>90</sup>

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with respect to the U.C.C. limitation, but gave the dentist a tort remedy. 491 N.W.2d at 17.

88. For a further examination of the issue of when the section 2-725 statute of limitations should begin to run, see Kevin D. Lyles, Note, *U.C.C. Section 2-725: A Statute Uncertain in Application and Effect*, 46 OHIO ST. L.J. 755 (1985). Lyles proposes a revision of section 2-725 that would extend the four-year limitation to ten years following tender of delivery but require that any action be brought within two years of discovery. *Id.* at 767. See *infra* note 92 for a discussion of this and other proposals. See also Richard R. Hyde, *Breach of Warranty Statute of Limitations Under the UCC*, 66 MICH. B.J. 504 (June 1987).

89. LEVY, *supra* note 24, § 4.42, at 156 ("For instance, states variously provide that: (1) the U.C.C. applies; (2) negligence statutes of limitation and not U.C.C. statutes of limitation apply because the claim is really based in tort; and (3) the U.C.C. applies, but only if there is privity.") The court in *Taylor v. Ford Motor Corp.* summarized the U.C.C.'s application to personal injury actions. *Taylor v. Ford Motor Co.*, 408 S.E.2d 270 (W. Va. 1991). There, the court divided the jurisdictions into three categories: (1) those holding that 2-725 applies to all breach-of-warranty actions regardless of whether personal injury damages are sought (Delaware, Mississippi, Oregon, Tennessee, and Wyoming); (2) those holding such actions should be subject to non-U.C.C. limitations (California, Iowa, Kansas, Missouri, New Jersey, Utah, and Virginia); (3) and those that apply the U.C.C. limitation only if privity exists between the plaintiff and the defendant (Kentucky, Ohio, Oklahoma, and Rhode Island). *Id.* at 272. West Virginia joined the second category. *Id.* at 274; see 9 U.C.C. BULL. 7, 8 (Dec. 1991).

90. See generally PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT (1990). The report notes that "[t]he scope of § 2-725 is frequently litigated" and subject to jurisdictional variation. *Id.* at 245. It notes that "[t]he limitation (repose?) period may be too short, especially in breach of warranty cases." *Id.* at 246. The report suggests a revised limitation period of two years from knowledge of breach, tempered by an eight-year statute yielding ultimate repose. *Id.* at 246-47. See also *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991). The task force appraising the report recommended a limitation running two years from discovery, with no statute of repose. *Id.* at 1249.



### III. CASES: PRUDENT JURISPRUDENCE?

Some jurisdictions recognize the purported cause of action for indemnity on a breach of warranty as a remedy outside the U.C.C.,<sup>91</sup> others view this remedy as running directly contrary to U.C.C. policy, and therefore sustain demurrers on the basis of the statute of limitations.<sup>92</sup> A survey of cases illustrates these approaches.

#### A. *U.C.C. Statute of Limitations Bars Indemnity*

One of the harsher effects of the U.C.C. statute of limitations occurs when a breaching seller, perhaps hoping that a suit by an unsatisfied buyer will "go away," or perhaps merely reluctant to enter the world of litigation, simply waits too long to bring an action against a third-party defendant-supplier who was at fault for a defect in a chattel causing harm to a buyer.<sup>93</sup> That was the case in *Perry v. Pioneer Wholesale Supply Co.*<sup>94</sup> In *Perry*, a supplier purchased doors from a manufacturer and resold the doors to a subcontractor, who in turn conveyed them to a general contractor.<sup>95</sup> The doors were unsatisfactory, so the general contractor rejected them and bought new doors directly from the supplier.<sup>96</sup> Two years after rejecting the doors, the general contractor sued to recover the purchase price from the subcontractor who sold him the doors.<sup>97</sup> The subcontractor, however, waited an additional three years to join the supplier and more than three years to join the manufacturer in the suit.<sup>98</sup> The court held that because more than four years had passed since the doors were tendered, the subcontractor's indemnity causes of action were barred by the U.C.C. statute of limitations for breach of

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91. See *supra* note 3.

92. For overviews of recent U.C.C. statute of limitations problems in the form of annual surveys, see David Frisch and John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 46 BUS. LAW. 1455, 1500-04 (1991) ("Much of the tension in this area is directly attributable to the drafters' decision to choose tender of delivery as the time when a breach of warranty occurs and a cause of action accrues (a date-of-delivery rule)."). Further notation appears in the 1992 annual survey carrying the same title, 47 BUS. LAW., 1517, 1540-43.

93. The harshest effect arguably occurs when a buyer, through no fault, fails to discover a defect that would otherwise constitute a breach of warranty within the four-year limitation.

94. 681 P.2d 214 (Utah 1984). The court noted that the goods were properly stored, indicating no factual issue as to the subcontractor's fault for the defect. *Id.* at 216.

95. *Id.* at 216.

96. *Id.*

97. *Id.*

98. *Id.*

warranty.<sup>90</sup>

The court treated the case as one of statutory interpretation.<sup>100</sup> It found that although "the limitation period specified in the Uniform Commercial Code conflicts with the general limitations rule for indemnity actions," U.C.C. section 2-725 "controls all actions for breach of contract for the sale of goods . . ."<sup>101</sup> The unanimous court noted that as a statute of repose, section 2-725 bars such causes of action regardless of the usual reasons for tolling.<sup>102</sup>

In addition to demonstrating the effect of the U.C.C. limitation on a buyer, *Perry* raises the disturbing possibility that a plaintiff-customer could force an innocent reseller, ignorant of any defects in a chattel, to bear the entire loss from a breach of warranty if the plaintiff-customer simply waited until late in the limitations period to file suit, leaving the innocent reseller insufficient time to file suit for indemnification.<sup>103</sup> In

99. *Id.* at 217. The subcontractor was in an unfortunate position because, in addition to losing his indemnity claims on summary judgment, he had stipulated to liability for the doors at trial despite a factual finding that he had properly stored the doors and presumably was not responsible for the condition that caused the buyer to reject them. *Id.* at 216.

100. *Id.* at 216, 218.

101. *Id.* at 218.

102. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 899, cmt. g (1977)).

In recent years special 'statutes of repose' have been adopted in some states covering particular types of activity such as special negligence for doctors, lawyers or architects, or products liability, or liability of building contractors. These statutes set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of the usual reasons for 'tolling' the statute.

*Id.*

A statute of limitation typically bars suit at a certain time after injury occurs; a statute of repose bars "action after a specific time has elapsed, regardless of whether there has as yet been an injury." BLACK'S LAW DICTIONARY 927 (6th ed. 1990). Thus, the standard distinction between statutes of limitation and statutes of repose is irrelevant when injury is held to have occurred at the time of breach rather than at the time of discovery, and repose is calculated, like the limitation, from the time of tender. If injury is held to have occurred at the time of delivery, as in *Perry*, it does not matter whether § 2-725 is labeled a statute of repose or limitation. Can a buyer be injured without knowing it? If a tree falls in the forest, does it make a sound if no one is there to hear? See also *Bolick v. American Barnag Corp.*, 293 S.E.2d 415, 417 (N.C. 1982) (statutes of repose "set a fixed time limit after the time of the product's manufacture, sale or delivery beyond which the product seller will not be held liable").

103. Blameworthy conduct on the part of the buyer is not required to cause a situation arguably inequitable to the seller. For example, manufacturer builds product on September 1, 1990 and ships to seller. Seller tenders product to buyer on January 1,

*Perry* itself, the subcontractor had about two years after learning it was being sued in which to file suit against the supplier and the manufacturer. However, suppose the buyer had filed suit against the subcontractor one day before the statute had run. Unless the subcontractor could immediately find an attorney, draft a complaint and get it to the courthouse, he would face almost certain liability without a just opportunity to plead a cause of action for indemnity. Whether this result is too harsh depends on whether the subcontractor knew about or had a duty to know about the defect and failed to do anything to remedy the situation.<sup>104</sup> If so, such a situation would presumably impute sufficient blame upon the subcontractor to justify the harsh result. If not, however, forcing the subcontractor to bear the entire loss would seem, at a minimum, inequitable.<sup>105</sup>

Another court, while also denying recovery on an indemnity claim under the U.C.C., established a test that could mitigate the harshness of the U.C.C. limitation. In *Sheehan v. Morris Irrigation, Inc.*,<sup>106</sup> Morris purchased parts for an irrigation system that he installed on a ranch in central South Dakota.<sup>107</sup> The system failed because of defective parts, and the rancher went into bankruptcy.<sup>108</sup> During litigation over the failed system, the parties neither notified the manufacturer of the allegedly defective parts nor filed suit until more than four years after the system had been installed.<sup>109</sup>

The *Morris* court held that section 2-725 indicated a legislative intent to impose "ultimate repose in transactions for the sale of goods"<sup>110</sup> and found that the U.C.C. barred an indemnity action against the manufacturer.<sup>111</sup> Although it did not adopt it, on grounds that the limitation had

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1991. Product fails on December 1, 1994, and buyer files suit against seller on December 31, 1994, to protect its interests under a breach of warranty action. Unless seller can get to the courthouse rather quickly, however, seller has no remedy against manufacturer because tender to him started the limitation running on January 1, 1991, and it lapsed on January 1, 1995.

104. See U.C.C. § 2-104(1) (1992) (imposing such a duty on merchants "in goods of the kind"). Issues with respect to the merchant clause are infrequently litigated. See WHITE, *supra* note 85, § 9-7 at 409. The code is clear that within the limitations period, there is veritable strict liability for resellers. See *id.* at 408.

105. For a discussion of duty and equity questions, see *infra* notes 247-59 and text accompanying.

106. 460 N.W.2d 413 (S.D. 1990).

107. *Id.* at 414.

108. *Id.*

109. *Id.*

110. *Id.* at 416, *citing* Farmers Nat'l Bank v. Wickham Pipeline Constr., 759 P.2d 71, 76-77 (Idaho 1988).

