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Products Liability: Vertical Privity Essential to Actions Arising under the Uniform Commercial Code

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PRODUCTS LIABILITY: VERTICAL PRIVITY ESSENTIAL TO ACTIONS ARISING UNDER THE UNIFORM COMMERCIAL CODE—*Barker v. Allied Supermarket,* 20 UCC Rptr. 6 (Okla. Ct. App. 1976)

In 1974, the Oklahoma Supreme Court adopted section 402A of the Restatement (Second) of Torts[1] by a series of three decisions.[2] In doing so, it followed a majority[3] of jurisdictions opting for the

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1. RESTATEMENT (SECOND) OF TORTS, § 402A (Official Text 1965) [hereinafter referred to as Restatement § 402A or § 402A].

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

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

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

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

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

2. Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974); O'Neal v. Black & Decker Mfg., 523 P.2d 614 (Okla. 1974). *Kirkland* announced the adoption of § 402A, and *Moss* and *O'Neal,* handed down the same day, defined its boundaries.

3. The following jurisdictions have adopted § 402A specifically: United States, Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972), *on remand* 352 F. Supp. 633 (E.D.Mo. 1972), *affirmed* 485 F.2d 1288 (8th Cir. 1973) (adopting § 402A as part of federal maritime law); Arizona, O.S. Stapely Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Colorado, Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo. App. 99, 517 P.2d 406 (1973); Connecticut, Wachtel v. Rosol, 159 Conn. 496, 271 A.2d 84 (1970); Delaware, Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); Florida, West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976); Hawaii, Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970); Idaho, Shields v. Morton Chemical Co., 95 Idaho 674, 518 P.2d 857 (1974); Indiana, Cornette v. Searjeant Metal Products, Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970); Iowa, Hawkeye Security Insurance Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Kentucky, Dealers Transport Co. v. Battery Distributing Co., 402 S.W.2d 441 (Ky. 1966); Maryland, Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Mississippi, State Stove Mfg. v. Hodges, 189 So.2d 113 (Miss. 1966), *cert. denied sub nom.* Yates v. Hodges, 386 U.S. 912 (1967); Missouri, Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); Montana, Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); New Hampshire, Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969); New Mexico, Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); Oklahoma, Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Oregon, Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967); Pennsylvania, Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Rhode Island, Ritter v. Narragansett Electric Co., 109 R.I. 176, 283 A.2d 255 (1971); Texas, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Vermont, Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975); Washington, Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); Wisconsin, Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

These jurisdictions have adopted a strict tort theory of products liability with only reference to § 402A: Alabama, Casrell v. Altec Ind., Inc., 335 So. 2d 128 (Ala. 1976); Alaska,

strict tort theory of products liability.

Prior to adopting the Restatement position, Oklahoma had provided for strict products liability under an implied warranty theory, under both the Uniform Sales Act and, later, the Uniform Commercial Code.[4] While the Restatement position has been adopted for the purpose, typically, of precluding the defenses available to manufacturers under the commercial codes,[5] such adoption has resulted in a dual system of manufacturers' products liability. Strict liability remedies are available both under the commercial code and in tort.[6]

This dual system seemed innocuous enough in its early development. However, confusion has resulted in the areas of defenses, wrongful death and survival statutes, and notice requirements. The overlapping and intermingling of contract law and the U.C.C. with tort law has caused some to call for the elimination of either section

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Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); California, Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Illinois, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E. 2d 182 (1965); Louisiana, Weber v. Fidelity & Casualty Insurance Co. of New York, 259 La. 599, 250 So. 2d 754 (1971); Michigan, Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Minnesota, Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969); Nebraska, Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Nevada, Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970); New Jersey, Corbin v. Camden Coca-Cola Bottling Co., 60 N.J. 425, 290 A.2d 441 (1972); New York, Codling v. Paglia, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973); Ohio, Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 622 (1966), *affirmed*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); South Dakota, Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); Tennessee, Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

In addition, South Carolina has adopted § 402A by statute, S.C. CODE § 15-73-10 (1976); a federal court has predicted that Utah will adopt strict tort theory, Julander v. Ford Motor Co., 488 F.2d 839 (10th Cir. 1973); and the North Dakota highest court has indicated a willingness to adopt § 402A upon the proper case, Haugen v. Ford Motor Co., 219 N.W.2d 462 (N.D. 1974).

4. *See* Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965).

5. *See generally*, Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966). These defenses included: lack of contractual privity, lack of reasonable notice as required, and any disclaimers effected incident to the sale. *See* notes 41-47 *supra* and accompanying text for discussion of these defenses.

