



1986

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### Recommended Citation

Janet A. Flaccus, *The Lemon and Its Rejection: Code Language and Its Misconstruction*, 9 U. ARK. LITTLE ROCK L. REV. 303 (1987).

Available at: <https://lawrepository.ualr.edu/lawreview/vol9/iss2/3>

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# THE LEMON AND ITS REJECTION: CODE LANGUAGE AND ITS MISCONSTRUCTION

*Janet A. Flaccus\**

## I. Introduction

The fact pattern is common enough. A person purchases a product from a seller who is not the manufacturer, and after taking the product home finds that the product does not work correctly. Sometimes the malfunction is not manifested until several weeks or months after the sale. Often, when the sales contract is read, the buyer discovers that it contains either a disclaimer of all warranties or a limitation of the remedies available for the included warranties. If the product is a car or other expensive purchase, the buyer usually takes the product back to the seller, or the seller comes to the buyer's premises to repair the defects. Some defects, however, remain even after several repair attempts.

While the fact pattern may be straightforward, the legal road delineating the rights and remedies of the buyer is twisted and, in some ways, uncertain. This article first addresses the buyer's rights against the actual seller. It then analyzes the rights the buyer has against the manufacturer with whom the buyer is not in privity of contract.

The uncertainties in this area are often caused by judicial construction of Article 2 of the Uniform Commercial Code.<sup>1</sup> Much of this construction occurred when courts were eliminating the concept of privity in warranty law in an effort to expand warranties to cover cases now covered under products liability. Now that the law in products liability is developed, it is time to reconstrue Article 2 and resolve the uncertainties.

In all except a few jurisdictions,<sup>2</sup> the buyer cannot sue either the

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1. The Uniform Commercial Code has been enacted in all states except Louisiana. Louisiana has enacted Articles 1, 3, 4, 5, 7 and 8 in substance. The Code has also been enacted in the District of Columbia, Guam, Northern Mariana Islands, and the Virgin Islands. Arkansas' version of the Uniform Commercial Code is in Title 85 of the Arkansas Revised Statutes.

2. *Santor v. A. & M. Karagheusian Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), is as celebrated as *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965), in that it came down at the same time and represents an opposite approach to the same problem. *Santor* allowed consumer purchasers to sue the manufacturer with whom they had no privity for the cost of carpet in their house

seller or the manufacturer in products liability in tort. We assume in our fact pattern that the malfunctioning product has not injured person or property, but that only "economic loss" is involved. Many jurisdictions, following the California case of *Seely v. White Motor Co.*,<sup>3</sup> hold that products liability in tort is not an available cause of action where only economic loss is involved.<sup>4</sup> Some jurisdictions, including Arkansas, deviate somewhat from the *Seely* approach and, instead of focusing on the type of loss involved, focus on whether the product was unreasonably dangerous or has caused a calamitous event.<sup>5</sup> If neither is found, these jurisdictions hold that strict liability is not available. This interpretation also may exclude property damage from an action in strict

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because the carpet had an unsightly run in it. The following jurisdictions follow the *Santor* rule: *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975); *Verdon v. Transamerica Ins. Co.*, 187 Conn. 363, 446 A.2d 3 (1982) (dicta); *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970); *Iacono v. Anderson Concrete Corp.*, 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975); *City of La Crosse v. Schubert, Schroeder and Assocs.*, 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

However, it should be noted that in at least New Jersey and Colorado, nonconsumer buyers will not be able to sue in strict liability when the damage is only economic loss. *Spring Motors Distribs. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), distinguished *Santor* while holding that a commercial buyer had no cause of action in tort for a defective transmission in a truck it had purchased. Thus, the *Santor* exception to the general rule has been narrowed. *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975), in dicta also excluded business losses.

3. 63 Cal. 2d 9, 403 P.2d 145 (1965).

4. *Corporate Air Fleet v. Gates Learjet, Inc.*, 589 F. Supp. 1076 (M.D. Tenn. 1984); *Midland Forge, Inc. v. Letts Indus.*, 395 F. Supp. 506 (N.D. Iowa 1975); *Cooley v. Salopian Indus.*, 383 F. Supp. 1114 (D.S.C. 1974); *Monsanto Agricultural Prods. Co. v. Edenfield*, 426 So. 2d 574 (Fla. Dist. Ct. App. 1982) (negligence action); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373 (Iowa 1972); *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981); *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591 (N.D. 1984); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966) (dicta); *Mid Continent Aircraft Corp. v. Curry County Spraying Serv.*, 572 S.W.2d 308 (Tex. 1978); *Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); *Berg v. General Motors Corp.*, 87 Wash. 2d 584, 555 P.2d 818 (1976) (negligence action).

5. *Cloud v. Kit Mfg. Co.*, 563 P.2d 248 (Alaska 1977); *Salt River Project Agricultural Improvement and Power Dist. v. Westinghouse Elec. Corp.*, 143 Ariz. 368, 694 P.2d 198 (1984); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983); *Vulcan Materials Co. v. Driltech, Inc.*, 251 Ga. 383, 306 S.E.2d 253 (1983) (negligence action); *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982); *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983); *John R. Dudley Constr., Inc. v. Drott Mfg. Co.*, 66 App. Div. 2d 368, 412 N.Y.S.2d 512 (1979); *Russell v. Ford Motor Co.*, 281 Or. 587, 575 P.2d 1383 (1978); *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982). It should be noted that there may not be unanimity here. Most of these courts use the calamitous event exception to broaden the otherwise restrictive rule that economic loss is not recoverable in a strict liability action. In *Berkeley Pump Co.*, however, the requirement of proof of unreasonable danger was used by the court to restrict the coverage of strict liability.

liability when the product was not unreasonably dangerous. In *Berkeley Pump Co. v. Reed-Joseph Land Co.*,<sup>6</sup> the defective product was an irrigation pump that failed to pump sufficient water and injured the buyer's crops.<sup>7</sup> The damage to the crops was arguably property damage, and under *Seely*, a strict liability action should have been available.<sup>8</sup> However, the Arkansas Supreme Court held that the pump was not unreasonably dangerous despite its malfunctioning, and the theory of products liability could not be used by the buyer.<sup>9</sup> For the most part, when only economic loss is involved, the product will not be unreasonably dangerous. Thus, the hypothetical buyer is relegated in most jurisdictions, including Arkansas, to contract relief governed by Article 2 of the Uniform Commercial Code.

## II. Buyers Remedies Against the Seller

### A. *In General*

Article 2 contains numerous remedies for a buyer. In general, once defective goods are received, the buyer can either return the product and sue for damages, or keep the product and sue for damages. To return the product the buyer must either reject the product under section 2-601 or revoke his or her acceptance of the product under section 2-608.<sup>10</sup> It is clear that unlike prior law, which required an election between rescission and damages, a decision to reject or revoke acceptance of a product does not preclude the buyer from seeking damages.<sup>11</sup>

Several sections delineate the buyer's damage rights under Article 2. Section 2-711 catalogues remedies available for the aggrieved buyer in cases in which he or she never received the goods, properly rejected them, or justifiably revoked acceptance of them.<sup>12</sup> For example, the buyer can buy the product elsewhere and sue for the difference in the

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6. 279 Ark. 384, 653 S.W.2d 128 (1983).

7. *Id.* at 385-86, 653 S.W.2d at 129-30.

8. It can be argued that the damage to the crops in *Berkeley Pump* was mere consequential economic loss, such as when the defendant damages a machine and causes it to produce fewer widgets and thus generate less profit.

9. *Berkeley Pump Co.*, 279 Ark. at 390-94, 653 S.W.2d at 131-33.

10. U.C.C. §§ 2-601, 2-608 (1978). It should be noted that rejection of installment contracts is covered by a different rule in § 2-612.

11. Section 2-720 states that any "cancellation" or "rescission" of the contract will not be construed as precluding the aggrieved party from suing for breach. Section 2-711 reinforces this by stating that a buyer may cancel the contract and still recover damages for breach. Section 2-608 official comment 1 (1978) makes it clear that the term "revocation of acceptance" was chosen to avoid any of the prior rules concerning rescission as an election of a remedy.

12. U.C.C. § 2-711 (1978).

price between the cover price and contract price under section 2-712.<sup>13</sup> If the buyer has not purchased the product elsewhere, he or she can sue to collect the difference between the market price of the product and the contract price under section 2-713.<sup>14</sup> In addition, the buyer may be entitled to incidental and consequential damages under section 2-715.<sup>15</sup> In contrast, if the buyer decides to keep the goods, available damages are outlined in section 2-714.<sup>16</sup>

*B. The Impact of Disclaimer Under Section 2-316 or the Limitation of Remedy Under Section 2-719.*

Recall that in the hypothetical fact pattern, the sales contract contained either a disclaimer of all warranties or a limitation of the available remedies under the warranty. The two are quite different and should not be confused.<sup>17</sup> A warranty disclaimer must comply with the requirements of section 2-316. For example, the disclaimer of the implied warranty of merchantability must mention merchantability and be conspicuous if the disclaimer is in writing, and the disclaimer of the implied warranty of fitness for a particular purpose must be in writing and be conspicuous.<sup>18</sup> If an express warranty has been created, a con-

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13. U.C.C. § 2-712 (1978) delineates the damages recoverable when the buyer has covered.