111. *Morris*, 460 N.W.2d at 418. The exact language of the *Morris* court is instructive, but troublesome, because future courts may be able to interpret it creatively. It is possible to argue that the court decided *Morris* on alternative grounds: (1) that

run, the court nevertheless set forth and applied the standard test for indemnity, concluding it was not met even though the limitation had run. To state such a cause of action, the court held, "The party seeking indemnity has to show an absence of proportionate fault so that the entire liability can be shifted."<sup>112</sup> The rancher and the installer were both aware of the problem with the irrigation system early on, but chose not to attempt a suit until later.<sup>113</sup> Thus, the record failed to show any diligence on the part of the rancher or installer after they learned of the nonconformity.<sup>114</sup> However, even if the parties had acted diligently upon discovering the alleged breach of warranty, showing a total absence of conduct potentially prejudicial to a defendant, the strident tone of the majority opinion in *Morris*, and the characterization of the U.C.C. limitation as a statute of repose, indicates that the South Dakota Supreme Court would be unlikely to recognize an exception to the U.C.C. limitation in a breach of warranty action.<sup>115</sup>

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the code limitation by its explicit language and by legislative intent bans all indemnity actions, and (2) that facts allowing for equitable relief through indemnity were not presented. *See id.* at 416-18. As to the first ground, the court stated, "[A]pplication of the general indemnity rule (statute of limitations does not begin to run until liability attaches to indemnitee) would contradict the legislature's specific directive . . ." *Id.* at 416 (emphasis added). However, it is unclear whether the court needed to decide this issue in order to resolve the case. The court further held that indemnity was unavailable because the party seeking it failed "to show an absence of proportionate fault." *Id.* at 417. Nevertheless, the court was emphatic about its interpretation of section 2-725, citing virtually every case on that point and analyzing the U.C.C. issue in much greater depth than the indemnity issue. *Id.* at 416-17. The better analysis seems to be that the holding was based on the premise that the U.C.C. limitation was controlling. Even if not controlling, however, indemnity probably would have been unavailable on the basis of the fault of the party seeking it.

A cursory reading of the case might leave the impression that the South Dakota Supreme Court decided the U.C.C. issue in 1969, shortly after the state adopted the Code in 1966. *Id.* at 416 (citing *Chipperfield v. Woessner*, 166 N.W.2d 727 (S.D. 1969)). The citation to *Chipperfield* could be read for the proposition that section 2-725 "is a statute of repose which sets a fixed period after the running of which actions are barred." *Morris*, 460 N.W.2d at 416. *Chipperfield*, however, involved the South Dakota limitation for personal injury actions and merely stands for the point that South Dakota law treats such limitations as statutes of repose. *Chipperfield*, 166 N.W.2d at 728. For an explanation of the distinction between statutes of repose and limitation, see *supra* note 102.

112. *Morris*, 460 N.W.2d at 417.

113. *Id.*

114. *Id.*

115. *See supra* note 111. The general provisions of the U.C.C. are not very helpful here. One section provides that "[u]nless displaced by the particular provisions of this

The dissent in *Morris* cited New York law for the proposition that indemnity is a separate cause of action from breach of warranty under the U.C.C. and therefore subject to its own statute of limitations.<sup>116</sup> Rather than the code limitation to the indemnity action, however, the dissent suggested using the alternative six-year pre-U.C.C. limitation established in the South Dakota Code for breach of contract.<sup>117</sup> The dissent also found that section 2-725 violates the South Dakota Constitution, because it "prevents a cause of action before it accrues" and thus impermissibly blocks the state guarantee of a right of access to the courts.<sup>118</sup>

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Act, the principles of law and equity . . . shall supplement its provisions." U.C.C. § 1-103 (1992). Another section provides that the code is to be "liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed *but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.*" U.C.C. § 1-106(1) (1992) (emphasis added). Reading these provisions in light of the rule of statutory interpretation that the specific controls the general, one gleans that courts applying the U.C.C. may venture outside the Code for either legal or equitable remedies, except when certain types of damages are involved. A literal reading, then, may first classify indemnity as special damages, because it involves certain payment to a third party, and then ban it as remedy not permitted by "rule of law," given its equitable basis. However, indemnity is also available as a legal remedy. See GEORGE E. PALMER, *THE LAW OF RESTITUTION* §1.5(d), at 29 (1978).

The *Morris* court cited the Restatement of Restitution for the proposition that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity." *Morris*, 460 N.W.2d at 417 (citing *Restatement of Restitution* § 76). However, the court also held that denial of indemnity was not inequitable because the installer sat on his rights. *Id.* In effect, the court applied the doctrine of laches without explicitly saying so.

116. *Morris*, 460 N.W.2d at 418 (Sabers, J., dissenting) (citing *McDermott v. City of New York*, 406 N.E.2d 460 (N.Y. 1980)). The holding in *McDermott*, however, a personal injury-product liability case, is arguably inapplicable to a U.C.C. breach of warranty action for property or economic damage. See *McDermott*, 406 N.E.2d at 461.

117. *Morris*, 460 N.W.2d at 418 (Sabers, J., dissenting) (citing S.D. CODIFIED LAWS ANN. § 15-2-13(1) (1984)). The reasoning of the dissent, however, is slightly enigmatic. It stated that "[a] cause of action based on indemnity should be controlled by a statute of limitations based on indemnity," *Morris*, 460 N.W.2d at 418, but failed to explain why a general statute of limitations applying to any action should control the statute of limitations relating to the sale of goods when the case at hand clearly involved the sale of goods. See *id.* See also *Bellevue South Assoc. v. HRH Constr. Corp.*, 579 N.E.2d 195, 202-03 (N.Y. 1991) (holding that six-year general contract limitation rather than the four-year U.C.C. limitation was applicable to breach of warranty/indemnity action by subcontractor against manufacturer of floor tiles and that limitation ran from payment by subcontractor to owner of premises).

118. *Morris*, 460 N.W.2d at 418-19 (Sabers, J., dissenting). The South Dakota Constitution provides that "[a]ll courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay." Art. IV, § 20. See also *Vilardebo v. Keene Corp.*, 431 So. 2d. 620, 622 (Fla. Dist. Ct. App. 1983) (statute of

The wide range of reasoning applied to the issue of whether the law of indemnity should control is well illustrated by the decision of the Second Circuit Court of Appeals in *People's Democratic Republic of Yemen v. Goodpasture, Inc.*<sup>119</sup> In that indemnity action, Yemen was awarded \$370,000 in a bench trial against a company it accused of selling insect-infested wheat.<sup>120</sup> On appeal, the seller argued that Yemen's claims did not qualify as indemnity claims and, thus, were barred by the four-year statute of limitations for ordinary breach-of-contract claims. The court was clearly correct to strike two claims relating to the cost of delayed shipments because such "claim[s]—for consequential damages resulting from the delivery of defective goods—[were] for breach of contract, not for indemnity," as the payments for which Yemen sought indemnity were made to the defendant rather than to a third party.<sup>121</sup> A third claim, for reimbursement of a deadfreight charge,<sup>122</sup> satisfied the test for payment to a third party, but again was characterized as "nothing more than a claim for consequential damages . . ." and thus was barred by the limitation.<sup>123</sup> The court reversed the fourth indemnity award because although the defendant prevented the ship hired by Yemen from docking, thereby forcing Yemen to pay its shipper to sit idle, the court found no duty running from the defendant to the shipper to allow docking.<sup>124</sup>

*Yemen* raises three issues subordinate to the question of whether the indemnity or code limitation should apply: (1) Why should courts distinguish payments made to third parties in the form of indemnity from payments made in the form of other costs imposed on defendants by the consequences of a breach of warranty? (2) What difference between consequential damages and indemnity justifies different treatment? And (3) why must there be a duty running from a potential third-party indemnitor to the party to whom the indemnitee made payment to justify indemnity, if it is allowed? These issues are discussed below.<sup>125</sup>

A handful of other cases hold that indemnity does not survive the

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repose unconstitutional).

119. 782 F.2d 346 (2d Cir. 1986).

120. *Id.* at 347-48.

121. *Id.* at 350.

122. A deadfreight charge is the amount due a shipper for unused shipping capacity. *Id.* at 350-51.

123. *Id.* at 351.

124. *Id.* at 352. Again, the remedy sought was classified as consequential damage, subject to the U.C.C. limitation. *Id.*

125. See *infra* notes 210-260 and accompanying text.

U.C.C. limitation. In *Payne v. Far-Mar-Co.*,<sup>126</sup> a Missouri court denied indemnity on a breach of warranty claim filed seven years after tender of delivery of soybeans.<sup>127</sup> The court held that when Missouri enacted section 2-725 in 1963, it created an exception to the previously enacted general statute<sup>128</sup> providing for a ten-year limitation on actions based on writings for the payment of money or property.<sup>129</sup> It reasoned that in adopting the comment, the legislature's purpose was reflected by the official comment to section 2-725, which, in addition to noting the need for uniformity,<sup>130</sup> suggests that the code "takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four-year period as the most appropriate to modern business practice."<sup>131</sup> In finding the law so clear cut, the court issued only a brief opinion devoid of any equitable arguments.<sup>132</sup>

One case cited for support by both the *Perry* and *Morris* courts actually goes beyond those two cases by imposing the section 2-725 limitation on a third-party indemnity complaint in a wrongful death action.<sup>133</sup> In *PPG Industries v. Genson*, the plaintiff's son died after falling through a glass wall at a movie theater.<sup>134</sup> The theater sought indemnity from the glass company, but the court denied the claim because tender had occurred more than four years before the theater made its contract claim against PPG.<sup>135</sup> In a brief opinion, the court placed responsibility for the condition of the premises on the landowner, and not the merchant.<sup>136</sup>

In a 1988 Idaho case, six different parties, in a fact pattern worthy of use in only the cruelest of contract examinations, fought out who would bear a loss caused by the supply of allegedly defective pipe.<sup>137</sup> The state supreme court limited its review to whether the section 2-725 limitation

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126. 612 S.W.2d 54 (Mo. Ct. App. 1981).

127. *Id.*

128. MO. ANN. STAT. § 516.110 (Vernon 1951).

129. *Payne*, 612 S.W.2d at 55.

130. See text accompanying *supra* note 70, for the text of the U.C.C. comment concerning uniformity.

131. *Payne*, 612 S.W.2d at 55 (citing comment accompanying MO. ANN. STAT. § 516.110 (Vernon 1951); U.C.C. § 2-725, 1B U.L.A. 525 (1989)).

132. See also *Reiss v. Pacific Steel Pool Corp.*, 341 N.Y.S.2d 364, 365 (N.Y. App. Div. 1973) (holding that a four-and-a-half-year-old claim for goods sold and delivered was subject to the U.C.C.'s four-year limitation and therefore barred).

133. *PPG Industries, Inc. v. Genson*, 217 S.E.2d 479 (Ga. Ct. App. 1975).

134. *Id.* at 480.

135. *Id.* The court dismissed a negligence claim against the glass maker on the basis that the theater and its architect approved the use of the grade of glass proposed by PPG. *Id.* at 481.

136. *Id.* But see *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565 (Ct. App. 1992) (failing to place analogous responsibility on a landowner for pollution from an industrial system); see *infra* notes 145-60 and accompanying text.