6. Breach of implied warranty under the Uniform Commercial Code [hereinafter referred to as the U.C.C. or the Code] is essentially a strict liability action, in that fault need not be proved. There are however procedural items under the Code which may lessen to some degree the strict nature of the liability under it. *See* Greeno v. Clark Equipment Co., 237 F.Supp. 427, 429 (N.D.Ind. 1965), in which the court stated: "[Strict liability in tort is] hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties." *See* U.C.C. § 2-316 (Exclusion or Modification of Warranties); U.C.C. § 2-607 (Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over); and U.C.C. § 2-719 (Contactual Modification or Limitation of Remedy).

402A (tort) theory[7] or the U.C.C.[8] from strict product liability law.

Through the decision in *Barker v. Allied Supermarket,*[9] Oklahoma has chosen strict tort liability as the proper means of providing manufacturers' product liability to the consumer not in privity. It is not inappropriate that the Oklahoma decision to tighten privity requirements under the U.C.C. involved a food product. This was the area where privity was first relaxed in order to permit recovery for a defective product.[10]

I. THE FACTS

On November 2, 1970, Brack Barker entered Arlan's Food Store in Midwest City, Oklahoma to grocery shop. Barker was removing a carton of Dr. Pepper soft drink from the shelf and transferring it to his shopping cart when a bottle of the soft drink exploded. A piece of flying glass struck Barker in the right eye, piercing the cornea and rendering him ninety per cent blind in that eye.

Barker brought an action against both Allied Supermarket—owner and operator of Arlan's—and the Dr. Pepper Bottling Co. of Oklahoma, alleging that each contributed to his injury. This action charged a) negligence, as to the shelving of the carton, b) failure to inspect the carton before offering it and its contents for sale, and c) breach of an implied warranty of fitness for purpose and use, which use was holding and dispensing a carbonated soft drink.

Barker commenced this action two years and one day from the date of the accident. Both defendants filed demurrers based on the fact that Barker's action was barred by the Oklahoma two year statute of limitations for tort actions.[11] While these motions were under advisement in the trial court, the Oklahoma Supreme Court handed down its decision to adopt a strict tort theory of products liability, calling it "Manufacturers' Product Liability."[12] The trial court then sustained both demurrers, ruling that liability in such a case was to be founded upon the strict tort theory just announced.

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7. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers,* 17 W. RES. L. REV. 5 (1965) [hereinafter referred to as Shanker, *Strict Tort Theory].*

8. *See, e.g.,* Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

9. 20 UCC Rptr. Serv. 6 (Okla. Ct. App. 1976), *cert. granted* No. 48,633 (Okla., filed Dec. 5, 1976).

10. *See* Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

11. OKLA. STAT. tit. 12, § 95 (1971).

12. Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

Because the statutory limit for the strict tort action was two years,[13] the court dismissed Barker's action.

II. THE COURT'S DECISION

The Oklahoma Court of Appeals, Second Division, affirmed the trial court order as it pertained to the negligence and tort liability allegations. However, it ruled that the charge of breach of implied warranty was not precluded, as that claim arose from the U.C.C.,[14] and was thereby governed by the five year statutory limit as provided therein.[15]

The appellate court then considered the merits of Barker's U.C.C. claim for breach of an implied warranty of fitness for use. The court ruled that a contract for a future sale had been transacted between Barker and Allied Supermarket, thus permitting a U.C.C. action against the supermarket.[16]

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13. *Id.*; OKLA. STAT. tit. 12, § 95 (1971).

14. U.C.C. § 2-314 [this and all other references to the U.C.C. are from the Official Text, 1962]:

Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from the course of dealing or usage of trade.

15. OKLA. STAT. tit. 12A, § 2-725 (1971).

16. Defendant Allied Supermarket claimed that because Barker had not paid for the carton of soft drink, no sale had been transacted. The supermarket also contended that because Barker might have returned the product to the shelf at anytime before purchase, neither had a contract for sale been concluded. The supermarket maintained that because recovery under Article 2 of the U.C.C. requires a sale or contract for sale as defined by U.C.C. § 2-106, plaintiff had failed to state a claim under the U.C.C.