14. U.C.C. § 2-713 (1978) delineates the damages recoverable when the buyer does not cover.

15. U.C.C. § 2-715 (1978).

16. U.C.C. § 2-714 (1978) specifies the damages recoverable when the buyer accepts the goods and does not revoke his or her acceptance. The buyer retains possession of the defective goods. Section 2-714 should not be confused with the buyer's damage rights for defective goods returned to the seller. Yet this is arguably what the Arkansas Supreme Court did in *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984). In this case the purchaser of a truck used the truck for approximately five months after revoking his acceptance of it. The primary issue before the court was whether this use precluded the buyer from revoking his acceptance of the truck, and the court held that it did not. The court remanded the case, however, because the buyer had failed to adequately prove his damages. The court stated that the appropriate section for measuring damages is § 2-714. However, § 2-714 is only applicable for measuring damages for buyers who keep the goods. It is not applicable for measuring damages when the buyer revokes his or her acceptance of the goods. If § 2-714 is used to measure damages then the buyer will not be properly compensated. Section 1-106 makes it clear that the remedy provisions of the Code are designed to place the aggrieved party in as good a position as they would have been had the other party fully performed. Once a buyer rejects or revokes acceptance of goods, he or she must be given a return of any part of the price paid, cover damages under § 2-712 or market price damages under § 2-713, and any incidental and/or consequential damages under § 2-715.

17. U.C.C. § 2-316(4) official comment 2 (1978) states: "[t]his Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty."

18. U.C.C. § 2-316(2) (1978).

tractual provision disclaiming all express warranties will not be given effect unless the two can be construed consistently.<sup>19</sup> In contrast, a limitation of remedies also must comply with the requirements of Article 2, but the requirements are different. The limitation of remedies is governed by section 2-719.<sup>20</sup> If the contract has properly excluded all warranties, however, then such limitations on the warranty are irrelevant.<sup>21</sup>

Although many cases focus on whether or not a warranty has been properly disclaimed, such is not the focus here. For the purpose of the hypothetical it is assumed that the contractual disclaimer of all warranties complied with all of the requirements of section 2-316. The same will be assumed with respect to a contractual provision limiting the buyer's available remedies in the event of a breach.

It is important to understand the relationship of these two Code provisions because contracts often have language covering both. If there is no warranty liability because all warranties have been properly disclaimed under section 2-316, a failure of the contract to comply with the requirements of section 2-719 in the language limiting any remedy does not create liability where none exists.<sup>22</sup> Similarly, a failure to properly disclaim warranty liability does not affect an otherwise proper limitation of remedy.<sup>23</sup> Thus, the questions of disclaimer of warranties and limitation of remedies are different, but both limit the buyer's rights under the contract.

What rights does the buyer have when a product malfunctions and the contract properly disclaims all implied warranties? The answer seems straightforward. In the hypothetical the seller has delivered, so

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19. U.C.C. § 2-316(1) (1978).

20. U.C.C. § 2-719 (1978).

21. U.C.C. § 2-316 official comment 2 (1978).

22. U.C.C. § 2-316 official comment 2 (1978) states:

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

23. U.C.C. § 2-316(4) (1978) states that remedies for breach of warranty can be limited by complying with § 2-719. Comment 2 to § 2-316, quoted in note 22 above, also makes it clear that disclaimer of warranties and limitation of remedies are independent of one another. Comment 3 to § 2-719, in discussing unconscionable consequential damage limitations, notes that "such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim all warranties in the manner provided in Section 2-316." See also J. WHITE & R. SUMMERS, HANDBOOK ON THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-8 (2d ed. 1980).

the question is whether the buyer can reject the malfunctioning product or revoke his or her acceptance of it. Rightful rejection is covered by section 2-601 and justifiable revocation of acceptance is covered by section 2-608. Both sections require, however, a showing that the breaching party has failed to perform at least one of its contractual obligations. Section 2-608 uses the word "non-conformity."<sup>24</sup> Section 2-601 uses the phrase "if the goods or the tender of delivery fail in any respect to conform to the contract."<sup>25</sup> Both tests are the same, however, because section 2-106(2) defines "conforming" as goods or any part of performance that "are in accordance with the obligations under the contract."<sup>26</sup> The New York Law Revisions Commission noted that "[t]he definition in subsection (2) of 'conforming' goods or conduct is self evident."<sup>27</sup> Courts, however, have not found it so clear.<sup>28</sup>

It follows from the definition of "conforming" in section 2-106(2) that the parties' contract must be examined to determine whether the seller has failed to comply with his or her obligations under the contract. Recall that, in the hypothetical, all warranties have been properly disclaimed. Recall also that, in the hypothetical, the alleged breach by the seller was the selling of a malfunctioning product. There are numerous duties of a seller in any given contract. When the product malfunctions, however, this is a breach of one of the warranty obligations in the contract, not a breach of one of the other obligations. If the seller has properly disclaimed all implied warranties, then the selling of a malfunctioning product does not breach the contract unless there is an express warranty as to quality. A contract that properly disclaims implied warranties is the same as a contract that sells the product "as is." Using the phrase "as is" is merely one way of disclaiming implied

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24. U.C.C. § 2-608(1) (1978) states: "(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it . . . ."

25. U.C.C. § 2-601 (1978) states:

Subject to the provision of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

26. U.C.C. § 2-106(2) (1978).

27. NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE, 363 (1955).

28. *Seekings v. Jimmy GMC, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981); *O'Neal Ford, Inc. v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985); *Blankenship v. Northtown Ford, Inc.*, 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

warranties.<sup>29</sup> There is no implied promise by the seller that the product will function properly. Therefore, there is no nonconformity and the buyer has no right to reject or revoke acceptance of the product. As the court noted in *Konicki v. Salvaco, Inc.*,<sup>30</sup> "[a]bsent any warranty . . . there is nothing to which the goods must conform, *ergo* there can be no non-conformity. Consequently, the buyer could not revoke acceptance as against the seller."<sup>31</sup>

Some courts have ignored this, however. In *Blankenship v. Northtown Ford, Inc.*,<sup>32</sup> the court held that, even in the event of a valid disclaimer of warranties, the buyer could revoke his acceptance of a car that was not functioning correctly.<sup>33</sup> The problems with the car were in the drive shaft, U joints, and differential, and the malfunction of the drive shaft necessitated repairs on many occasions.<sup>34</sup> The court focused on the word "non-conformity" in section 2-608 and reasoned that this meant more than warranty obligations.<sup>35</sup> Nonconformity is a failure of the goods or conduct to comply with a party's obligations under the contract.<sup>36</sup> However, the nonconformity in *Blankenship* was a malfunctioning car. This was a breach of the implied warranty of merchantability.<sup>37</sup> As the court noted, the car would not pass without objection in the trade,<sup>38</sup> which is one of the tests for the purpose of establishing a breach of a warranty of merchantability.<sup>39</sup> But, as the court noted early in the opinion, it was going to assume that the warranty disclaimer was effective. This would have meant that the seller-dealer had no warranty obligations under the contract. Thus, the malfunctioning car did not represent a contract breach and there was no nonconformity.

However, the court in *Blankenship* concluded that "[i]n this case, the evidence unequivocally demonstrated that the substantially defec-

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29. U.C.C. § 2-316(3)(a) (1978).

30. 16 Ohio App. 3d 40, 474 N.E.2d 347 (1984) (italics in original).

31. *Id.* at 45, 474 N.E.2d at 352; *see also* Bruffey Contracting Co. v. Burroughs Corp., 522 F. Supp. 769 (D. Md. 1981), *aff'd*, 681 F.2d 812 (4th Cir. 1982); Crume v. Ford Motor Co., 60 Or. App. 224, 653 P.2d 564 (1982).

32. 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981).

33. *Id.* The plaintiff's attorney stipulated that the warranty disclaimer complied with § 2-316. At least one judge concurred, however, because he found that the disclaimer was not conspicuous.

34. *Id.* at 304, 420 N.E.2d at 168-69.

35. *Id.* at 305-06, 420 N.E.2d at 170-71.

36. U.C.C. § 2-106(2) (1978).

37. U.C.C. § 2-315 (1978).

38. 95 Ill. App. 3d at 305-06, 420 N.E.2d at 170-71.

39. U.C.C. § 2-314(2)(a) (1978).



tive nature of the vehicle clearly impaired its value to the plaintiffs and thus revocation of acceptance is appropriate even if the dealer has properly disclaimed all implied warranties."<sup>40</sup> While it is true that the seller has more than warranty obligations under a contract, the sale of a defective car is a warranty breach, not a breach of another obligation. If the disclaimer of warranties was effective under section 2-316 then the court's conclusion was incorrect.