137. *Farmers Nat'l Bank v. Wickham Pipeline Constr.*, 759 P.2d 71 (Idaho 1988).

protected the pipe supplier or whether two of the parties could get around that limitation to join the supplier to indemnify them against claims that they had defaulted on their contractual responsibilities.<sup>138</sup> The court held that by delaying their action, the indemnity plaintiffs gave up their legal claim when the statute ran and lost their equitable claim because there had been an adequate remedy at law.<sup>139</sup> If the court had concluded the case on this point, it would have implicitly left open the possibility that plaintiffs who do not have an adequate remedy at law—who, for example, do not learn of a breach during the four-year U.C.C. limitation period—may yet be entitled to indemnity. However, the court went on to adopt the reasoning in *Perry v. Pioneer Wholesale Supply Co.*<sup>140</sup> that section 2-725 “was apparently intended to afford ultimate repose in transactions for the sale of goods.”<sup>141</sup> Thus, Idaho joined Utah, Missouri, and Georgia as jurisdictions explicitly finding that the U.C.C. limitation cuts off indemnity actions. South Dakota prefers the U.C.C., but leaves open a small window that parties seeking indemnity might be able to enter if equity so mandates. Elsewhere, that window is wide open.<sup>142</sup>

#### *B. Indemnity Claim Survives Despite U.C.C. Limitation*

While half a dozen jurisdictions clearly favor the U.C.C. limitation over the indemnity cause of action, another handful find that the U.C.C. should not block such an effort, even when, in the words of White and Summers,<sup>143</sup> the plaintiff's blood is not spilled.<sup>144</sup> Perhaps most signifi-

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138. *Id.* at 73.

139. *Id.* at 74.

140. 681 P.2d 214 (Utah 1984). *See supra* notes 93-102 and accompanying text.

141. *Farmers*, 759 P.2d at 76.

142. *See also* Housing and Redevelopment Auth. v. Agassiz Constr. Inc., 476 N.W.2d 781 (Minn. Ct. App. 1991). “The [U.C.C.] provides the sole remedy for economic losses due to property damage resulting from a commercial transaction, and allows no recovery under tort theories of negligence or strict products liability.” *Id.* at 783. “[W]here the sale of goods is the predominant purpose of a sales contract, the U.C.C. governs all breach claims which arise from that sale.” *Id.* at 785. Thus, an indemnity claim based on discoloration of stucco caused by delivery of the wrong lumber, *id.* at 783, was extinguished by operation of § 2-725. *Id.* at 785.

143. *See supra* note 85 and accompanying text.

144. WHITE & SUMMERS, *supra* note 85, at 479-80. *But see* John C. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C., § 2-607(3)(a)*, 73 CORNELL L. REV. 534 (1988). Reitz noted that as of his writing, it appeared that the U.C.C. limitation was enjoying greater judicial popularity than indemnity as a



cantly, a California court decided the issue for the first time in 1992 and gave enterprising trial attorneys an additional weapon to use in products liability attacks. In September 1979, Carrier Corporation, an air conditioner manufacturer, purchased from Detrex Corporation a system to remove grease from air conditioner coils.<sup>145</sup> In April 1985, Carrier noticed that the system was using more Perchloroethylene<sup>146</sup> (PCE) than normal and discovered that the degreasing system was leaking PCE into the soil below its plant.<sup>147</sup> Carrier notified the government and undertook clean-up efforts costing an estimated \$10 million.<sup>148</sup> In October 1988, more than three years later, Carrier filed a breach-of-warranty claim for damages against Detrex.<sup>149</sup> In 1990, Carrier amended its claim to seek indemnification for clean-up costs. The trial court granted Detrex's motion for summary judgment, based on the four-year U.C.C. limitation, which ran in 1983.<sup>150</sup>

In this case of first impression in California, the Court of Appeal reversed the trial court and sustained the action against the seller on the basis of Carrier's amended complaint for indemnity.<sup>151</sup> In holding that the 1979 seller could be liable in indemnity for the clean-up costs of system leakage discovered in 1985, the court discounted the seller's argument that the buyer was being permitted to "plead around" the intent of the U.C.C.<sup>152</sup> Instead, the court held that California should adopt the reasoning of a New York case that allowed New York City to seek indemnity when an employee's arm was severed by a garbage truck, despite the running of the U.C.C. limitation.<sup>153</sup> The difference, of course, between the two cases was that the New York case involved personal injury while the California case involved only clean-up costs.<sup>154</sup> Nevertheless, without recognizing this distinction, the court held that "[t]here is a substantial difference between an instance where a product simply fails

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means to avoid it. *Id.* at 571, n.111.

145. *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565, 566 (Ct. App. 1992).

146. Perchloroethylene is a common degreasing agent that is a suspected carcinogen. C. Claiborne Ray, Q&A, N.Y. TIMES, Nov. 5, 1991, at C9; Philip Shabecoff, *Estimate of Risk of Dioxin Is Cut in Cancer Study*, N.Y. TIMES, Dec. 9, 1987, at A1.

147. *Carrier*, 6 Cal. Rptr. 2d at 566.

148. *Id.* at 567. The parties disputed the actual cost of the clean-up. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 569.

152. *Id.* at 568.

153. *Id.* (discussing *McDermott v. City of New York*, 406 N.E.2d 460 (N.Y. 1980)).

154. Carrier conceded it was not seeking relief for injury to real property. *Id.* at 570. California Civil Code § 338 establishes a three-year limitation for injury to real property. CAL. CIV. PROC. CODE § 338 (West 1992). Because the pollution was discovered in early 1985 and the action was not filed until late 1988, *id.* at 567, that limitation had run.

as opposed to a situation where the product fails and causes damage to a third party."<sup>155</sup> That there actually was damage to a third party, beyond the mere threat of groundwater contamination, was not reported in *Carrier*. Nor did the case make clear why the seller of the product should pay for any such damage rather than the user. The court held that the third party to whom payment was due was the government.<sup>156</sup> However, no payment to the state had been made. The court found that the mere potential for liability under anti-pollution law created an indemnity situation,<sup>157</sup> which seems a rather broad expansion of potential liability.<sup>158</sup> The California Supreme Court denied review,<sup>159</sup> perhaps awaiting a trial record permitting complete analysis, or a contrary decision from another district court that it could affirm. Such a scenario seems likely given the national split on the issue, the recent flurry of decisions discussed herein, and the large number of Republican appointees to the California bench in recent years who might be more inclined to limit the scope of liability in commercial transactions.<sup>160</sup>

Illinois case law on point has its relatively recent origins in the landmark 1982 case of *Moorman Manufacturing Co. v. National Tank Co.*,<sup>161</sup> in which the state supreme court rejected strict products liability

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155. *Carrier*, 6 Cal. Rptr. 2d at 570. If *Carrier* is overruled, the court's attempt to analogize *McDermott* seems a likely point of attack.

156. *Id.* at 569.

157. *See id.*:

Had *Carrier* not complied with the [clean-up] order, it likely would have had to defend an injunctive action brought by the Attorney General. Additionally, if the Los Angeles Regional Board did the abatement work, it would be entitled to recover the costs thereof from *Carrier* in a civil action.

*Id.* This, however, hardly qualifies as reasoning for the proposition that the seller should pay for damage caused by property in the possession of the user.

158. *Cf. Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 218 (Utah 1984) (discussing the elements required for indemnification), *supra* note 63.

159. No. B056060 (June 18, 1992), 1992 Cal. Lexis 3157.

160. The author of *Carrier*, Michael G. Nott, was appointed by Republican Governor George Deukmejian, but he had a background in civil litigation as a name partner in the firm that "pioneered asbestos injury litigation among dockworkers" in the Long Beach area. Joe Applegate, *Profile: Michael G. Nott*, THE DAILY JOURNAL, June 22, 1988. The current trend of California courts toward limiting tort liability would seem to make the survival of *Carrier* uncertain. *See generally* Lorraine A. Musko, *Christensen v. Superior Court*, California Supreme Court Survey, 20 PEPP. L. REV. 878 (1993).

161. 435 N.E.2d 443 (Ill. 1982). *Moorman* contains an outstanding history of strict liability in tort and a summary of the argument over allowing recovery for purely economic loss under such a cause of action. *Id.* at 445-48.

recovery for purely economic loss.<sup>162</sup> While indemnity per se was not at issue in *Moorman*, the court held that the sole avenue of relief was a U.C.C. action and that the code limitation barred the action.<sup>163</sup> The next year, the court distinguished *Moorman* from *Maxfield v. Simmons*,<sup>164</sup> a case in which indemnity was sought, by creating a dichotomy in which "[s]ection 2-725 controls in causes of action based on contract principles, but not in those causes of action based on tort principles."<sup>165</sup> In addition to economic loss, *Maxfield* also involved damage to property.<sup>166</sup> In drawing the line between economic damage and other forms of damage, the court illustrated the truism proffered by a concurring judge in *Moorman* that "a tort approach to enforcing routine commercial expectations is as fictitious as a warranty theory usually is for personal injuries."<sup>167</sup> It went further, however, by placing property damage on the personal injury side of the truism instead of the economic injury side, thus keeping alive the debate explained in *Moorman*.<sup>168</sup>

The following year, an Illinois appellate court seemingly departed from the contract/tort dichotomy set out in the second Illinois Supreme Court case.<sup>169</sup> In *Anixter Bros., Inc. v. Central Steel & Wire*, the court characterized a claim as "an implied contract of indemnity action," but nevertheless took it outside the U.C.C. contract limitation.<sup>170</sup> The court reasoned that despite its name, an implied contract of indemnity is not a

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162. *Id.* at 448.

163. *Id.* at 454.

164. 449 N.E.2d 110 (Ill. 1983).

165. *Id.* at 112.

166. *Id.* The property damage was to a house from allegedly defective support beams. *Id.* at 110. See *infra* notes 255-58 for reference to a survey article criticizing *Maxfield*. See also *Bethlehem Steel Corp. v. Chicago Eastern Corp.*, 863 F.2d 508, 512 (7th Cir. 1988) (holding that § 2-725 does not bar counterclaims or set-off claims). The court noted that in the wake of *Moorman* and *Maxfield* "there is a great deal of uncertainty and complexity in this area of Illinois law . . ." *Id.* at 518.

167. *Moorman*, 435 N.E.2d at 456 (Simon, J., concurring). Justice Simon continued: "We need both, and this case should not be construed to foreclose that possibility." *Id.* The next year, the Utah Supreme Court used *Maxfield* as support for the rule that the U.C.C. bars indemnity actions on the basis that the Illinois plaintiff had pleaded a separate cause of action for negligence. *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 218 n.2 (citing *Maxfield*, 449 N.E.2d at 112). *Maxfield* is not as clear as *Perry* might indicate, but is open to Utah's interpretation.

168. *Moorman*, 435 N.E.2d at 445-48.