The court ruled that taking a product from the shelf of a self service store constituted a contract for future sale in accordance with U.C.C. § 2-106. In so ruling, the court determined that a warranty would attach under U.C.C. § 2-401(3)(b), the goods having been identified and no documents needing to be delivered. The court ruled further that though the patron

The appellate court agreed, however, with defendant Dr. Pepper Bottling Company that plaintiff had stated no cause of action under the U.C.C. against the bottler. The court noted that there was no contractual privity between plaintiff Barker and the bottler. Because Oklahoma required such privity for causes of action under the U.C.C.,[17] the court ruled that the action must fail. The court also noted that the U.C.C. section extending privity did so in Oklahoma only "horizontally," that is, to other users of the product beyond the purchaser.[18] The court cited *obiter dictum* of *Moss v. Polyco, Inc.*, as evidence of what the role of privity was to be with respect to the U.C.C. in products liability causes of action in Oklahoma.[19] To the effect that "vertical" privity was to be required, the *Moss* court had commented:

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may rescind before purchase under such a contract, he does so only upon the consent of the seller. And, in such a self service operation, the consent of the seller for such rescission must be implied.

The court noted that this is a fairly well settled point of law, the only authority to the contrary being pre-U.C.C. case law. *Accord,* Gillispie v. Great Atlantic & Pacific Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972); Sheeskin v. Giant Food, Inc., 20 Md. App. 611, 318 A.2d 874 (1974). *Contra,* Day v. Grand Union Co., 280 App. Div. 253, 113 N.Y.S. 2d 436 (1952); Lasky v. Economy Grocery Store, 319 Mass. 224, 65 N.E.2d 305 (1946).

17. Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974) (dicta).

18. OKLA. STAT. tit. 12A, § 2-318 (1971). The official text of the U.C.C. offered three alternatives of this section from which legislatures might choose::L

Alternative A

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

Alternative B

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.

Alternative C

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.

U.C.C. § 2-318 (amended 1966).

These alternatives extend "horizontal" privity to varying degrees and Oklahoma enacted the most restrictive option, Alternative A.

19. The ruling in *Moss* was chiefly concerned with "horizontal" rather than "vertical" privity, and the effect of U.C.C. § 2-318 following *Kirkland.*

The distinction between "horizontal" and "vertical" privity is, briefly stated, this: "horizontal" is concerned with other users of the product beyond the purchaser; "vertical" is concerned with the distributive chain.

> We believe that the statutory implied warranty sections of the UCC are not applicable in this case. The UCC has to do with commercial transactions (12A O.S. 1971, § 1-102) and presupposes a buyer in privity with a seller, . . . and extended only as provided by the legislature. . . . Warranty recovery applies to loss flowing from the commercial transaction.[20]

The court then noted that, although the U.C.C. directs that there be a liberal administration of its remedial provisions,[21] the language of the highest court in *Moss* was clearly opposed to a judicial extension of "vertical" privity.[22]

Based on the *dicta* of *Moss*, the *Barker* court ruled that a) because the action did not arise out of a commercial transaction between plaintiff and bottler, b) because vertical privity was not to be extended beyond what the legislature had provided, and c) because the Oklahoma Supreme Court had provided for an adequate strict liability vehicle for recovery, no action should lie against the bottler.

III. Analysis of Product Liability Remedies

A. *Privity and the U.C.C.*

Permitting products liability actions under the U.C.C. by consumers not in privity with the manufacturers of the products which injure them has several justifications. Initially, warranty was not the theory courts employed to provide a remedy to a remote buyer injured by a manufacturer's product. But whatever the theory, the chief obstacle which courts felt obligated to overcome was the doctrine of privity.[23] Courts did find rationales to avoid this obstacle, and warranty theory presented them with no insurmountable problems with respect to it.[24]

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20. 522 P.2d at 625.

21. U.C.C. § 1-106 (Remedies to be Liberally Administered).

22. Other courts have interpreted U.C.C. § 2-318 to permit judicial extension of vertical privity. *See, e.g.*, Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967) (dicta).

23. Initially, the sale of chattels involved no guarantee against a personal injury to anyone but the immediate purchaser. *See* Winterbottom v. Wright, 10 M. & W. 109, 152 Eng.Rep. 402 (1842). Privity was first extended for policy reasons in the area of food and drink. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). The "citadel" of privity continued to erode until, in 1958, Michigan removed privity requirements as to all products whose manufacturing defects caused injury. Spence v. Three Rivers Builders and Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). *See generally* Prosser, *The Assault Upon the Citadel*, 69 Yale L. J. 1099 (1960) [hereinafter referred to as Prosser, *The Assault*].