The court in *Blankenship* also used a slightly different line of reasoning to justify its decision.<sup>41</sup> It relied on an official comment to section 2-313, the section that covers express warranties.<sup>42</sup> Section 2-316(1) recognizes that a disclaimer of all warranties does not disclaim an express warranty included in the contract.<sup>43</sup> An inclusion of both a disclaimer and an express warranty would create ambiguity, and section 2-316(1) renders such a warranty disclaimer inoperative with respect to the express warranty unless the two can be construed consistently.<sup>44</sup> The court in *Blankenship* noted that a car without an engine would breach the seller's express obligation to sell a new car, reasoning that a metal box without an engine is not a car.<sup>45</sup> The court's logic falters, however, when the court reasons that a malfunctioning motor breaches the express obligation to sell a new car. It is recognized that a car with drive shaft, U joint, and differential problems is more like a car with no engine than a car with merely a door problem. But, what the car salesman expressly warranted was a sale of a new car. As long as the car was not preowned, the agreement to sell a *new* car has not been breached. The real issue in *Blankenship* was whether a car with a malfunctioning drive shaft was a car. A metal box with no engine at all would not be a car, but even a malfunctioning drive shaft or transmission does not render the car a noncar. Otherwise, to hold that a malfunctioning engine turns a car into a noncar effectively eliminates the seller's ability to disclaim the implied warranty of merchantability by

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40. 95 Ill. App. 3d at 306-07, 420 N.E.2d at 170.

41. *Id.* at 307, 420 N.E.2d at 171.

42. U.C.C. § 2-313 official comment 4 (1978) states:

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

43. U.C.C. § 2-316(1) (1978).

44. *Id.*

45. 95 Ill. App. 3d at 307, 420 N.E.2d at 171.

turning the implied warranty of merchantability into an express warranty. The parties could have done this if the seller had agreed to deliver a car that functioned perfectly. This was not part of the parties' contract in *Blankenship*, the court effectively wrote the obligation into the contract.

The *Blankenship* decision, or at least its reasoning, has been followed in Arkansas and Arizona.<sup>46</sup> The Arizona Supreme Court in *Seekings v. Jimmy GMC of Tucson, Inc.*,<sup>47</sup> reached a similar result, on similar facts, with similar reasoning.<sup>48</sup> The defective product was a motor home with a malfunctioning engine, as in *Blankenship*. The defects this time were in the gas gauge, power generator, furnace, and air conditioner.<sup>49</sup> In addition, the door was unsatisfactory.<sup>50</sup> The dealer-seller had disclaimed all implied warranties pursuant to section 2-316, and the only express warranty was a five-year power train warranty.<sup>51</sup> As did the court in *Blankenship*, the Arizona court noted that, the term "non-conformity" of section 2-608 is not limited to breaches of warranties.<sup>52</sup> The court in *Seekings* stressed that the dealer had agreed to sell

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46. *Seekings v. Jimmy GMC, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981); *O'Neal Ford, Inc. v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985).

47. 130 Ariz. 596, 638 P.2d 210 (1981).

48. *Id.*

49. *Id.* at 599, 638 P.2d at 213.

50. *Id.*

51. Unlike the court in *Blankenship*, which intimated that it would not be bound by the parties' stipulation that the disclaimer was valid, the *Seekings* court held that the disclaimer was valid. 130 Ariz. at 602, 638 P.2d at 216. The result in the *Seekings* case can be justified on a separate ground not discussed in the opinion. Under the Magnuson-Moss Act an entity that makes a written warranty, as defined in the Act, is prohibited from disclaiming any implied warranties arising under state law. 15 U.S.C. § 2308 (1982). Written warranties are defined as:

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than the resale of such product.

15 U.S.C. § 2301 (1982). In *Seekings* the dealer had, for additional considerations, given a warranty on the power train. 130 Ariz. at 599, 638 P.2d at 213. Since this was given for additional consideration it may not have been a basis of the sale bargain. 16 C.F.R. § 700.11(b) (1986). But this is not significant, since it would be a service contract defined in 15 U.S.C. § 2301(8)(1982). Both the suppliers of written warranties and suppliers of service contracts are precluded from disclaiming implied warranties. 15 U.S.C. § 2308(a). Therefore, the attempt by the dealer to disclaim all implied warranties was ineffective under Magnuson-Moss.

52. 130 Ariz. at 602, 638 P.2d at 216.

a new car.<sup>53</sup> Therefore, the court reasoned, the dealer had impliedly represented that the vehicle, "after a reasonable time for authorized warranty repair work to cure any defects, would be 'mechanically new and factory furnished, operate perfectly, and be free of substantial defects.'"<sup>54</sup>

It seems at first blush that the seller in *Seekings* had agreed to provide more than the seller had provided in *Blankenship*, since a contractual obligation to provide, in a short period of time, a car free of defects would clearly have been breached under the facts in *Seekings*. A closer examination of the opinion, however, reveals that the seller did not promise this. As the court noted, it implied this obligation into the parties' agreement.<sup>55</sup> The parties had not expressly agreed to such a warranty, and all implied warranties had been disclaimed. Thus, the question is where does the court in *Seekings* acquire the power to imply such an obligation? The only place the Code implies such an obligation is in the implied warranty of merchantability, however, this had been properly disclaimed. The court in *Seekings* merely relied on prior cases for this implied obligation.<sup>56</sup> The problem, however, is that the cases relied on by the court are factually dissimilar to the facts in *Seekings*. In none of the three cases were the implied quality warranties entirely disclaimed, as in *Seekings*.<sup>57</sup> All had an express warranty of quality with a remedy limited to repair and/or replacement of defective parts.<sup>58</sup> The language quoted by the court in *Seekings* to create the implied obligation was used by the other courts to indicate that after many unsuccessful repair attempts by the seller, the remedy failed of its essential purpose.<sup>59</sup> None of these decisions hold, or even suggest, that when all warranties are validly disclaimed the seller still warrants

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53. *Id.* at 602-03, 638 P.2d at 216-17.

54. *Id.* at 603, 638 P.2d at 217.

55. *Id.* at 602, 638 P.2d at 216.

56. *Orange Motors, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (1972); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

57. *Orange Motors, Inc.*, 258 So. 2d at 320 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (1972). *Zabriskie Chevrolet, Inc.*, 99 N.J. Super. at 445, 240 A.2d at 198 (1968); *Murray*, 83 Wis. 2d at 414, 265 N.W.2d at 518-19 (1978).

58. 258 So. 2d at 320 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (1972); 99 N.J. Super. at 445, 240 A.2d at 198 (1968); 83 Wis. 2d at 414, 265 N.W.2d at 518-19 (1978).

59. 258 So. 2d at 320 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (1972); 99 N.J. Super. at 445, 240 A.2d at 198 (1968); 83 Wis. 2d at 414, 265 N.W.2d at 518-19 (1978). The *Murray* and *Orange Motors* cases involved revocation of acceptance when the repair and replacement remedy had failed of its essential purpose. The *Zabriskie Chevrolet* case is a rejection case.

that the car will "operate perfectly and be free of substantial defects."<sup>60</sup> Thus, the court in *Seekings*, as did the court in *Blankenship*, used the sale of a new car to write into the parties' agreement a warranty as to workmanship while ignoring an explicit contractual provision disclaiming all implied warranties.<sup>61</sup>

This same misconstruction of the word "non-conformity" as used in section 2-608 can be seen in an Arkansas limitation of remedy case, *O'Neal Ford v. Earley*.<sup>62</sup> In *O'Neal*, unlike *Blankenship* and *Seekings*, the seller did not attempt to disclaim all quality warranties covering the used Granada it sold.<sup>63</sup> Instead, it provided an express warranty but limited the buyer's remedies to repair, and obligated the buyer to pay one-half of the cost of any needed repairs.<sup>64</sup> The buyer noticed strange noises shortly after purchasing the car. Upon returning it to the dealership, the seller produced a list of needed repairs that it agreed to make as long as the buyer paid one-half of the labor and parts.<sup>65</sup> Dissatisfied with this proposal, the buyer attempted to revoke her acceptance of the car.<sup>66</sup> The court in *O'Neal* allowed plaintiff to revoke by concluding that:

[T]he guarantee may have limited the [buyer's] . . . other warranties provided for by the Uniform Commercial Code, or remedies therein for the breach of such warranties, but in no way can [sic] be construed to have foreclosed her right to revoke her acceptance within a reasonable time of discovery of a nonconformity in the automobile.<sup>67</sup>

As in *Blankenship* and *Seekings*, the only defect was a malfunction in the car. In these two cases, the contract disclaimed implied warranties. In *O'Neal* the malfunction did place some obligations on the seller, but section 2-719 allows sellers to limit the buyer's remedies flowing from contract breaches.<sup>68</sup> It is on the basis of section 2-719 that most buyers win. For example, section 2-719(1) requires that any limi-

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60. 258 So. 2d at 320 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (1972); 99 N.J. Super. at 445, 240 A.2d at 198 (1968); 83 Wis. 2d at 414, 265 N.W.2d at 518-19 (1978).

61. *Seeking v. Jimmy GMC, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981).

62. 13 Ark. App. 189, 681 S.W.2d 414 (1985).

63. *Id.* at 190, 681 S.W.2d at 415.

64. *Id.*

65. *Id.*

66. *Id.* at 190-91, 681 S.W.2d at 415.

67. *Id.* at 192-93, 681 S.W.2d at 416.