169. *Anixter Bros., Inc. v. Cent. Steel & Wire*, 463 N.E.2d 913 (Ill. App. 1984). See *supra* notes 163-64 and accompanying text.

170. *Id.* at 917. In *Anixter*, a microwave antenna manufacturer purchased brass tubing. *Id.* at 915-16. The antenna buyer alleged economic harm and sued for damages. *Id.* at 916. The manufacturer sought damages from the tubing company under an implied contract for indemnity that the trial court would have time-barred using the U.C.C. The appellate court, however, said the cause of action sounded in tort and therefore justified recovery in the face of the U.C.C. limitation. *Id.* at 917.

contract action, but a tort action.<sup>171</sup> In so holding, *Anixter* brought Illinois case law to the side of the U.C.C.-indemnity split favoring the indemnity statute of limitations. However, the lack of a definitive supreme court holding in Illinois, as in California, leaves room for doubt about the ultimate outcome there.

In reversing the trial court, the Illinois appellate court presented the issue as a choice between the supreme court cases of *Moorman* and *Maxfield*. *Moorman* held that to allow tort theories to be used in an action to recover merely economic damages would "eviscerate the warranty sections of the U.C.C."<sup>172</sup> On the other hand, *Maxfield*, decided the following year, held that *Moorman* did not control in the latter case because

[a] single transaction or occurrence, such as an injury caused by a defective product, will typically present the possibility of causes of actions sounding in implied warranty, express warranty, negligence, and strict liability. Section 2-725 controls in causes of action based on contract principles, but not in those causes of action based on tort principles. A recognition of this implied right of indemnity does not 'eviscerate' the UCC's statute of limitations contained in section 2-725, since it has no application to the indemnity cause of action.<sup>173</sup>

The court further held that "an implied contract of indemnity action is not a contract action."<sup>174</sup> However, the result in *Anixter* is directly contrary to the philosophy the Illinois Supreme Court expressed in *Moorman*, that tort remedies should not be applied to "causes of action based on contract principles."<sup>175</sup>

Unlike *Carrier*, in which the court held that there was a cause of action even before an indemnity payment was made,<sup>176</sup> Maine's supreme court held that such a claim accrues when payment is made to a third party.<sup>177</sup> In *Cyr v. Michaud*, a trial court's dismissal on limitations grounds of an indemnification claim by the owner of a harvester against the manufacturer was overruled.<sup>178</sup> *Cyr*, however, involved a personal

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171. *Id.* at 917.

172. *Moorman*, 435 N.E.2d at 447.

173. *Anixter*, 463 N.E.2d at 916 & n.4 (quoting *Maxfield v. Simmons*, 449 N.E.2d 110, 112 (Ill. 1983)).

174. *Id.* at 917.

175. See *supra* text accompanying note 173; see also *Bethlehem Steel Corp. v. Chicago Eastern Corp.*, 863 F.2d 508, 524 (7th Cir. 1988) (recognizing *Maxfield* as a "narrow exception" to *Moorman*).

176. 6 Cal. Rptr. 2d 565, 569 (1992).

177. *Cyr v. Michaud*, 454 A.2d 1376, 1385 (Me. 1983).

178. *Id.*

injury action<sup>179</sup> like the one in the New York case<sup>180</sup> that the California court relied on in *Carrier*.<sup>181</sup> Thus, the fact that the court allowed the warranty cause of action to survive was of little import because the tort liability action would have survived under well-settled law. The *Cyr* court did, however, take a position that would have mitigated the potentially harsh result in *Perry v. Pioneer Wholesale Supply Co.*<sup>182</sup> by holding that the limitation begins to run upon payment of the judgment rather than tender of delivery, as in *Perry*.<sup>183</sup> This result was similar to the 1987 decision of the New Hampshire Supreme Court in *Jaswell Drill Corp. v. General Motors Corp.*<sup>184</sup> There, the purchaser of an oil rig sued Jaswell on breach of warranty and other theories, and Jaswell sued GM for indemnity. The court, with little analysis, treated the indemnity claim as wholly separate from the U.C.C. breach of warranty claim, concluding that "the 'statute of limitations cannot possibly start to run on an indemnity claim until the party seeking indemnification suffers a loss."<sup>185</sup>

In *Hanscome v. Perry*,<sup>186</sup> a Maryland appellate court agreed that the majority view "seems to be" that an indemnity cause of action may bypass the section 2-725 limitation,<sup>187</sup> but then limited the right of indemnification through an analysis of tort and contractual duties.<sup>188</sup> Despite

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179. *Id.* at 1378.

180. *McDermott v. New York*, 406 N.E.2d 460 (N.Y. 1980).

181. 6 Cal. Rptr. 2d 565, 568-69 (1992).

182. 681 P.2d 214 (Utah 1984). *See supra* text accompanying note 94.

183. In so holding, the *Cyr* court arguably established Maine's rule for both contract and tort actions.

184. 529 A.2d 875 (N.H. 1987).

185. *Id.* (citing *Morrisette v. Sears, Roebuck & Co.*, 322 A.2d 7, 12 (N.H. 1974)). This appears consistent with the dissent's approach in *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413 (S.D. 1990), criticized in *supra* note 116 and accompanying text. *See also* *E.S.P., Inc. v. Midway Nat'l Bank*, 447 N.W.2d 882 (Minn. 1989) (holding that the limitation does not run against party seeking indemnity until it sustains loss, despite prior breach of warranty). In *E.S.P.*, the court reasoned that encouraging earlier suits would burden banks, contrary to the policy of streamlining commerce. *Id.* at 886. That it is better for commerce to extend the period of liability on this basis rather than to set a uniform cutoff is not self-evident and is, in fact, violative of the rationale of the framers of the Uniform Commercial Code. *See supra* note 70.

186. 542 A.2d 421 (Md. Ct. App. 1988). In *Hanscome*, an interior decorator was denied indemnity against her supplier and a manufacturer for damaged merchandise on two grounds: (1) the three-year limitation period for a negligence action and the four-year limitation period for a breach of warranty action had run, *id.* at 425, and (2) she failed to show facts sufficient to state a cause of action for indemnification by failing to show that either the supplier or the manufacturer were responsible for the damage. *Id.* at 426-28.

187. *Id.* at 425.

188. *Id.* at 426-28. The court distinguished between contract- and tort-based indemnity, primarily adopting the analysis used in *People's Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346 (2d Cir. 1986), discussed *supra* at notes 119-125. It

the fact that the *Hanscome* conclusion on the indemnity-U.C.C. conflict was not dispositive, but merely allowed the court to reach the indemnity issue, the Nebraska Supreme Court cited *Hanscome's* nondispositive holding in *Wood River v. Geer-Melkus Construction Co.*<sup>189</sup> In *Wood River*, the city paid the construction company to install a water-treatment plant, which broke down and could not be repaired.<sup>190</sup> About five years after delivery and initiation of operations, a period in which the system repeatedly broke down, the construction company filed a third-party complaint against the manufacturer of the system installed by the construction company.<sup>191</sup>

The Nebraska Supreme Court, recognizing the split among jurisdictions in allowing an action for indemnity after the running of the U.C.C. statute of limitations,<sup>192</sup> held that the rule in Nebraska is that the "statute of limitations for indemnity does not start to run until the indemnitee is found liable to a third party."<sup>193</sup> Reasoning that a buyer who buys and then resells a product is not in a position to be put on notice of a hidden defect, the court stated that its result "does not imprudently enlarge the statute of limitations for breach of warranty."<sup>194</sup> The court recognized, however, that other jurisdictions have held to the contrary "to avoid the problem of unending litigation."<sup>195</sup> Perhaps most telling, Nebraska, as a preliminary matter, held that "[a] duty to indemnify will always arise out of another more basic obligation whether it arises on contract or tort."<sup>196</sup> This separate recognition of a duty to indemnify—outside the express language of the U.C.C.—at a minimum presaged and probably mandated the court's holding.<sup>197</sup>

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then assumed the "most liberal view" of contract- and tort-based indemnity to "find appellant's case lacking." *Hanscome*, 542 A.2d at 427.

189. 444 N.W.2d 305 (Neb. 1989).

190. *Id.* at 306.

191. *Id.* at 307.

192. *Id.* at 309-10. The court appears to have miscast *Anixter Bros., Inc. v. Cent. Steel & Wire Co.*, 463 N.E.2d 913 (Ill. 1984), *supra* note 170, as favoring strict application of the U.C.C. limitation.

193. *Id.* at 311.

194. *Id.*

195. *Id.* at 310 (citing *PPG Indus. v. Genson*, 217 S.E.2d 479 (Ga. 1975); *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214 (Utah 1984); *Farmers Nat'l Bank v. Wickham Pipeline*, 759 P.2d 71 (Idaho 1988)).

196. *Id.* at 309.

197. *See also Walker Mfg. Co. v. Dickerson, Inc.*, 619 F.2d 305 (4th Cir. 1980). Using North Carolina law, the court held that a roofing subcontractor could assert a claim for indemnity against a supplier despite the running of the 2-725 limitation. *Id.* at

#### IV. ANALYSIS: INCENTIVES AND INVECTIVE

##### A. Introduction

The reasoning of the cases passing on whether a cause of action for indemnity survives the four-year statute of limitations for breach of warranty claims established by the Uniform Commercial Code is diverse. One court looks to legislative intent;<sup>198</sup> another lays the foundation of its decision on the distinction between tort and contract actions.<sup>199</sup> One court's concern is hidden defects;<sup>200</sup> another's is distinguishing tort and contractual duties.<sup>201</sup> To some extent, these considerations must be the result of facts presented to the courts. But in a larger sense, no matter what factors courts consider, the resolution of the issue implicates fairness concerns and reflects judicial thinking about the extent of responsibility society should entrust to and place upon buyers who use their goods in a manner that affects third parties and upon sellers who attempt to supply goods to fulfill those buyers' needs.

The strongest rhetorical point against the U.C.C. limitation might be made by a critical legal scholar, who could describe a result in its favor as reinforcing the oppressive message "that inequality, powerlessness,

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310. The majority contended that the "U.C.C. was not intended to shield manufacturers of defective products from indemnity claims made by their purchasers more than four years from the date of sale by the manufacturer." *Id.* The dissent, however, carefully analyzed existing case law and concluded that the majority had erred by permitting indemnity for the breach of warranty claim based on negligence precedent. *Id.* at 313 (Field, J., concurring and dissenting). In essence, Justice Field argued that "common law indemnity" must be based on the lack of fault of the party seeking indemnity and the existence of fault of the party from whom indemnity is sought. *See id.* at 311. Breach of warranty, where the issue is not what a defendant did wrong, but whether the product it sold performed, is therefore not a proper cause of action upon which to seek relief under indemnity.