24. Courts at the turn of the century used a variety of rationales to hurdle the privity obstacle and allow recovery to remote purchasers. These rationales included the postulated

Warranty, as a basis for a cause of action, sounded originally in tort.[25] Thus, a breach of warranty was a breach of a duty imposed by law, not a breach of promise or duty thereby created. Because privity was only required where a promise created the duty (assumpsit), there was no need for privity in an action based on warranty as it was originally considered.

Further, it has been felt that because a manufacturer aims the bulk of its research, development, manufacturing, marketing and sales efforts at the consumer, the manufacturer and the consumer are thereby in privity in substance if not in form.[26] This reasoning is further supported by the consumer's modern tendency to relate the product to its manufacturer.

It has also been reasoned that the manufacturer is in the best position to warrant or insure the safety of the product, by distributing the cost of such product "insurance" evenly to all consumers by pricing. While this argument has been used in adopting a strict tort theory of products liability, it has also led to some concern about that theory. Because strict tort law as promulgated in section 402A of the Restatement (Second) of Torts speaks in terms of products "unreasonably dangerous,"[27] the consumer must presumably insure himself against products made only "reasonably dangerous" by their defective manufacture.[28] Implied warranty theory under the U.C.C., when applied without requiring privity, can make the manufacturer the insurer in each case, leaving no such loophole.[29]

Finally, it is to be noted that even where vertical privity is required, each seller in the chain of distribution may often have indemnity from his respective seller. Where a manufacturer is either

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agency of the dealer, either to buy for the consumer or to sell for the manufacturer, and third party beneficiary contracts for the benefit of the consumer. The rationale most widely used by 1960 was that first put forth in Mississippi in 1927. This was the notion of a warranty running with the goods from the manufacurer to the consumer, by analogy to warranties running with land. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). This entire development is traced in Prosser, *The Assault, supra* note 23.

25. *See generally:* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 654-56 (4th ed. 1971), noting the development of warranty theory, having an initial basis in tort and later emerging upon a contract basis.

26. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

27. RESTATEMENT § 402A(1), *supra* note 1.

28. At least one jurisdiction recognized this and modified its strict tort theory to dispense with the requirement that the danger be unreasonable. *See* Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alas. 1973).

29. Under implied warranty theory, proof deals only with showing a defect present in the product when it left the manufacturer. This defect need not be shown to be unreasonable. U.C.C. § 2-314, comment 13.

unknown or unreachable, courts have held anyone in the distributive chain liable,[30] and thus responsible for the manufacturer's liability. Given this, implied warranty theory without privity requirements avails the consumer to the most accessible seller, including the manufacturer.

B. Historical Background

The warranty theory of products liability came to be embodied in the uniform commercial laws, first in the Uniform Sales Act, and later in the U.C.C.[31] In response to consumerism in the second half of this century, the U.C.C. has endeavored to better accommodate products liability actions under it, through section 2-318.[32] This section was expressly not intended to either enlarge or restrict the developing case law of implied warranty recovery.[33] In fact, the U.C.C. was to be liberally construed to achieve an equitable result.[34] Given this, courts have been free to develop products liability law under the U.C.C., and the doctrine of privity has often been no obstacle.[35]

As the doctrine of privity was being eroded in the products liability area, another theory of liability was developed. Propounded first in 1960 in an article by William Prosser,[36] this theory eventually emerged in 1965 as section 402A of the Restatement (Second) of Torts.[37] Section 402A proposed that a manufacturer be held strictly liable in tort, to any reasonably foreseeable user, for all injuries and property damage caused by products made unreasonably dangerous by their manufacture.[38] Because section 402A presented a products

30. *See, e.g.*, Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1945); Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385 (1932), *overruled,* Porpora v. City of New Haven, 122 Conn. 80, 187 A. 668 (1936).

31. UNIFORM SALES ACT § 15, UNIFORM COMMERCIAL CODE (U.L.A.) Appendix (1968); U.C.C. § 2-314, *supra* note 14.

32. Note 18 *supra.* There was no similar provision in the U.C.C.'s predecessor, the Uniform Sales Act.

33. *See* U.C.C. § 2-318, Official Comment 1.

34. U.C.C. § 1-106(1) (in relevant part): "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."

35. *See generally,* Prosser, *The Assault, supra* note 23, to the effect that as of 1960 the obstacle of privity under implied warranty theory was disappearing. *See also* Dawson v. Canteen Co., 212 S.E.2d 82 (W.Va. 1975) (abolishing privity requirement in U.C.C. action).