68. U.C.C. § 2-719 (1978) states: "(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

tation or remedy expressly be made exclusive,<sup>69</sup> a requirement the Arkansas courts have strictly required.<sup>70</sup> If the limited remedy is not expressly made the exclusive remedy, then the Code provides that the buyer can resort to any of the remedies provided in the Code.<sup>71</sup> There was no indication in *O'Neal*, however, that the used car dealer's limited remedy was not expressly made exclusive or otherwise failed to comply with section 2-719.

In most litigated limited remedy cases, the buyer brings the car back to the dealer several times, and the dealer is unable to fix the problems. Under these facts many courts hold that the exclusive repair and parts replacement remedy has failed of its essential purpose,<sup>72</sup> as provided for in section 2-719(2).<sup>73</sup> Once again, when an exclusive remedy fails of its essential purpose, the buyer has the choice of all of the remedies provided in the Code.<sup>74</sup> The plaintiff in *O'Neal*, however, could not use this approach to extricate herself from such a bad bargain, because she gave the dealer no opportunity to repair the car's defects.<sup>75</sup>

The court in *O'Neal* quoted from the *Blankenship* opinion and concluded that, despite the contractual provision limiting the buyer's remedies, section 2-608 and the buyer's right to revoke acceptance were not affected.<sup>76</sup> There is nothing in the Code, however, to support this conclusion. When a particular remedy is made expressly exclusive, all other remedies, including rejection and revocation of acceptance, become unavailable to the buyer because the Code has given the seller the right to contractually limit the buyer's remedies under section 2-719.<sup>77</sup> The rights to reject or revoke acceptance are no different from

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69. U.C.C. § 2-719(1)(b) (1978).

70. *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971) held that a limitation of remedy stating, "the warranties herein are expressly IN LIEU OF any other . . . warranty . . . and of any other obligation on the part of the . . . dealer" did not exclusively limit the remedy to the one stated and thus any remedy under the Code was available to the buyer. *Id.* at 180, 465 S.W.2d at 82.

71. U.C.C. § 2-719(1)(b) (1978).

72. *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. 1978); *Polycon Indus., v. Hercules, Inc.*, 471 F. Supp. 1316 (E.D. Wis. 1979); *Orange Motors, Inc. v. Dade County Dairies, Inc.*, 258 So. 2d 319 (Fla. Dist. Ct. App. 1972), *cert. denied*, 263 So. 2d 831 (1972); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

73. U.C.C. § 2-719(2) (1978).

74. U.C.C. § 2-719(2) official comment 1 (1978).

75. 13 Ark. App. 189, 681 S.W.2d 414 (1985).

76. *Id.* at 193, 681 S.W.2d at 416-17.

77. U.C.C. § 2-719(1)(a)-(b) (1978). Moreover, it is clear that rejection and revocation of acceptance remedies are included in the limitation of remedies provisions in § 2-719. Section 2-

other remedies. If there is no breach of warranty, or the remedies flowing from a breach are limited, the buyer cannot revoke acceptance of the goods.

If the dealer has contractually agreed to provide repairs under the manufacturer's warranty there is hope for the buyer in the disclaimer of warranty situation. This repair obligation must be part of the contract to sell the car, otherwise, it will be a services contract and, therefore, not covered by the Code.<sup>78</sup> If the dealer is contractually obligated to repair the product, but fails to fix the problems, then the dealer has breached one of its contractual duties. This breach is a "non-conformity" pursuant to section 2-608(1).<sup>79</sup> There are, of course, other elements that need to be proven to be entitled to revoke acceptance under section 2-608,<sup>80</sup> but once these are met, the nonconformity allows the revocation of the buyer's acceptance of the goods.

The main problem with this approach is that there must be a contractual agreement to provide repair that binds the seller. The Eighth

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608(3) states that when the buyer has revoked his or her acceptance of a good, he or she has the "same rights and duties with regard to the goods as if he had rejected them." Section 2-601 covers the right to reject in noninstallment contracts. The right to reject the goods under § 2-601 is expressly limited by any contractual limitation of remedy under § 2-719. Section 2-601 states: "Subject to the provisions of this Article on breach in installment contracts . . . and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719) . . . ." Thus, Code language makes it clear that a proper limitation of a buyer's remedies limits rejection and revocation remedies as well as damage remedies.

78. U.C.C. §§ 2-102, 2-105(2) (1978). However, as discussed in note 51, *supra*, such a service contract precludes the disclaimer of state created implied warranties under the Magnuson-Moss Warranty Act. Such a service contract must be in writing, however, to qualify as a service contract under Magnuson-Moss. 15 U.S.C. § 2301(8) (1982).

79. U.C.C. §§ 2-608(1), 2-106(2) (1978).

80. Section 2-608 requires several elements before a buyer is entitled to revoke his or her acceptance of the product. First, there must be a nonconformity. Second, the nonconformity must substantially impair the product's value to the buyer. Third, the buyer must have accepted the product either on the reasonable assumption that the seller would cure the nonconformity, or without discovering the nonconformity because of the difficulty of discovery or the seller's assurances. Fourth, the revocation must occur within a reasonable time after acceptance, and notice of revocation must be given to the seller. Finally, revocation must be made before there is any substantial change in the condition of the goods not caused by the defect itself. The only requirement that creates many problems for the buyer with an unrepaired product is the reasonable time requirement. But many courts hold that as long as the seller is trying to repair the product the buyer can reasonably wait to see if the repair can be made. *Seekings v. Jimmy GMC, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981); *Irrigation Motor & Pump Co. v. Belcher*, 29 Colo. App. 343, 483 P.2d 980 (1971); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978). Considerable time can elapse. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982) (a delay of seventeen months); *Irrigation Motor & Pump Co. v. Belcher*, 29 Colo. App. 343, 483 P.2d 980 (1971) (a delay of six months); *Sarnecki v. Al Johns Pontiac*, 3 U.C.C. Rep. Serv. (Callaghan) 1121 (Pa. Ct. C. P. 1966) (a delay of five months; 3,000 miles had been put on the car).

Circuit in *Ford Motor Credit v. Harper*<sup>81</sup> used this rationale, but it is unclear whether in that case there was, in fact, such a contractual obligation to repair. The court only stated that the parties had an express understanding that Tri-County Ford Tractor Sales, the seller, would provide efficient and competent repairs on the tractor.<sup>82</sup> The court does not discuss whether this understanding was in writing and, if not, whether the various parol evidence rule requirements had been met.<sup>83</sup> Only then is there a nonconformity and therefore a breach.<sup>84</sup>

This approach would not have helped the buyer in *O'Neal* because she never allowed the seller to repair the car. Also, it will not help a plaintiff whose seller has failed to repair the product if the seller is not bound under the sales contract to repair the product. Thus, unless there is a contractual obligation to repair, a buyer has no remedy against a seller that has properly disclaimed warranties.

The buyer would not be in this dilemma if the seller had not validly disclaimed all warranty obligations. Unfortunately, this seems to be a rather routine practice in the new car industry. In the typical pattern, the seller disclaims all warranties and the manufacturer provides an express limited warranty. From the buyer's perspective, this is not an "as is" purchase since the manufacturer's warranty obligations are so prominently displayed. Yet, unless there is an express repair obligation binding the seller<sup>85</sup> or an express written warranty,<sup>86</sup> the buyer has no remedy rights against the seller. This usually is not a disaster for

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81. 671 F.2d 1117 (8th Cir. 1982).

82. *Id.* at 1124.

83. *Id.* at 1117.

84. The facts of the *Harper* case are not exactly like those in *Blankenship*, *Seekings* and *O'Neal*. Although Tri-County had tried to disclaim all warranties, the court held that the disclaimer was not conspicuous. *Harper*, 671 F.2d at 1122-23 n.7. It therefore did not comply with § 2-316 and was not valid. The court went on to discuss whether there was a breach by the seller other than a warranty breach. The manufacturer argued that the tractor defects were not a manufacturing defect but were caused by Tri-County's poor repair job. *Id.* at 1122-23. Therefore, the Eighth Circuit examined whether there was a contract breach other than a warranty breach. Tri-County tried for 17 months to repair the tractor. *Id.* at 1124. The court stressed that the farmer had bought the tractor from Tri-County because repairs would be quick and dependable there. After noting the fact that the term "non-conformity" as used in § 2-608 includes more than warranty obligations, the court held that Tri-County had breached the agreement because it had failed to repair the tractor. Therefore, according to the court, there was a nonconformity and the farmer could revoke his acceptance of the tractor.

85. The express repair obligation may create a nonconformity under the Code and may be a service contract under Magnuson-Moss. See *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462 (1985).

86. The written warranty, if a written warranty under 15 U.S.C. § 2301(6) (1982) of the Magnuson-Moss Act, will also preclude the disclaimer of implied warranties. 15 U.S.C. § 2308 (1982).

the buyer, as long as he or she has a remedy against the manufacturer. After all, it is the manufacturer that provided a limited warranty guaranteeing the car to be free of defects for a limited period of time. However, this road to recovery also has its uncertainties.