In *In re Fela Asbestos Litigation*, 638 F. Supp. 107 (W.D. Va. 1986), *rev'd* by *Wingo v. Celofex Corp.*, 834 F.2d 375 (4th Cir. 1987) on negligence-of-user grounds, the court cited RONALD A. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE*, § 2-314.15 at 124 (3d ed. 1983), for the proposition that indemnity and warranty actions are covered by different limitations. *Fela*, 638 F. Supp. at 112. However, a review of Anderson clarifies the confusion on this issue. Despite its support for allowing indemnity under a breach of warranty theory, the treatise also notes that the warranty limitation applies "regardless of the particular kind of harm sustained by the plaintiff." ANDERSON, *supra* § 2-725:55 at 117.

*See also* Maurice T. Brunner, *What Statute of Limitation Covers Action for Indemnity?*, Annotation, 57 A.L.R.3d 833 (1974).

198. *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413, 416 (S.D. 1990).

199. *P.P.G. Indus. v. Genson*, 217 S.E.2d 479 (Ga. Ct. App. 1975). *See Walker*, 619 F.2d at 312.

200. *Wood River v. Geer-Melkus Constr. Co.*, 444 N.W.2d 305, 311 (Neb. 1989).

201. *Hanscome v. Perry*, 542 A.2d 421, 426-28 (Md. Ct. App. 1988).

and alienation [demonstrated through the lack of a remedy] are consequences of what people have chosen through their own action."<sup>202</sup> Another critic might say that the limitation "endowed economically dominant commercial practices with undeserved normativity."<sup>203</sup> On the other hand, allowing indemnity despite the U.C.C. limitation may be framed more objectively as permitting "the courts [to] read the principles of tort law . . . into contracts," thus giving "the parties what the parties would have bargained for expressly if they had not relied on the courts to supply terms."<sup>204</sup> Judges, however, are rarely so direct.<sup>205</sup>

In considering whether to allow the extra-statutory remedy of indemnity after the statute has run, a further preliminary consideration should be the general commercial posture of the defendant. In standard contract actions involving the violation of express contractual duties of future performance, breach is often voluntary and intentional and, for society as a whole, efficient, because the breach permits resources devoted to the contract to be put to more productive use elsewhere.<sup>206</sup> Tort law, including strict products liability and negligence actions, must be considered separately from standard contract and warranty actions because the purpose of tort law is not to enforce contracts, but to protect users, consumers, and others from conduct society views as inappropriate.<sup>207</sup>

202. Jay M. Feinman & Peter Gabel, *Contract Law as Ideology, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 373, 374 (David Kairys ed., rev. ed. 1990).

203. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 211 (1992). Horwitz notes the supposed division between the political function of legislators (who passed the U.C.C.) and the scientific function of judges (who invented the cause of action for indemnity and who retain a great deal of discretion in its application, even where codification has occurred). *Id.* at 9.

204. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 136 (1987).

205. See generally *supra* notes 191-201.

206. See POSNER, *supra* note 37, at 128-29. See generally Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

207. Justice Holmes explained the difference between philosophies of contract and tort recoveries:

When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured.

*Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903).



Breach of warranty may be classified as a hybrid of tort and contract law.<sup>208</sup> The conduct is almost never volitional. Despite the rhetoric of the strict products liability bar,<sup>209</sup> product liability defendants want to perform contracts by supplying satisfactory goods because commercial success suffers from earning a reputation as a manufacturer of inferior products. In reconciling standard contract, breach of warranty, and tort recovery, it is important to remember that if one form of recovery fails, another is often available. In the issue at hand, for example, if a breach of warranty cause of action is barred by the limitation period, a strict products liability action is often available, depending on the jurisdictional requirements. Thus, it is short-sighted to view the breach of warranty action in isolation from other methods of recovery. The breadth of products liability law mandates that each jurisdiction independently analyze the prudence of allowing indemnity after the U.C.C. limitation runs.

## B. *Indemnity v. Consequential Damages*

### 1. Form and Substance of Relief

The three questions raised by *Yemen v. Good Pasture, Inc.*<sup>210</sup> yield the most direct approach of analyzing the issue at hand. The first question is why should a court distinguish payments made to third parties in the form of indemnity from payments made for other costs imposed on defendants by the consequences of a breach of warranty? These other costs are what *Yemen* and the U.C.C. call consequential damages.<sup>211</sup> If indemnity recovery is distinguishable from consequential damage, perhaps it should survive as a separate cause of action. If it is not, it bolsters the argument of those jurisdictions that disallow indemnity as consequential damage barred by the U.C.C. limitation.

The rationale for permitting indemnity recovery, but not consequential damage recovery, is not squarely addressed in the cases. *Morris* finds a partial answer "in principles of equity"<sup>212</sup> and in preventing "unjust enrichment."<sup>213</sup> However, the gravamen of unjust enrichment in a sale of goods context is elusive. That it is unjust for a seller to retain the consideration paid for a chattel when that chattel has apparently functioned

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208. See, e.g., KEETON, *supra* note 18, § 92 at 655 (discussing the increasing difficulty of distinguishing between tort and contract actions).

209. See Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, 78 A.B.A. J. 44 (April 1992).

210. 782 F.2d 346 (2d Cir. 1986). See *supra* notes 119-25 and accompanying text.

211. For extensive analysis of consequential damages, which is well beyond the scope of this Comment, see WHITE, *supra* note 85, at §§ 6-5 & 10-4.

212. *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413, 417 (S.D. 1990) (citing RESTATEMENT OF RESTITUTION § 76).

213. *Id.*

well enough during a four-year period to prevent the buyer from filing suit is not self-evident. It may be equally unjust to unsettle an old transaction.<sup>214</sup> Moreover, indemnity recovery, if awarded, may have no relation to price. If such damage recovery exceeds the consideration paid, an unjust enrichment theory applied here must assume as its underlying premise that the seller obtained enrichment from the sale of goods beyond the consideration paid. While it is possible to argue that the seller may have benefited from sales of unwarrantable goods to other buyers, and that it is therefore unjust for the seller to retain that enrichment, such a question is outside the action on the contract associated with the U.C.C.<sup>215</sup> The Code allows recovery for "injury to person or property proximately resulting from any breach of warranty."<sup>216</sup> However, transferring the rationale of this section to support an indemnity award is unjustified because the statute of limitations clearly applies with respect to recovery under this provision.<sup>217</sup>

A specific, fact-sensitive answer to the first question about distinguishing consequential damages from indemnity is suggested by *Carrier*,<sup>218</sup> although the court did not consider such an answer. As a defendant in

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214. See Simon Rottenberg, *Mistaken Judicial Activism: Proposed Constraints on Creditor Remedies*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 335 (James A. Dorn & Henry G. Manne, eds. 1987). "In a system of liberty, the smallest possible number of constraints is put on the rights of individuals to . . . define the terms on which exchange is consummated." *Id.* In jurisdictions where indemnity is a way around § 2-725, it has become a bargained-for term, at least insofar as it is tenable to ignore the illusionary concept that players in the commercial sector are aware of potential remedies; so, of course, is the repose of such claims a bargained-for term, where it is applicable and where knowledge is assumed. Thus, liberty is only served where courts allow parties to contracts to bargain away such terms.

215. Unjust enrichment is better limited to situations in which one party confers a benefit on another for which it is generally proper for the benefiting party to pay. See, e.g., POSNER, *supra* note 37, § 4.13 at 133-34. With respect to post-transaction recovery for failure to confer the expected benefit, the relatively simple contract analysis of unjust enrichment is insufficient, and the tort analysis discussed *infra* notes 248-260 and accompanying text is more appropriate.

216. U.C.C. § 2-715(2)(b) (1992). The official comment notes that "'proximate' cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defect." *Id.* at ¶ 5. This comment is particularly applicable in cases such as *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565 (Ct. App. 1992), in which a user of hazardous chemicals might be held to have a reasonable duty to inspect its processing system to ensure that it is not leaking.

217. U.C.C. § 2-725 (1992). See *supra* note 216 for the rationale of the proximate cause requirement.

218. See text accompanying notes 145-154.

an environmental case, Carrier may arguably be held to a higher standard because of the existence of statutes imposing liability for environmentally dangerous activity.<sup>219</sup> The court did not address such claims, but instead permitted plaintiffs to recover for essentially economic harm in a case that might be better characterized as a products liability or negligence action, or better yet, as environmental litigation.

Moreover, allowing indemnity in a *Carrier*-style situation results in arguably reduced incentives for the owners and operators of industrial equipment to diligently monitor and maintain the equipment. Under the *Morris* test suggested by South Dakota, Carrier would arguably fail for being unable to show it was "free of wrongdoing"<sup>220</sup> because it polluted the environment.<sup>221</sup> While Carrier could argue that such a consequence was partly the result of the system installed by Detrex, the fact remains that Carrier possessed and controlled the malfunctioning system for more than four years before discovering that it was contaminating the ground.<sup>222</sup> It is untenable to argue that no fault was attributable to Carrier, particularly in light of the government's finding that Carrier was responsible for clean-up.<sup>223</sup> *Carrier* is clearly outside the scope of traditional indemnity, which requires the absence of any fault by the indemnitee if indemnity is to be recovered.<sup>224</sup>

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219. See, e.g., 42 U.S.C. § 9607(a)(4) (1983). "[A]ny person who by contract . . . arranged for disposal or treatment . . . of hazardous substances . . . shall be liable for . . . necessary costs of response . . ." *Id.*

220. *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413, 417 (S.D. 1990).

221. Carrier estimated that it incurred \$10,000,000 in clean-up costs. *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d at 565, 567 (Ct. App. 1992).

222. It is ironic that the U.C.C. is now beginning to garner criticism as lacking in consumer protection. See PERMANENT EDITORIAL BOARD STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 17-20 (1990). The code's four-year limitation presents the more socially-enlightened position by increasing incentives to the party in the best position to prevent environmental harm to monitor the performance of its equipment, to maintain environmental controls, and to make more timely detection of environmental damage.

In the contract setting of *Carrier*, the common law policy behind barring indemnity among joint tortfeasors shows through: the burden to prevent the harm should be placed on the party in the best position to avoid it. See POSNER, *supra* note 37 § 6.8 at 189. Posner notes that indemnity fulfills the goal of "shift[ing] the ultimate liability to the most efficient accident avoider." *Id.* However, his praise for indemnity relates to its use in tort rather than contract, where the parties have an opportunity to bargain for risk and therefore achieve a much more efficient result than any court can hope to impose. See *id.*

223. *Id.* The clean-up order, authorized by CAL. WATER CODE § 13304 (West 1992 & Supp. 1993), was issued to Carrier, not Detrex. *Carrier*, 6 Cal. Rptr. 2d at 567.

224. However, in California, and in many other jurisdictions, the traditional rule requiring complete absence of fault by the party seeking indemnity was abrogated. *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 907 (Cal. 1978) (en banc). The potential effect of comparative fault statutes remains interesting. See Miller

To return, then, to the first question raised by *Yemen*, regarding the rationale for distinguishing consequential from indemnity damages, a final potential distinction is the holding of some courts that to establish indemnity, there must be a legal duty in the indemnitee to make payment.<sup>225</sup> However, this requirement of a legal duty is neither universal nor necessarily correct.<sup>226</sup> In *Carrier*, the court conceded that allowing indemnity was outside the "traditional setting" for such relief because there was no legal duty per se, but found that "the potential to merit indemnification" was sufficient to permit it.<sup>227</sup> In *Anixter*, the court found a legal duty equivalent to that in a products liability action, despite the fact that the only harm to the indemnitee was the damage claim against it.<sup>228</sup> If Illinois in fact requires a legal duty upon which to base an indemnity claim, the duty imposed by an "implied contract of indemnity" is apparently sufficient.<sup>229</sup> In *Cyr*, a personal injury action, either the duty of due care or a strict products liability theory could be used to establish the indemnitor's legal duty to the indemnitee.<sup>230</sup> In *Wood River*, the court held that a "duty to indemnify will always arise out of another more basic obligation whether it arises on contract or tort."<sup>231</sup> In the end, such broad language leads to the danger of completely eviscerating the U.C.C., which limits consequential damages to those that are foreseeable and proximately caused by the breach of warranty unless they cause injury to person or property.<sup>232</sup> Nevertheless, courts do at least implied-

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v. Stouffer, 11 Cal. Rptr. 2d 454 (Ct. App. 1992) (holding respondeat superior survives comparative fault statute). See generally 42 C.J.S. *Indemnity* § 38, at 131 (1991).

225. See *Fulton Ins. Co. v. White Motor Corp.*, 493 P.2d 138, 141 (Or. 1972).

226. In *Fulton*, the court cited the RESTATEMENT OF RESTITUTION, § 76 (1937), for the requirement that the indemnitee discharge a "legal" obligation of the indemnitor. *Id.* at 140-41. But see 42 C.J.S. *Indemnity* § 32, at 122 (1991). "The right to such indemnity exists independently of statute." *Id.* (citing *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 479 N.E.2d 1386 (Mass. 1985)). Contractual relations are immaterial to indemnity. *Id.* (citing *Milwaukee Mut. Ins. Co. v. Prieue*, 348 N.W.2d 585 (Wis. Ct. App. 1984)). See also *Anixter Bros., Inc. v. Central Steel & Wire Co.*, 463 N.E.2d 913 (Ill. App. Ct. 1984). The *Anixter* court awarded indemnity in a contractual setting by finding a legal obligation in the form of an "implied contract of indemnity." *Id.* at 917.

227. *Carrier*, 6 Cal. Rptr. 2d at 569.

228. 463 N.E.2d at 915, 917.

229. See *id.* at 917.

230. *Cyr v. Michaud*, 454 A.2d 1376, 1385 (Me. 1983). See *supra* notes 177-79.

231. *Wood River v. Geer-Melkus Constr. Co.*, 444 N.W.2d 305, 309 (Neb. 1989).

232. Consequential damages resulting from the seller's breach include:

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and

ly distinguish consequential damages from indemnity, and therefore the second question raised by *Yemen* must be addressed.

## 2. Statutes of Limitation

The second challenge raised by *Yemen* for those courts and attorneys hoping to escape the U.C.C. limitation is to find a difference between consequential damages and indemnity that justifies banning consequential damages after four years, but permits indemnity after four years. Of courts opining on the statute of limitation conflict, again, the only one to address this issue directly was *Yemen*, which summarily concluded that there was no difference between consequential damages and a claim for indemnity for a shipping charge, and thus indemnity was barred as being more properly a claim for consequential damages.<sup>233</sup> One court, perhaps understating the problem, noted that "indemnity is sometimes confused with other legal concepts such as suretyship, consequential damages, assignment, or third party beneficiary rights."<sup>234</sup> The *Yemen* court, however, suffered no such confusion, holding that "[i]f an implied contract for indemnification were to be found here, one would have to be found in nearly every commodities sale contract that lacked a clause excluding it, a result that would reverse all standard contract and indemnity law."<sup>235</sup> *Carrier*, again, provides a contrast to *Yemen*. In *Carrier*, the legal indemnity sought was for clean-up and abatement costs for groundwater contamination.<sup>236</sup> Normally, such costs would be consequential damages because a firm selling and installing equipment to dispose of hazardous chemicals would presumably have "reason to know" that equipment failure would result in clean-up costs.<sup>237</sup> There would also be injury to property, if not person.<sup>238</sup> The court, however, held that con-

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which could not reasonably be prevented by cover or otherwise; and  
(b) injury to person or property proximately resulting from any breach  
of warranty.

U.C.C. 2-715 (1992).

233. *People's Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346, 350 (2d Cir. 1986). See *supra* notes 119-125. The court in *Carrier* noted that summary judgment was precluded because the original proposal accepted by *Carrier* exempted *Detrex* from consequential damages while the last contractual documents accepted by *Detrex* warranted indemnity. *Carrier Corp. v. Detrex Corp.*, 6 Cal. Rptr. 2d 565, 569 (1992).

234. *Winnsboro v. Wiedeman-Singleton, Inc.*, 398 S.E.2d 500, 502 (S.C. Ct. App. 1990).

235. *Yemen*, 782 F.2d at 351.

236. *Carrier*, 6 Cal. Rptr. 2d at 567.

237. U.C.C. § 2-715(a)(2) (1992).

238. U.C.C. § 2-715(b)(2) (1992). The plaintiff in *Carrier* conceded it was not seeking relief for injury to real property, although the court failed to explain why. One reason for its position could be evidentiary problems, because it is possible to clean

flicting warranty provisions that Detrex wrote to limit its liability and Carrier wrote to impose liability on Detrex presented an issue of fact for trial.<sup>239</sup> Thus, *Carrier* is at least distinguishable from *Yemen* on this point.

Section 2-715 of the Code yields a clear, if flexible, definition of consequential damages.<sup>240</sup> While it omits "economic harm" in clause (b), a form of indemnity relief is available under clause (a), although it is slightly limited by the "reason to know" requirement.<sup>241</sup> Compared with consequential damages, indemnity law is less clearly and more diversely defined. Those definitions range from discharge of a legal obligation, accompanied by a duty from indemnitor to both indemnitee and a third party,<sup>242</sup> to a right that "will always arise out of another more basic obligation whether it arises on contract or tort."<sup>243</sup> As a rationale for the latter, broader description, the Nebraska Supreme Court noted that resellers are not in a position to discover any breach of warranty in the form of a latent defect during the running of the U.C.C. statute if the good is in the dominion and control of the buyer.<sup>244</sup>

One question lacking a definitive answer is the effect of a statute of limitation on the decision of potential litigants to litigate. On one hand, it is tenable that a limitation encourages parties to commence litigation to avoid a time bar. On the other hand, one might believe that people do not pay much attention to limitations until the situation becomes so desperate as to require judicial intervention. Both perceptions are no doubt at least occasionally correct. While the framers of U.C.C. Article 2 at least implicitly saw the purpose of the limitation as reducing litigation by

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up property after a spill; another could be that the California limitation for injury to real property had run, perhaps blocking recovery under CAL. CIV. PRO. CODE § 338 (West 1992). See *Carrier*, 6 Cal. Rptr. 2d at 570; see also *supra* note 154.

239. *Id.* at 569.

240. See *supra* note 232.

241. This provision liberally codified the classic rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

242. One court requires that:

(1) the payor (prospective indemnitee) must discharge a legal obligation the payor owes to a third person; (2) the prospective indemnitor must also be liable to the third person; and (3) as between the claimant payor and the prospective indemnitor, the obligation ought to be discharged by the indemnitor.

*Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 218 (Utah 1984).

243. *Wood River v. Geer-Melkus Constr. Co.*, 444 N.W.2d 305, 309 (Neb. 1989).

244. *Id.* at 311.

cutting off old claims,<sup>245</sup> the drafters of Article 2A, the U.C.C. lease section, appear to believe that the former is the primary effect. Their comment to the statute of limitations in lease cases justifies accrual of a cause of action for default under a lease contract at the time of discovery, rather than at the time of tender, on grounds that encouraging parties in a lease relationship to undertake litigation "makes little sense" when the mere passage of time can often alleviate disputes.<sup>246</sup> One might argue, however, that allowing causes of action to survive until a later date poisons the lessor-lessee relationship.<sup>247</sup>

### C. Duty Questions

The third question raised by *Yemen* is why the court requires the finding of a duty running from a potential third-party indemnitor to the party to whom the indemnitee made (or will have to make) payment to allow indemnity.<sup>248</sup> In this regard, the indemnity problem is analogous to the perennial duty question in tort law.<sup>249</sup> Few of the courts addressing the indemnity question in the Article 2 breach of warranty situation have examined the duty issue.<sup>250</sup> Commentators, however, have frequently addressed the underlying issue it raises, the use of tort theory in contract law.<sup>251</sup> When it comes to personal injury actions, having three different

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245. See *supra* note 70.

246. See U.C.C. § 2A-506.

247. Compare § 2-725 with § 2A-506(2):

A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

U.C.C. § 2A-506(2) (1992). If a legislature had drafted and passed both § 2-725 and § 2A-506, one could argue that the more specific language in § 2A-506 with respect to leasing indicated that the legislature did not intend for courts to expand the meaning of the plain language of § 2-725 to permit the actions specifically allowed by § 2A-506. Since these are uniform laws, however, such an analysis becomes problematic because such intent cannot be assumed in good faith.

248. Cf. *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413, 418 (S.D. 1990) (J. Sakers, dissenting) ("[A]n indemnity claim is a separate cause of action, independent of the underlying liability.")

249. See KEETON, *supra* note 18 § 53 at 356-59. While Prosser and Keeton generally give the duty question short shrift, noting that "courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists," *id.* at 359, other commentators—and the California courts—have adopted a more intellectually challenging approach to the issue. See, e.g., Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1929).

250. While several courts note that indemnity requires the discovery of a legal duty, only *Yemen* among those surveyed made significant use of the issue.