### III. The Buyer's Remedies Against the Manufacturer-Nonseller

#### A. *Express Warranties*

In many retail purchases the buyer is not buying from the manufacturer and there is no privity of contract between the seller and the manufacturer. This privity requirement in contracts was a major reason for the development of products liability in tort.<sup>87</sup> If the loss is only economic loss through a nondangerous malfunction, strict liability in tort is not an available cause of action in most jurisdictions.<sup>88</sup> If the seller has validly disclaimed all warranties and has no contractual repair obligation, does this leave the buyer with no remedy?

Most courts say no. As long as the manufacturer has given an express warranty, most courts allow the manufacturer to be sued for the breach of that express warranty despite the lack of privity.<sup>89</sup> In many of these jurisdictions, this decision is often made without Code guidance. The section in the Code dealing with privity is section 2-318.<sup>90</sup> It contains three alternatives from which states can choose. Alternative A of section 2-318 does not address the question of vertical privity and deals only with horizontal privity, which allows members of the buyer's household and family and house guests to sue.<sup>91</sup> Vertical

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87. *Becker v. Volkswagen of Am., Inc.*, 52 Cal. App. 3d 794, 125 Cal. Rptr. 326 (1975).

88. See *supra* notes 1-5.

89. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965); *Connolly v. Hagi*, 24 Conn. Supp. 198, 188 A.2d 884 (1963); *State v. Mitchell Constr. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984); *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 571 P.2d 48 (1977); *Milbank Mut. Ins. Co. v. Proksch*, 309 Minn. 106, 244 N.W.2d 105 (1976); *Whitaker v. Farmland, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977); *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981); *Spring Motors Distrib., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399 (1962); *Kinlaw v. Long Mfg.*, 298 N.C. 494, 259 S.E.2d 552 (1979); *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966); *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*, 602 S.W.2d 282 (Tex. Civ. App. 1980); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932); *ARK. STAT. ANN. § 85-2-318.1* (Supp. 1985); *VA. CODE ANN. § 8.2-318* (1965).

90. U.C.C. § 2-318 (1978).

91. U.C.C. § 2-318 alternative A (1978) states:

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



privity is the interrelationship among the parties in the distributive chain. Horizontal privity, on the other hand, concerns people outside the distributive chain who have been affected by the product. Most jurisdictions have adopted alternative A to section 2-318.<sup>92</sup> Despite the silence of alternative A as to vertical privity, comment 3 to section 2-318 points out that alternative A should not be construed as a limitation on the abolition of vertical privity.<sup>93</sup> A number of states have expressly abolished vertical privity, at least for express warranties.<sup>94</sup>

Alternative B to section 2-318 covers more beneficiaries and could be construed to cover vertical privity.<sup>95</sup> However, it is of no help in the economic loss case since it is limited to personal injury.<sup>96</sup> Once personal injury is involved, most plaintiffs have a cause of action in strict liability, and strict liability has no privity requirement.

Alternative C to section 2-318 covers the most beneficiaries and can be construed to abolish vertical as well as horizontal privity for any person who is injured by breach of an express or implied warranty.<sup>97</sup> A good argument can be made that mere economic loss is an injury due to a warranty breach. However, when alternatives B and C were added

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injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

92. Alaska, Arizona, Connecticut, District of Columbia, Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, the Virgin Islands, Washington, West Virginia, and Wisconsin have adopted alternative A or a similar provision.

93. U.C.C. § 2-318 official comment 3 (1978) states: "the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

94. Connecticut, Idaho, Montana, Nebraska, New Jersey, Ohio, and Washington have adopted alternative A to § 2-318, and they have expressly abolished privity with respect to express warranties.

95. U.C.C. § 2-318 alternative B (1978) or a similar provision has been adopted by Alabama, Georgia, Kansas, Maryland, New York, North Carolina and Vermont. It states: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

96. U.C.C. § 2-318 alternative B (1978).

97. U.C.C. § 2-318 alternative C (1978) or a similar provision has been more popular. The following sixteen states have adopted alternative C or a similar provision: Arkansas, Colorado, Delaware, Hawaii, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, Virginia and Wyoming. Texas and California have omitted the question of privity. Alternative C states:

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.

to the official version of the Code, the Permanent Editorial Board's explanation for the proposed changes in section 2-218 stated that alternative C was modeled after section 402A of the *Restatement (Second) of Torts*,<sup>98</sup> which is limited to personal injury and property damage.<sup>99</sup> This seems to indicate that the drafters of alternative C did not intend that it cover mere economic loss. But, most courts allowing a plaintiff to sue a nonprivity manufacturer for breach of express warranty do not base their decisions on section 2-318, and this possible ambiguity is not addressed.

The most common rationale used by courts abolishing the privity requirement in express warranty cases was discussed in detail by the New York Court of Appeals in *Randy Knitwear, Inc. v. American Cyanamid Co.*<sup>100</sup> Noting that the world of merchandising no longer involved direct contact, the court stressed the use of advertising techniques and labels in which manufacturers proclaimed the qualities of their product.<sup>101</sup> The court reasoned that since the manufacturers intended the buyer to rely on these representations, the manufacturer could not hide behind the doctrine of privity when the representations proved to be false.<sup>102</sup> The representations in *Randy Knitwear* were on labels and in advertising.<sup>103</sup>

The rationale of the court in *Randy Knitwear* is even more persuasive in the car warranty situation in which the car is expressly warranted for a particular period of time. It cannot be doubted that the car manufacturers intend that the ultimate buyer rely on these warranties. Therefore, the reasons for abolishing privity in express warranty cases justify its abolition in automobile cases. This abolition will not create interpretive difficulties in the Code and therefore abolishing privity in express warranty cases is fully justified.

### 1. *Remedy Limitations*

Even if privity is abolished, the buyer is not home free because some courts have limited the situations in which a buyer can revoke his or her acceptance of the product when there is no privity of contract. When an exclusive repair or replacement remedy fails of its essential purpose the buyer is statutorily given all available remedies provided in

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98. Perm. Ed. Bd. U.C.C. Report No. 3 at 14 (1966).

99. RESTATEMENT (SECOND) OF TORTS § 402A (1977).

100. 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

101. *Id.* at 12, 181 N.E.2d at 402.

102. *Id.*

103. *Id.* at 13, 181 N.E.2d at 402-03.

the Code,<sup>104</sup> including that provided in section 2-608.<sup>106</sup> Once the privity requirement is abolished, all these remedies should also be available against the manufacturer. Such is not always the case. The plaintiff may not be allowed to revoke his or her acceptance from the manufacturer under section 2-608.<sup>106</sup>

Courts that refuse to allow the buyer to revoke his or her acceptance base their decision on the inclusion of the word "seller" in section 2-608.<sup>107</sup> Seller is defined as a "person who sells or contracts to sell goods."<sup>108</sup> Section 2-608, however, does not say that revocation of acceptance can be taken only against the seller. It only conditions the buyer's revocation rights on certain preconditions,<sup>109</sup> and it is in this context that the word "seller" is used in section 2-608. "Seller" is used only twice in section 2-608, first in the requirement that the buyer have an excuse for accepting defective goods in the first place such as acceptance based on the seller's assurances.<sup>110</sup> The second time the term "seller" is used is in the requirement that notice of revocation of acceptance be given to the seller.<sup>111</sup> Acceptance without discovery of the

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104. U.C.C. § 2-719(2) (1978).

105. U.C.C. § 2-608 (1978).

106. This is a desirable remedy, since many buyers do not want to keep the defective product and seek damages based on the difference between the value of the car if it had been in the condition warranted and its actual value. For example, if a buyer, whose exclusive remedy has failed of its essential purpose, had a defective car that could not be fixed, he or she would be stuck with a defective car and damages that could not be used to repair the car. Yet, this is the measure of damages in § 2-714 for goods the buyer keeps. Many buyers merely want to return the car to the dealer, get their down payment back and eliminate any obligation to pay the remainder of the purchase price. Moreover, after rejection or revocation of acceptance the buyer is still entitled to damages under § 2-712 or § 2-713.

107. U.C.C. § 2-608(1)(b)(2) (1978). *Voytovich v. Bangor Punta Operations, Inc.*, 494 F.2d 1208 (6th Cir. 1974); *Seekings v. Jimmy GMC, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981); *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976); *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 313 S.E.2d 384 (1984); *Reece v. Yeager Ford Sales, Inc.*, 155 W. Va. 461, 184 S.E.2d 727 (1971).

108. U.C.C. § 2-103(1)(d) (1978).

109. See *supra* note 80.

110. U.C.C. § 2-608(1)(a)-(b) (1978) states:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. (Emphasis added.)

111. U.C.C. § 2-608(2) (1978) states:

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. *It is not effective*

nonconformity due to assurances by the seller does not mandate that the revocation of the acceptance be taken only against the seller, nor does the requirement that notice be given to the seller require such a result. Article 2, in general, contemplates actions between buyers and sellers, but once a court allows any remedy against a remote party, such as a manufacturer, there is no basis for treating revocation of acceptance as separate and distinct from a damage remedy for accepted goods. However, this is what the courts have done since they allow the plaintiff to sue for damages.