251. See, e.g., David Frisch et al., *Uniform Commercial Code Annual Survey: Gen-*

theories—breach of warranty, negligence, and strict products liability—upon which to base a claim is cumbersome and has resulted in a system of ill-uniformity. The issue, in its clearest form, is simply whether defendant has violated a duty to plaintiff for which a court will recognize a remedy. Such a duty may be based on either economic or moral concerns. Presumably, economic duties will more often be based in contract law while moral duties will find their rationale in tort law. Professor Dobbs compared the choice between tort and contract actions to the historical pleading device of waiving the tort and suing in *assumpsit*,<sup>252</sup> the plea developed by common law judges to allow recovery for breaches of promises formerly heard only by equity courts. He explained that

[w]hen the *assumpsit* theory has been pursued in tort cases, the purpose has usually been to get the advantage of some procedural incident attached to contract claims, such as the contract statute of limitations. Whatever sense this may have made before the forms of action were abolished, it does not seem to make much sense today to permit a plaintiff to call his case tort or contract to manipulate the statute of limitations.<sup>253</sup>

The distinction made by Professor Dobbs between tort and contract actions presents one way of thinking about whether to apply the U.C.C. or indemnity limitation: Decide first whether the action sounds in tort or contract and then apply the indemnity limitation to tort and the U.C.C. limitation to contract. In other words, the issue becomes whether certain facts create a duty that the law will recognize, either through the words of a contract or a duty of reasonable care.<sup>254</sup>

Representative thinking among the defense bar is similar to the analysis of Professor Dobbs. The American Bar Association Business Law Section's publication<sup>255</sup> criticized *Maxfield v. Simmons*<sup>256</sup> as "poorly reasoned," because although the court "correctly recognized that U.C.C. section 2-725 'controls in causes of action based on contract principles but not in those causes of action based on tort principles,'" it also held

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*eral Provisions, Sales, Bulk Transfers, and Documents of Title*, 42 BUS. LAW. 1213, 1256 (1987) (criticizing *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986) as "foster[ing] the often artificial distinction between tort and contract").

252. DAN B. DOBBS, *REMEDIES* § 4.2, at 238 (1973).

253. *Id.* at 239.

254. See *infra*, notes 286-295, proposing the application of a duty analysis to set rules to determine whether to allow the indemnity or U.C.C. limitation to control.

255. Fairfax Leary, Jr. & David Frisch, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 39 BUS. LAW. 1851 (1984).

256. 449 N.E.2d 110 (Ill. 1983); see *supra* notes 163, 164 and accompanying text.



that "the contract statute has no application to the indemnity cause of action."<sup>257</sup> The survey interpreted *Maxfield* as holding that while the duty to indemnify arose from contract, indemnity itself is grounded in tort and therefore the contract limitation should not apply.<sup>258</sup>

In *Ross v. Stanley*,<sup>259</sup> the Fifth Circuit decided that even a fiduciary relationship between a shareholder and a utility company was an insufficiently powerful duty to justify tolling the statute of limitations on a cause of action for restitution. The statute ran from the time the utility allegedly made improper contracts that were the subject of the litigation — not from when the profits on those contracts were realized.<sup>260</sup> The bottom line is that even where duty is powerful, statutes of limitation may operate to destroy any remedy otherwise based on such a duty. A court so disposed could thus dispose of the issue at hand with a simple syllogism: Statutes of limitation destroy duties. The limitation has run. Therefore, the duty to indemnify is dead.

#### D. *Miscellaneous Concerns*

A wide variety of rationale outside the questions raised by *Yemen* may be asserted for and against allowing indemnity to transcend the U.C.C. The arguments may be divided into two categories concerned with two discrete issues: efficiency and fairness, or as they are characterized in the title of this section, incentives and invective. Foremost among efficiency concerns, at least in the view of the framers of the code, is the record retention problem.<sup>261</sup> Whether this remains a problem is doubtful. With other causes of action involving the sale of goods, such as negligence and strict products liability, surviving well into the future, it is a foolish manufacturer who takes comfort from the possible repose of the breach or warranty action after four years. Moreover, technology developed since the writing of the code that permits the contents of hundreds of file cabinets to be reduced onto a single hard disk drive on a single desktop also weakens the record-storage rationale.<sup>262</sup> Secondarily, a jurisdictional division with respect to allowing a cause of action for breach of warranty to survive indefinitely by renaming it indemnity presumably has some marginal economic effect on interstate commerce as a non-tariff trade barrier, although the significance of such a holding, given the

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257. *Id.* at 1897.

258. *Id.*

259. 346 F.2d 645 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

260. *Id.*

261. This is the only purely economic rationale noted in the Official Comment to § 2-725.

262. See generally Leslie M. Bock, *Sales in the Information Age: Reconsidering the Scope of Article 2*, 27 IDAHO L. REV. 463 (1990-91).

fact that the split is only now emerging, is difficult to evaluate.<sup>263</sup> The heart of the economic concern is to be found elsewhere.

One of the more compelling approaches to analyzing the efficiency of indemnity was explained by the Wyoming Supreme Court.<sup>264</sup> The court, citing Judge Posner extensively, noted that in situations in which it is more efficient for one party than the other to take measures to avoid loss, indemnity should be awarded because doing so discourages redundant accident avoidance expenditures.<sup>265</sup> On the other hand, where efficiency concerns mandate that both parties take precautions to avoid accidents, classic indemnity, which shifts the entire burden onto the party adjudged more culpable, is inefficient because it allows the party less culpable to take no precautions.<sup>266</sup> The efficiency of banning a cause of action for indemnity four years after tender of delivery is less clear. However, it seems safe to assume that in most cases, four years after possession of a good is taken, the burden of taking precautions should shift to the party in possession.<sup>267</sup>

The economic effects of enforcing a statute of limitations were implicitly explored by R.H. Coase in his seminal work on the Problem of Social Cost,<sup>268</sup> in which he examined the utility of pricing systems with<sup>269</sup> and without<sup>270</sup> liability for damages. Under the U.C.C., there is potential liability if an action is filed within four years of tender; there is no liability if it is not filed within the period. Coase was concerned with nuisance. However, the harmful effects of unindemnified loss and litigation are just as real as nuisance effects. Thus, Coase's statement of the problem and his prescription are on point: "The cost of exercising a right . . . is always the loss which is suffered elsewhere in consequence of the

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263. See generally Barry A. Sanders, *Non-Tariff Trade Barriers*, DEVELOPING AN EXPORT TRADE BUSINESS, 458 PRAC. L. INS. 113 (1988) for a discussion of trade barriers with respect to international law.

264. *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561 (Wyo. 1992).

265. *Id.* at 572 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.8 (3d ed. 1986); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OR TORT LAW* 191 (1987)). The court noted that Judge Posner's analysis "is precise and persuasive." *Schneider*, 843 P.2d at 572 n.10.

266. *Id.* at 572.

267. This seems especially clear in cases like *Carrier*, in which it is necessary to impose incentives on users of products to maintain their equipment to prevent environmental damage.

268. 3 J.L. & ECON. 1 (1960).

269. *Id.* at 2.

270. *Id.* at 6.

exercise of that right . . . . In devising and choosing between social arrangements we should have regard for the total effect."<sup>271</sup> In an ideal world, the running of the statute would be set at the point in time at which the cost to society of litigation exceeded the benefit to society of equitably attributing liability. Whether four years is an accurate estimate is a proper subject for empirical research.

Allowing recovery for breach of contract may be based either on protecting the expectations of plaintiffs or on imposing incentives on defendants not to breach.<sup>272</sup> While not looking at the economic effect of the statute of limitations per se, one scholar analyzed the U.C.C.'s reasonable time provisions and concluded that a court strictly construing the U.C.C. reached the most efficient result.<sup>273</sup> One would suspect that a similar conclusion would be reached through a similar analysis of the Code's limitation period.

However, one argument for increasing the limitations period by allowing the statute to run from the date of indemnity rather than the date of delivery is that the longer period increases the incentive on manufacturers to take greater care in the design and manufacturing process.<sup>274</sup> Whether this is actually the case, however, is debatable. While manufacturers—and their insurers—undoubtedly consider the risk of litigation during the design and manufacturing process, there is no evidence that less sophisticated manufacturers consider it in such detail so as to weigh statute of limitations concerns. Thus, it is possible that the behavior of many manufacturers will be unaffected by the limitation rule adopted.<sup>275</sup>

If this is the case, and therefore the increased level of litigation permitted by extending the statute of limitations fails to reduce economic and physical injury, then the statute of limitations merely reduces the cost of litigation by reducing its volume. This would presumably free up resourc-

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271. *Id.* at 44.

272. John H. Barton, *The Economic Basis of Contract Damages*, 1 J. LEGAL STUD. 277, 278 (1972).

273. George Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 985 (1978).

274. See, e.g., Nicholas A. Ashford & Robert F. Stone, *Liability, Innovation, and Safety in the Chemical Industry*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY & INNOVATION 394 (Peter W. Huber & Robert E. Litan, eds., 1991). The author discusses the imposition of liability generally, but one can argue that extending the period of liability would have the same general effect.

275. For nationwide sellers, it is unrealistic to expect that they might consider the various limitations rules in each state; in this sense, a uniform limitation rule would certainly contribute to efficiency by lowering the cost to manufacturers of making such calculations.

es of manufacturers for other purposes, such as safety improvements.<sup>276</sup>

If, on the other hand, an extended statute of limitations is effective in creating incentives that modify manufacturer behavior, one such incentive would presumably be to build more durable products. The efficiency of such an incentive is not transparent. Economists would argue that durability questions are better left to bargaining between buyers and sellers, at least in commercial settings where the parties have access to information about the costs and necessities for building a certain degree of durability into a product.<sup>277</sup>

From the perspective of the defendant who may be asked to indemnify a buyer for the malfunctioning of a good, the "fairest" way to attribute cost would seem to be to set a strict cut-off date. But from the perspective of plaintiffs who may not have discovered any injury until after the running of the statute, the fairest solution is a discovery rule.<sup>278</sup> Fairness, however, is being better served in word than by law. For example, in *Carrier*, California left merchants unprotected by repose. However, California does cut off liability for actions against lawyers<sup>279</sup> and doctors.<sup>280</sup> Why shouldn't merchants get the same protection, if not the same short time period?<sup>281</sup>

Fairness may be served by the limitation if courts exclude stale evidence and the opportunity for error so invited.<sup>282</sup> It may also be served by whatever amorphous feeling of justice is experienced by citizens seeing alleged breachers held accountable for their wrongdoing. On the other hand, such utility must be balanced against the equally amorphous utility of those engaged in commerce who benefit from whatever certainty a limitation for a warranty cause of action might yield. The utility experienced by either side in the context of warranty is limited, however, by the fact that a cause of action for products liability survives, whatever the limitation for breach of warranty. After finding that the rule of strict construction of the U.C.C. limitation enjoyed a "slight majority" over the

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276. See generally HUBER, *supra* note 17.

277. See *infra* text accompanying note 295.

278. See generally Stephen V. O'Neal, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CAL. L. REV. 106 (1980) (advocating that courts unilaterally adopt, without legislative action, a policy that the statute for all causes of action commences on the date of discovery of the injury).

279. CAL. CIV. PROC. CODE § 340.6 (West 1982).

280. CAL. CIV. PROC. CODE § 340.5 (West 1982).

281. See O'Neal, *supra* note 278 at 122.

282. See *supra* note 76.

rule allowing indemnity, one commentator suggested that the former was the better rule "because the rule on accrual in Article 2 apparently was intended to create a highly predictable cut-off rule" in comparison to the 2-607 notice rule, which merely uses a "reasonable time" standard.<sup>283</sup>

Finally, while the effect of denying indemnity on the basis of the U.C.C. limitation may at times seem unfair to plaintiffs, if there is legislative intent that such claims be barred, courts must arguably comply.<sup>284</sup> In examining the fairness of allowing an indemnity action to survive, it is helpful to distinguish between express and implied indemnity. The provision in 2-725(2) allowing parties to explicitly extend a warranty of future performance presumably also allows an explicit indemnity agreement that lasts more than four years, notwithstanding 2-725(1)'s ban on extending the statute of limitations.<sup>285</sup> This provision for extension by agreement in the U.C.C. evinces an intent to permit parties to freely bargain about liability rather than have it imposed by a court.

## V. PROPOSAL

It is well-settled that the manufacturer of a defectively dangerous product should be held liable for physical injury caused by that product to an individual.<sup>286</sup> In the realm of economic and property losses, however, the law is murkier. The old common law rule requiring privity of contract was simple, but unfair to innocent users harmed, either physically or

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283. John C. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C., § 2-607(3)(a)*, 73 CORNELL L. REV. 534, 571 n.111 (1988) (Reitz cites *Maxfield v. Simmons*, 449 N.E.2d 110 (Ill. 1983), as holding that 2-725 bars indemnity, although an Illinois court of appeals interpreted the case differently. See *Anixter Bros., Inc. v. Central Steel & Wire Co.*, 463 N.E.2d 913 (Ill. App. 1984).

284. Courts could arguably ignore legislative intent on the grounds that such statutes violate the "open courts" amendments in some state constitutions. See, e.g., *Sheehan v. Morris Irrigation, Inc.*, 460 N.W.2d 413, 419 (S.D. 1990) (Sabers, J., dissenting) (arguing that South Dakota's constitution should be so construed). However, applying such amendments to causes of action that did not exist at the time of ratification is troublesome, to say the least. See, e.g., S.D. CONST. art. VI, § 20 (adopted 1889); THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 613 (9th ed. 1904). "If there be no express warranty, the common law, in general, implies none. Its rule is, unquestionably, both in England and in this country, *caveat emptor*." *Id.* See also *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987) (preservation of U.C.C. is rational basis making 2-725 constitutional under state and federal constitutions); *Mayo v. Rouselle Corp.*, 375 So. 2d 449 (Ala. 1979) (statute running from date of sale rather than date of injury was consistent with the Alabama Constitution).

285. See generally Howard Foss, *Interpreting the Uniform Commercial Code: Methodologies Use, Misused and Unused*, 20 GOLDEN GATE U.L. REV. 29 (1990).

286. Such liability, as long as it is not so harsh as to cut off incentives to build products at all, encourages manufacturers to build safer products and insures users against harm. *But see* KEETON, *supra* note 18, § 75 at 534-38 (emphasizing insurance aspects over incentives).

economically, by defective products.<sup>287</sup> The limits of liability continue to test courts and thus the judiciary faces an ongoing challenge to set the right rule. Conflict among states under the Uniform Commercial Code betrays a reluctance among those courts to look at policy issues thoroughly enough to establish a genuine consensus. With a handful of exceptions, courts are likely to either block indemnity with a few words about legislative intent or to extend it by citing equitable concerns. While the former is probably the better result, the fact that courts cite the framers of the code instead of actual state legislators indicates that true legislative intent is not what is being examined. The lack of such evidence leaves the door open for a more thoughtful analysis of the issue, which itself could start a trend toward uniformity in this most disuniform area.

An alternative way to frame the issue is in two parts: (1) is there a duty, contractual or otherwise, and (2) should the running of the U.C.C. statute of limitations extinguish that non-contractual duty? If one assumes that the contract gave rise to the duty, the U.C.C. statute of limitations would presumably operate to extinguish the duty. If the duty arose outside the contract, however, the cases analyzed indicate that opinion is divided about whether it should be extinguished by operation of the U.C.C. statute of limitations.

Despite its contractual origins,<sup>288</sup> whether to allow indemnity is analyzed more properly under tort law than contract law.<sup>289</sup> The reason is simple: Imposing a duty to indemnify in cases such as those presented goes outside the contract, notwithstanding any legal fiction that courts are merely enforcing "implied" contracts. To call indemnity a contractual action forces consideration of it under contractual rules, something too many courts have been reluctant to do. Before allowing such extra-contractual recovery, courts ought to openly examine the policy considerations involved. A good starting place is a California Supreme Court case, which set out a list of policy factors courts should consider when deciding whether to extend liability to a defendant in a case sounding in both

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287. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). "Many courts seem more willing to allow recovery to a non-privy plaintiff when they characterize his cause of action as one in tort than when they characterize it as one in warranty." JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 457 (3d ed. 1988).

288. See *supra* note 58 and accompanying text.

289. See *supra* note 253 and accompanying text.

tort and contract.<sup>290</sup> In that case, *Biakanja v. Irving*, the court considered whether to transcend the traditional rule that limited recovery for economic harm to parties in privity of contract.<sup>291</sup> Here, the issue is analogous because the passage of time, rather than privity, limits the parties' recovery and liability.<sup>292</sup> The longer the time between the incident giving rise to the cause of action and the cause of action itself, the higher the error cost to society.<sup>293</sup> The higher the error cost, the more the expected benefit of a longer limitation period must be discounted.

The factors to be explored are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty of injury, (4) the closeness of connection between the defendant's conduct and injury, (5) moral blame, and (6) the policy of preventing future harm.<sup>294</sup> In looking at these factors, a strong argument can be made that liability for breach of warranty in the form of indemnity should not extend beyond the limitation period. No doubt contracts are intended to affect both parties, but to the extent that indemnity arises more than four years after the contract was executed, the intent to affect a remote party is weak at best. Moreover, the foreseeability of harm to a plaintiff has declined considerably after four years. Injury must be uncertain in cases violating the U.C.C. limitation; otherwise a reasonable plaintiff would discontinue using the good. Certainty of injury applies more to factors that vary from case to case, but again, after four years, certainty is anything but established. Moral blame cannot very easily be established in a voluntary transaction without some evidence of misrepresentation, in which case the action would be for fraud and the plaintiff would not be deprived of a remedy. Finally, imposing indemnity liability does little to affect the possibility of future harm. Longer exposure to liability could create an incentive to make

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290. See *Biakanja v. Irving*, 320 P.2d 16 (1958).

291. *Id.* at 19. The court allowed recovery for negligent drafting of a will despite the absence of privity between the notary who drafted a will, thus practicing law without a license, and the beneficiary. *Id.*

292. "In essence there is . . . often a temptation to translate a moral imperative into a legal norm, without fully addressing the question of whether the magnitude of the moral concern is large enough to warrant invoking the coercive power of the state." Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1177 (1986). In other words, the question is whether the incremental increase in fairness from extending the statute of limitations is of sufficient benefit to society to justify the increased cost of litigation. Epstein also points out that the error rate must be factored into the equation. *Id.* at 1183. Any societal benefit from increasing the limitations period must be discounted by the percentage of time the court gets the judgment wrong.

293. See POSNER, *supra* note 37 at 587 (discussing efficiency and the use of "stale" evidence).

294. *Biakanja*, 320 P.2d at 19.

products more durable, but in competitive markets, such incentives would likely be offset by more powerful market forces.<sup>295</sup>

It is important to note that plaintiffs victimized by damages caused by defective products are not necessarily cut off from relief if the breach of warranty limitation period has run, even if that limitation is held to bar indemnity actions. First, courts may find that the contract that is the basis of the claim is not subject to the U.C.C. limitation because it is one for services rather than goods.<sup>296</sup> Second, tort theories survive; in addition to strict products liability, plaintiffs may be able to plead negligence and fraudulent concealment of the condition of the product. In an era when courts are struggling about whether to include lost profits as consequential damages,<sup>297</sup> it makes little sense to extend potential liability even further by including anything any plaintiff may label as indemnity.

The most important point in this analysis is that rather than use the duty factors on a case-by-case basis, they should be used to establish a general rule. Where tort is not pleaded—except to the extent that indemnity is considered a tort action—there is no room for wide, case-by-case discretion, which would destroy not only any uniformity with respect to the section 2-725 limitation, but open other provisions of the code to unintended flexibility as well. For the reasons stated above, the general rule should be that Uniform Commercial Code section 2-725 operates to cut off all actions for breach of warranty after four years. Logic requires that claims of indemnity be included in those breach of warranty actions because such claims are always, at best, equivalent to consequential damages.

## VI. CONCLUSION

Within the statute of limitations, indemnity for purely economic harm under breach of warranty theory is recoverable under the Uniform Commercial Code's consequential damages provisions. There is nothing uniform, however, about how different jurisdictions treat such liability after the expiration of the limitation. The use of indemnity to breach the limitation is better characterized as a punitive measure smuggled into con-

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295. See *supra* note 274.

296. See BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 11.01 at S11-3 (Supp. 1989).

297. See *Georgia Ports Auth. v. Servac Int'l*, 415 S.E.2d 516, 518 (Ga. Ct. App. 1992) (adopting position that lost profits are recoverable "in appropriate cases") (citing WHITE, *supra* note 85, § 21-3 at 142-43 (3d ed. 1988)).



tract law than as a deterrent to contract breaking. The great tradition of rejecting punitive measures in contract actions is therefore threatened by the recent flurry of cases permitting an end run around the U.C.C.

If breach of warranty can be based on indemnity, with the cause of action accruing at the time of discovery, or, still later, at the time of payment to a third party, merchants remain subject to liability *ad infinitum*. At some point, the law must recognize bargained-for risk. Safety concerns can be adequately protected through standard tort law. There is no need for indemnity innovation. Possessors of goods ought to have incentives to use their goods safely. Indemnity removes such incentives. Unless legislators change the words of U.C.C. section 2-725, the words should be given their plain meaning and be allowed to cut off an "action for breach of *any* contract for sale"<sup>298</sup> commenced more than four years after the breach.

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298. U.C.C. § 2-725 (1992) (emphasis added).