An examination of the remedy sections of Article 2 reveals that there is no basis for treating a damage remedy for accepting goods differently from a right to revoke acceptance. Unlike prior law a buyer does not have to choose between remedies.<sup>112</sup> A buyer can revoke acceptance and cancel the underlying contract and still recover damages.<sup>113</sup> The type of damages a buyer can recover when rejecting or revoking acceptance are included in sections 2-712 and 2-713,<sup>114</sup> which covers the buyer's right to damages when the buyer rejects the goods. Section 2-608(3) states that when a buyer rightfully revokes acceptance of a product he or she has the "same rights and duties with regard to the goods involved as if he had rejected them."<sup>115</sup>

It is in these damage sections for rejected or revoked goods that the only evidence for limiting the revocation remedy to the seller exists. Section 2-712 delineates the measure of damages to which the buyer is entitled when the buyer rejects the goods and buys substitute goods. This is the only remedy section that states that the buyer may recover damages *from the seller*.<sup>116</sup> This should not be used to justify limiting revocation of acceptance to the seller because a buyer does not even

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*until the buyer notifies the seller of it.* (Emphasis added.)

112. U.C.C. § 2-608 official comment 1 (1977) emphasizes that the Code drafters chose the phrase "revocation of acceptance" instead of the old term "rescission" to make it clear that the buyer was no longer obligated to elect between a damages remedy and revocation of acceptance.

113. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

114. U.C.C. §§ 2-712, 2-713 (1978).

115. U.C.C. § 2-608(3) (1978).

116. U.C.C. § 2-712 (1978) states:

(1) After a breach within the preceding section *the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.* (Emphasis added.)

(2) The buyer *may recover from the seller* as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach. (Emphasis added.)

(3) Failure of the buyer to effect cover within this Section does not bar him from any other remedy.

need to seek damages, let alone measure his or her damages under section 2-712. Under section 2-713, a buyer may decide not to cover and may merely recover damages based on the differences between the market price of the goods and contract price. Unlike section 2-712, section 2-713 does not state that the buyer can recover damages *from the seller*.<sup>117</sup> If the Code drafters had wanted to limit revocation remedies to the seller, such limiting language would be in sections 2-608 and 2-713, not only in section 2-712.

Section 2-713 includes language about the seller's breach and could be used to support the decisions that limit revocation of acceptance to the seller. However, section 2-714 has the same language linking damages to the seller's breach.<sup>118</sup> Section 2-714 sets up the measure of damages for accepted goods or goods the buyer keeps. There is no difference in the use of the word "seller" in the sections dealing with damage remedies for rejected and revoked goods, sections 2-712 and 2-713, and the section delineating the damage remedies for accepted goods, section 2-714. Thus, Code language does not justify different treatment in allowing a buyer to sue a nonprivity manufacturer for damages under section 2-714 but barring the buyer from revoking acceptance from such manufacturer.

If a court reads the Code literally, it should bar any type of remedy from the manufacturer unless the manufacturer was also the seller. Once a court abolishes the privity requirement with respect to damages, it should also make adjustments in other sections of Article 2, including reading the word "seller" liberally in all the buyer's remedy sections.<sup>119</sup> The Code states that its remedies are to be construed liberally.<sup>120</sup> However, there is no statutory basis for distinguishing between

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117. U.C.C. § 2-713 (1978) states:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), *the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.* (Emphasis added.)

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

118. U.C.C. § 2-714(1) (1978) states:

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) *he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.* (Emphasis added.)

119. U.C.C. §§ 2-608, 2-711, 2-712, 2-713, 2-714 (1978).

120. U.C.C. § 1-106(1) (1978) states:

(1) The remedies provided by this Act shall be liberally administered to the end

revocation damages and acceptance damages. Thus, without liberal construction of Code language, even though privity is abolished, the buyer will still have no available remedy since all damage sections address breach by the seller.<sup>121</sup> Moreover, the Code drafters did not intend to preclude abolition of vertical privity.<sup>122</sup> If that was not their intent by the language in section 2-318 alternative A, then it cannot be argued that they intended such a result by discussing the seller's breach in nearly all of the buyer's remedy sections.

In express warranty situations strong policy grounds exist for the abolition of privity. Courts have recognized that a manufacturer should not be allowed to induce the purchase of its product, either by express statements about the product's characteristics or quality, or by expressly warranting the product, and then use privity to protect itself from suits when the product does not have such characteristics or quality, or the expressly stated warranty is breached.<sup>123</sup> This should be the case even if a remedy also exists against the seller; but, as can be seen, sellers often disclaim all warranties for themselves when an express manufacturing warranty is available. Thus, allowing the buyer to sue the manufacturer is the only remedy available to the buyer.

Barring a buyer from any remedy from the manufacturer based on lack of privity is at least consistent with Article 2, especially if the jurisdiction has adopted alternative A of section 2-318. Of the five jurisdictions that have held that a buyer cannot revoke acceptance of a product from a nonprivity manufacturer, four have abolished vertical privity at least when an express warranty is involved.<sup>124</sup> In these juris-

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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.

121. See *supra* notes 110, 111, 116-18.

122. U.C.C. § 2-318 official comment 3 (1978).

123. See *supra* text accompanying note 53.

124. In Connecticut, in *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976), the court held that a buyer could not revoke acceptance against the manufacturer. In *Connolly v. Hagi*, 24 Conn. Supp. 198, 188 A.2d 884 (1963), the court allowed a buyer to sue a manufacturer for damages for breach of an express warranty. Applying Ohio law, the court in *Voytovich v. Bangor Punta Operations, Inc.*, 494 F.2d 1208 (6th Cir. 1974), held that a buyer could sue a manufacturer for damages despite the lack of privity but could not revoke his acceptance of the product. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966), makes it clear that in Ohio a buyer can sue a manufacturer on an express warranty despite lack of privity. In *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 313 S.E.2d 384 (1984), the court held that a manufacturer could not be subject to a revocation of acceptance. In Virginia, VA. CODE ANN. § 8.2-318 (1965) abolishes privity in warranty actions. In West Virginia, W. VA. CODE § 46-A-6-108 (Supp. 1985) abolishes privity in warranty actions. In *Reece v. Yeager Ford Sales, Inc.*, 155 W. Va. 461, 184 S.E.2d 727 (1971), the court held that the buyer could not revoke acceptance against a nonprivity manufacturer.

dictions, barring a buyer from revoking acceptance of a product from a manufacturer is not based on lack of privity. If such a decision is not based on privity, it must be based on the use of the word "seller" in section 2-608. This is an inaccurate reading of the Code. If a court has abolished vertical privity then the buyer should be able to use all of the remedy sections in the Code, including revocation of acceptance.

At least two courts have analyzed the situation correctly.<sup>125</sup> In *Ford Motor Credit Co. v. Harper*<sup>126</sup> and *Durfee v. Rod Baxter Imports, Inc.*,<sup>127</sup> the Eighth Circuit, applying Arkansas law, and the Minnesota Supreme Court, respectively, held that the buyer could revoke acceptance of the product from the manufacturer despite the lack of privity between them.<sup>128</sup> In both Arkansas and Minnesota privity has been abolished, at least for a violation of an express warranty.<sup>129</sup> Neither case provides an examination of Article 2, nor does either case address the statutory language relied on by cases ruling the other way.<sup>130</sup> Both courts merely emphasized that the buyer would be left remediless if revocation of acceptance were not allowed. In *Harper* the seller had gone out of business,<sup>131</sup> a risk that influenced the *Durfee* court.<sup>132</sup> Despite lack of extended reasoning, however, both decisions are correctly decided. With the privity bar removed there is no justification for treating revocation and damages any differently from acceptance and damages. Once courts recognize this, then the main problem buyers will face is showing nonconformity when warranties have been properly disclaimed. If there is no nonconformity then there has been no breach and the buyer is entitled to no remedy. If there is a breach then all remedies should be available to the buyer, including the right

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125. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977).

126. 671 F.2d 1117 (8th Cir. 1982).

127. 262 N.W.2d 349 (Minn. 1977).

128. 671 F.2d at 1126; 262 N.W.2d at 357-58.

129. In Arkansas, privity for both express warranty and implied warranty actions has been abolished by statute. ARK. STAT. ANN. § 85-2-318.1 (Supp. 1985). A similar statute has been enacted in Virginia. VA. CODE ANN. § 8.2-318 (1965). Arkansas' statute has been construed to cover economic loss cases as well as cases involving property damage or personal injury. *Mack Trucks, Inc. v. Jet Asphalt and Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969). The statute only provided for damages and the court in *Harper* had to determine whether it covered revocation of acceptance as well. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1126. In Minnesota privity is abolished at least as to express warranty actions. *Milbank Mut. Ins. Co. v. Proksch*, 309 Minn. 106, 244 N.W.2d 105 (1976).

130. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977).

131. *Ford Motor Credit Co. v. Harper*, 671 F.2d at 1126.

132. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d at 358.

to revoke acceptance of the goods.

### B. Implied Warranties

If the remedy path against the manufacturer for a breach of an express warranty is a cloudy one for buyers, the remedy path for a breach of an implied warranty is definitely harder to travel. The main hurdle is privity. Unlike the question of privity for express warranties, a majority of courts hold that privity is a requirement when suing on an implied warranty.<sup>133</sup> There is, however, a substantial minority that has abolished privity even in implied warranty actions.<sup>134</sup> Many of the states that have abolished privity in implied warranty actions have done so by statute.<sup>135</sup>

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133. *Best Canvas Prod. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir. 1983) (interpreting Georgia law); *Man v. Weyerhaeuser Co.*, 703 F.2d 272 (8th Cir. 1983) (interpreting Nebraska law); *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793 (D. Minn. 1980); *Curtis v. Murphy Elevator Co.*, 407 F. Supp. 940 (E.D. Tenn. 1976); *Jenkins Brick Co. v. Waldrop*, 384 So. 2d 117 (Ala. Civ. App. 1980); *Rocky Mountain Fire and Casualty Co. v. Bidulph Oldsmobile*, 131 Ariz. 289, 640 P.2d 851 (1982); *Rhodrigues v. Campbell Indus.*, 151 Cal. App. 3d 494, 151 Cal. Rptr. 90 (1978); *G.A.F. Corp. v. Zack Co.*, 445 So. 2d 350 (Fla. Dist. Ct. App. 1984); *Spiegel v. Sharp Electronics Corp.*, 125 Ill. App. 3d 897, 466 N.E.2d 1040 (1984); *Candlelight Homes, Inc. v. Zornes*, 414 N.E.2d 980 (Ind. App. 1981); *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 234 Kan. 742, 675 P.2d 887 (1984); *Auto Owners Ins. Co. v. Chrysler Corp.*, 129 Mich. App. 38, 341 N.W.2d 223 (1983); *Pawelec v. Digitcom, Inc.*, 192 N.J. Super. 474, 471 A.2d 60 (1984); *Titlebaum v. Loblaws, Inc.*, 64 A.D.2d 822, 407 N.Y.S.2d 307 (1978); *Davis v. Siloo, Inc.*, 47 N.C. App. 237, 267 S.E.2d 354 (1980), *reh'g denied*, 301 N.C. 234, 283 S.E.2d 131 (1980); *Davis v. Homasote Co.*, 281 Or. 383, 574 P.2d 1116 (1978) (en banc); *City of La Crosse v. Schubert, Schroeder & Assoc.*, 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

134. Arkansas—ARK. STAT. ANN. § 85-2-318.1 (Supp. 1985); *Mack Trucks, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969); Colorado—*Hansen v. Mercy Hosp.*, 40 Colo. App. 17, 570 P.2d 1309 (1977) *aff'd*, *Bell Bonfils Memorial Blood Bank v. Hansen*, 195 Colo. 529, 579 P.2d 1158 (1977) (en banc) (personal injury); Mississippi—MISS. CODE ANN. § 11-7-20 (Supp. 1984); Montana—*Streich v. Hilton-Davis*, 692 P.2d. 440 (Mont. 1984); Nevada—*Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 560 P.2d 154 (1977); Ohio—A.T.S. Laboratories, Inc. v. Cessna Aircraft Co., 59 Ohio App. 2d 15, 391 N.E.2d 1041 (1978); Oklahoma—*Old Albomy Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849 (Okla. 1979); New Mexico—*Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983); South Carolina—*Gasque v. Eagle Machine Co.*, 270 S.C. 499, 243 S.E.2d 831 (1978); South Dakota—*Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771 (D. S.D. 1982), *rev'd on other grounds*, 714 F.2d 862 (8th Cir. 1983); Tennessee—TENN. CODE ANN. § 29-34-104 (Supp. 1984) (refers to personal injury and property damage); *Commercial Truck & Trailer Sales, Inc. v. McCampbell*, 580 S.W.2d 765 (Tenn. 1979) (personal injury); Texas—*Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); West Virginia—W. VA. CODE § 46A-6-108 (Supp. 1985).

135. ARK. STAT. ANN. § 85-2-318.1 (Supp. 1985); MISS. CODE ANN. § 11-7-20 (Supp. 1984); TENN. CODE ANN. § 29-34-104 (Supp. 1984); VA. CODE ANN. § 8.2-318 (1965) (but this section has not yet been construed to cover purely economic loss; Arkansas' statute, which is very similar in language, has been construed to cover purely economic loss); W. VA. CODE § 46A-6-108 (Supp. 1985).



The policy reasons for justifying the elimination of the privity requirement in express warranty cases are not available for abolishing the privity requirement in implied warranty cases. In implied warranty cases the manufacturer has done nothing to induce reliance by the buyer on a warranty. The implied warranty is quite different from an express contractual agreement. Although sections 2-314 and 2-315, which contain the Code's implied warranties, are not expressly limited to sellers, Article 2 generally contemplates a contractual relationship between the parties. It is difficult to imagine how the implied warranty of fitness for a particular purpose could apply to a noncontracting party since the warranty arises only in situations in which the buyer relies on the other party's expertise to provide a specific product for a specific need.<sup>136</sup> In addition, there is no statutory authorization for abolishing privity for implied warranties of merchantability claims, yet requiring privity for warranties of fitness for a particular purpose claim. Therefore, a good argument can be made that vertical privity should not be abolished for implied warranty actions. Moreover, the abolition of vertical privity in such cases creates additional problems with the language of Article 2. The problem created by the buyer's remedy sections' reference to the seller has already been mentioned, but other sections in Article 2 dealing with notice and the statute of limitations will cause even more significant problems when privity is abolished.<sup>137</sup>

### *1. Notice to Whom?*

Sections 2-607(3)(a) and 2-605(1) contain the bane of many a plaintiff's warranty suit. They require the buyer to notify the seller of a breach of warranty within a reasonable time after knowledge of the breach, or the plaintiff is barred from suit.<sup>138</sup> Section 2-607(3)(a) applies when the buyer is seeking damages for accepted goods. It merely requires notice to the seller of a breach. Section 2-605(1) on the other hand, applies when the buyer rejects the goods or revokes acceptance of them. It is separate and distinct from the notice requirement in section 2-602(1) which requires the buyer to notify the seller of rejection within a reasonable time. Section 2-605(1) requires notice of particular

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136. U.C.C. § 2-315 (1978) states:

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

137. U.C.C. §§ 2-607, 2-725 (1977).

138. U.C.C. § 2-607(3)(a) (1977).

defects when the seller has a right to cure or the seller has requested such a notice. If the buyer omits any ground for breach, he or she is precluded from relying on such a ground to prove breach. All three of these sections require that notice be given to the seller. The purpose of the notice requirement is to protect the seller, allowing the seller to cure, if time permits, under section 2-508 or otherwise minimize loss.<sup>139</sup> If the manufacturer instead of the seller is to be sued, the notice should be given to the manufacturer. The same is true with respect to the notice requirement in section 2-608 when revoking acceptance.<sup>140</sup> To abolish privity and yet, fail to make other adjustments in the Code, undermines the balance created among the various sections of Article 2. Once privity is removed, all sections of Article 2 must be applied with a view toward fulfilling their original purpose. The notification requirements in sections 2-607 and 2-608 should be read to require notice to the nonselling manufacturer.

## 2. *Statute of Limitations—Section 2-725*

Section 2-725 contains the statute of limitations applicable to sales transactions<sup>141</sup> and provides a basic four-year limitation period that begins to accrue when the contract is breached.<sup>142</sup> Section 2-725 could either hurt or help the plaintiff. It could help a plaintiff since the four-year period provided in section 2-725 is longer than the statute of limitations for personal injury or property damage in most states. However, the four-year period in section 2-725 accrues at the time of breach, regardless of the aggrieved party's lack of knowledge of the breach,

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139. U.C.C. § 2-508 (1977) allows a seller to cure a nonconforming tender when the time for performance under the contract has not yet expired and when a buyer rejects a nonconforming tender that the seller had reasonable grounds to believe would be acceptable.

140. U.C.C. § 2-608(2) (1977) requires that revocation of acceptance be made within a reasonable time after the buyer should have discovered the ground for it. Notice is required because this section specifies that the revocation will not be considered effective until notice is given to the seller. As in many other Code sections, the word "seller" is used. Once vertical privity is abolished, however, adjustments must be made in many Code sections, of which this is just one example.

141. U.C.C. § 2-725(1), (2) (1977) states:

(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.

142. U.C.C. § 2-725(2) (1977).

unless the warranty deals with future performance.<sup>143</sup> The section specifies that in breach of warranty cases the breach occurs at the time delivery is tendered.<sup>144</sup>

When the manufacturer is being sued on a breach of implied warranties, the question arises as to which tender of delivery is the relevant date—the date of the delivery from the manufacturer to the seller, or the date the seller delivers the product to the buyer. These two transactions may be months or even years apart. Choosing the sale date from the manufacturer is obviously to the plaintiff's disadvantage. Not only does this starting point shorten the four-year period, but it makes the accrual date for the statute of limitations unknown to the plaintiff without further investigation. If the relevant sale is the sale between the seller and the buyer, however, the manufacturer is at a disadvantage. This would lengthen the four-year period since the sale from the seller would come after the sale from the manufacturer. The manufacturer would not be able to estimate its liability, since it would not know when the sale to the buyer had taken place.

The uncertainty these questions create would lead to differing interpretations by the courts. This is just what section 2-725 was designed to avoid. The official comment notes that section 2-725 was added to Article 2 in order to provide uniformity among states and predictability for manufacturers, especially those involved in multistate transactions.<sup>145</sup> If the four-year period does not begin to run until the sale to the ultimate buyer, the elimination of privity not only creates uncertainty in multistate transactions but in intrastate transactions as well.

There is an additional problem created by the language in section 2-725. The four-year period in section 2-725 is not absolute. In addition to the future warranty exception, section 2-725 also allows the parties to contractually agree on a shorter time period as long as the period is at least one year.<sup>146</sup> If the manufacturer is economically strong enough to bargain the four-year period down to one year in its contract with the seller, should this bind the buyer who was not a party to the contract? Most courts would probably be inclined to hold that the buyer ought not to be bound by such an agreement. Yet, if the buyer is not bound and still has the four-year period in which to sue the manufacturer, one of the basic contractual rights given to a contracting party

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143. U.C.C. § 2-725 (1977).

144. *Id.*

145. U.C.C. § 2-725, official comment (1977).

146. U.C.C. § 2-725(1) (1977).

by statute will have been taken away by the courts.

These problems, which arise under section 2-725 once privity is removed, have prompted many courts to hold that section 2-725 is inapplicable when privity does not exist between the plaintiff and defendant.<sup>147</sup> This eliminates the problems, and is also consistent with requiring privity before any suit on implied warranties can be brought. Yet, some jurisdictions allow a manufacturer, nonseller, to be sued for implied warranty and refuse to apply section 2-725 to the statute of limitations question because of the lack of privity.<sup>148</sup> Moreover, as most jurisdictions have abolished privity with respect to express warranties, any decision refusing to apply section 2-725 because of lack of privity would be equally inconsistent. This is nothing less than picking and choosing among Code provisions to shape the law, which should not be done. It violates basic principles of statutory construction, and the strength of the Code. More than most other statutory compilations, the various sections in each article in the Uniform Commercial Code are intertwined and interrelated so that they make a whole. If any part of Article 2 creates a cause of action, section 2-725 should apply.<sup>149</sup>

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147. *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976 (D. Alaska 1973); *Seekings v. Jimmy GMC, Inc.*, 130 Ariz. 596, 638 P.2d 210 (1981); *Ouellette v. Sturm, Ruger & Co.*, 466 A.2d 478 (Me. 1983); *Southgate Community School Dist. v. Westside Constr. Co.*, 399 Mich. 72, 247 N.W.2d 884 (1976); *McCarthy v. Bristol Lab.*, 86 A.D.2d 279, 449 N.Y.S.2d 280 (1982); *United States Fidelity & Guarantee Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970); *Moss v. Poly Co.*, 522 P.2d 622 (Okla. 1974); *Plouffe v. Goodyear Tire and Rubber Co.*, 118 R.I. 288, 373 A.2d 492 (1977); *Martin v. Patent Scaffolding*, 37 Wash. App. 37, 678 P.2d 362 (1984).

148. *Ohio-United States Fidelity and Guarantee Co. v. Truck and Concrete Equip. Co.*, 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970) (refused to apply § 2-725 unless there is privity) *A.T.S. Laboratories, Inc. v. Cessna Aircraft*, 59 Ohio App. 2d 15, 391 N.E.2d 1041 (1978) (allowed suit for implied warranty despite lack of privity); *Ouellette v. Sturm, Ruger & Co.*, 466 A.2d 478 (Me. 1983) (refused to apply § 2-725 unless there is privity); *Maine-Stanley v. Schiari Mobile Homes, Inc.*, 462 A.2d 1144 (Me. 1983) (allowed suit on implied warranty despite lack of privity). Another approach is illustrated by the following cases: *Becker v. Volkswagen, Inc.*, 52 Cal. App. 3d 749, 125 Cal. Rptr. 326 (1975); *Abate v. Barkers of Wallingford, Inc.*, 27 Conn. Supp. 46, 229 A.2d 366 (1967); *Heavner v. Uniroyal Inc.*, 63 N.J. 130, 305 A.2d 412 (1973) (held that when personal injury is involved § 2-725 is inapplicable). These courts note that implied warranty actions for personal injuries sound in tort and thus the general personal injury statute of limitations is applicable.

It should be pointed out, however, that § 2-715(2)(b) specifically provides that damages for personal injuries are recoverable as consequential damages. Moreover, § 2-719(3) makes any attempt to contractually exclude personal injury damages caused by consumer goods, prima facie unconscionable. Thus, decisions on the applicability of § 2-725 should not preclude a plaintiff from suing for personal injuries under the warranties provided in Article 2.

149. U.C.C. § 1-104 (1977) states: "[t]his Act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided." The official comment states: "[t]his Act, carefully integrated and intended as a uniform codification covering an entire 'field' of

The easiest and perhaps most fair solution to all of these problems is to require privity in implied warranty actions and construe section 2-725 in favor of buyers in express warranty actions when no privity is involved. With privity required for implied warranty suits, there are no problems in the application of section 2-725. In express warranties, the manufacturer has taken steps on which it was reasonably foreseeable that a buyer would rely. Under these circumstances, it is not unfair to construe the phrase "tender of delivery" in section 2-725 as the sale between the seller and buyer. Moreover, since the buyer is not a contracting party, any reduction in the four-year period in the contract between the manufacturer and the seller should not bind the buyer. The manufacturer should not be allowed to make express warranties, and yet undermine these warranties by reducing the statute of limitations period. By requiring privity in implied warranty cases, the Code can be applied consistently and fairly. When there is personal injury or property damage the buyer would have a products liability cause of action. Only with economic losses would the buyer be limited to remedies against the seller.

Unfortunately, courts are not following this approach. A number of courts require privity before they will apply section 2-725. This creates problems only if the same jurisdiction allows suits on the Code for implied warranties without requiring privity. However, not all courts require privity in applying section 2-725. Some courts apply section 2-725 to all warranty actions, including those in which there is no privity.<sup>150</sup> In these jurisdictions the interpretive problems with section 2-725 will have to be resolved.

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law, is to be regarded as particularly resistant to implied repeal." When courts apply some sections of the Code while refusing to apply other sections applicable to the transaction, they in essence are impliedly repealing those sections with respect to similar cases. Moreover, § 1-102 sets out rules of construction. Subsection 1-102(1) states that the Act is to be "construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102(1) (1977). Listed as one of the underlying purposes and policies is the goal of making uniform the law among the various jurisdictions. This policy is again reiterated in the official comment to § 2-725. Ignoring § 2-725 or any other section when the sale of goods is involved ignores these underlying policies and the express statutory language.

150. *Johnson v. Hockessin Tractor, Inc.*, 420 A.2d 154 (Del. 1980); *Everhart v. Rich's, Inc.*, 128 Ga. App. 319, 196 S.E.2d 475 (1973); *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (however, an Illinois Appellate Court has required privity); *Knox v. North Am. Car Corp.*, 80 Ill. App. 3d 683, 399 N.E.2d 1355 (1980) (Simon, J., concurring); *Spring Motors Distribs. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985) (dicta); *Williams v. West Penn Power Co.*, 502 Pa. 557, 467 A.2d 811 (1983).

#### IV. Conclusion

The impetus behind the abolition of privity in implied warranty actions was initially the injustice of precluding a personally injured plaintiff from recovery from a manufacturer. Now, however, more than twenty years after the adoption of section 402(A) of the Restatement (Second) of Torts, products liability has filled the need for providing injured plaintiffs a cause of action against the manufacturer without privity.<sup>151</sup> Thus, there is no longer a need to abolish privity. Moreover, a good statutory argument can be made against abolition of privity in implied warranty actions.

A number of states, such as Arkansas, have statutorily abolished vertical privity in implied warranty actions, but such legislation has created a host of problems with other Article 2 sections. Once privity has been abolished, the interpretive problems created must be resolved by construing the Code as a whole based on its underlying purposes.

The rejection of a "lemon" automobile or any other good has certain potential limitations. Many of these are due to court misconstruction of Code language, primarily in section 2-608 and the right to revoke a buyer's acceptance of goods. Section 2-608, however, is basically straightforward. Once a buyer has a right to revoke his or her acceptance of goods, section 2-608(3) gives the buyer all the rights and duties of a person who has rejected the goods. These rights include a right to return the goods, recover any money paid, cancel the contract under section 2-711 and, if applicable, seek damages under either section 2-712 or 2-713 and incidental and/or consequential damages under section 2-715. Examined together, the Code sections make sense. Basically, the remedy sections are designed to place the aggrieved party in as good a position as it would have been in if the other party had performed.<sup>152</sup> If the buyer returns the goods to the seller, damages are measured under sections 2-712 or 2-713 and 2-715. Only if the acceptance cannot be revoked is the buyer relegated to keeping the goods and seeking damages under section 2-714. The key is reading and understanding all of the relevant Code sections as they relate to one another. Once this is done the rights of the buyer, as well as members of the distributive chain can be protected.

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151. W. PROSSER & R. KEETON, PROSSER AND KEETON ON TORTS, § 98 5th ed. (1984).

152. U.C.C. § 1-106(1) (1978).