36. Prosser, *The Assault, supra* note 23.

37. William Prosser was the chief reporter for the A.L.I. in the drafting of § 402A. Reitz and Seabolt, *Warranties and Product Liability: Who Can Sue and Where?*, 46 TEMP. L. Q. 527, 530 (1973).

38. RESTATEMENT § 402A, *supra* note 1.

liability alternative not based on the commercial code, courts now had two theories of strict liability before them—section 402A as well as the implied warranty provisions of the U.C.C. Because the U.C.C. was inadequate in many respects in the products liability area, there followed a wide and rapid acceptance of the strict tort theory.[39]

C. *Inherent Problems*

The defenses available to the manufacturer under the U.C.C., while quite appropriate in the commercial setting, are often unreasonable in a consumer products liability action against a remote manufacturer. For example, U.C.C. section 2-607(3)(a) requires that reasonable notice be given the seller upon the buyer's being injured by the defective product.[40] Should the manufacturer be unknown, notice becomes a problem. Even where the manufacturer is known, giving reasonable notice may not even occur to the consumer not accustomed to the commercial climate. The unwary consumer might thus find himself without a cause of action.[41] This prospect has been instrumental in both the development[42] and adoption[43] of strict tort theory.

Another stumbling block appears in the area of liability disclaimers. The U.C.C. provides for disclaimers, because, in the commerical setting, restrictions of liability may be bargained for between parties dealing at arm's length.[44] However, subsection three

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39. *See* cited cases, *supra* note 3.

40. U.C.C. § 2-607(3)(a) (Notice of Breach):

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.

41. Courts have however, shown some reluctance to deny the consumer an implied warranty cause of action for want of reasonable notice. To permit actions, courts have ruled long delays "reasonable," or that the notice requirement did not apply to personal injury cases. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 655-56 (4th ed. 1971).

42. See Prosser, *The Assault, supra* note 23.

43. Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d. 57, 61, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963), the court noting that:

> The notice requirement . . . is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. . . . "As between the immediate parties . . . the notice requirement is a sound commercial rule,. . . . As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' [James, *Product Liability* (sic), 34 Texas L. Rev. 44, 192, 1971]."

44. U.C.C. § 2-316: Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable

of U.C.C. section 2-719 provides that while disclaimers as to personal injuries resulting from the use of defective consumer goods is *prima facie* unconscionable, other losses may be disclaimed.[45] Here the consumer might again be precluded from recovery as to some legitimate losses, including property damage.[46]

Because "warranty" has its roots both in tort and in contract,[47] courts have had little trouble fitting tort recoveries under wrongful death and survival statutes into actions that were otherwise essentially in contract.[48] However, regardless of whether a U.C.C. warranty action sounds in tort or in contract, the remedial provisions of the U.C.C. nowhere account for such recoveries. In a products liability action arising under the U.C.C., the U.C.C. statute of limitations is used, as well as the definitional terms of the Code. Also, U.C.C. section 2-314 or section 2-315 is used to found an action in strict liability—a much more appealing prospect than a negligence action. It is inapposite—doctrinally at least—to provide for tort recoveries when they are brought under the U.C.C., when its re-

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as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", or "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

45. U.C.C. § 2-719(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."

46. Recognizing this shortcoming, at least one jurisdiction has amended its U.C.C. to permit property damage recovery. *See* ME. REV. STAT. ANN. tit. 11, § 2-316(5) (Supp. 1975).

47. *See* note 25 *supra*.

48. *See, e.g.*, Gosling v. Nichols, 59 Cal. App. 2d 442, 139 P.2d 86 (1943).

medial provisions nowhere provide for them.

Finally, there is the more academic problem concerning where in the law consumerism and products liability shall have their niche. With its expansion of horizontal privity[49] and its eroded (by case law) vertical privity requirements,[50] the U.C.C. in effect provides for strict products liability. Section 402A of the Restatement provides for strict liability by definition. Each theory permits direct actions by consumers against remote manufacturers. The Restatement position, however, approaches products liability from the concept of duty rather than from an implied promise,[51] thereby eliminating any need for either horizontal or vertical privity.[52] Also, because section 402A sounds in tort,[53] it avails the consumer of both

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49. The U.C.C., adopted first in Pennsylvania in 1953, included § 2-318, to extend "horizontal" privity. There was no similar provision in the U.C.C.'s predecessor, the Uniform Sales Act.

50. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

51. RESTATEMENT § 402A, comment c: "On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, *has undertaken a special responsibility to any member* of the consuming public who may be injured by it; . . ." (emphasis added)

The enunciated purpose of the U.C.C. is to regulate " Certain Commercial Transactions in or Regarding Personal Property and Contracts and Other Documents concerning them . . . [And] to Make Uniform the Law . . . Thereto . . ." 1 U.C.C.(U.L.A.) 1 (1968).

These official notes from both the Restatement and the text of the U.C.C. suggest that in practice if not also in theory, actions under the U.C.C. lie in contract, while actions under § 402A are certainly in tort. Further evidence of the contractual nature of actions under the U.C.C. is found in the language of the U.C.C. implied warranty provisions. U.C.C. § 2-314, *supra* note 14, states that "a warranty that the goods shall be merchantable is implied in a *contract* for their sale." (emphasis added).

The language of U.C.C. § 2-315 is similarly revealing:

Implied Warranty: Fitness for Particular Purpose.

> 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. (Emphasis added).

Prosser, citing Winfield and Pollock, has distinguished tort and contract actions by their theories:

> The fundamental difference between tort and contract lies in the nature of the interest protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law and are based . . . not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifestiing consent, and are *owed only to the specific individuals* named in the contract (emphasis added).

W. PROSSER, HANDBOOK OF THE LAW OF TORTS 613 (4th ed. 1971).

52. *See* RESTATEMENT § 402A, comment 1.

53. RESTATEMENT § 402A, comment m: "The basis of liability [under this section] is purely one of tort."

wrongful death/survival statutes and the generally more liberal tort damages.[54] The section 402A theory requires no statutory notice such as section 2-607 of the U.C.C. Also, the Restatement position is not subject to liability disclaimers for property damage. Section 402A officially states that property damage is recoverable.[55]

IV. CONCLUSION

Because the Restatement position is so well adapted to products liability law, there seems little to recommend keeping both modes of recovery. To do so only benefits the consumer, by giving him a choice of limitations statutes.[56] From a policy standpoint this benefit is, arguably at least, unwarranted. If, in the subject case, plaintiff sat on his rights, or if his attorney was slow in filing, then a reprieve should not be available by means of redundant theories of recovery with different statutes of limitations. These dual theories lead to "jurisprudential eclipses and pigeonholes,"[57] duplication of effort, judicial inefficiency and resulting confusion.

That products liability law should rest solely in tort, upon strict tort and negligence theory, is a simple and logical result. This result is not in derogation of the U.C.C. provisions relating to implied warranty.[58] It keeps the U.C.C. in the commercial setting where it is best equipped to operate.

Further, judicial tampering with the doctrine of privity to enable products liability actions to be brought under the U.C.C., is both doctrinally bankrupt and too outdated a contrivance to meet the demands of twentieth century consumerism. With such a viable means to the end of consumerism as strict liability in tort, there is

54. *See, e.g.*, Casrell v. Altec Industries, 335 So. 2d 128 (Ala. 1976) (applying wrongful death statute in strict tort action). *But see* Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 40 N.W.2d 73 (1949) (applying liberal tort damages in warranty action).

55. RESTATEMENT § 402A, comment(d) (in pertinent part): "[This rule] applies also to products which, if they are defective, may be expected to and do cause only 'physical harm' in the form of damage to the user's land or chattels . . ."

56. U.C.C. § 2-725 provides for a four year statute of limitations, though it may be revised by the legislature when enacted. Limitations statutes for tort actions may be and often are shorter then § 2-725, as in Oklahoma. *See* note 15 *supra*.

57. Shanker, *Strict Tort Theory*, *supra* note 7.

58. There will be some inevitable overlap, in those cases where the consumer is in a direct privity relation with the manufacturer.

little to recommend retaining implied warranty theory as the sole means to strict liability recovery. There is even less to recommend maintaining a dual system of recovery.[59]

Under the commercial code, adequate consumer redress was only achieved by a fifty-year "assault upon the citadel" of privity, and the system which evolved is still filled with loopholes. With the inception of strict liability in tort, the commercial code need no longer bear what is for it an uncomfortable burden—manufacturers' product liability. The U.C.C. need no longer be stretched to accommodate an area of the law with which it is only peripherally concerned, when strict tort liability handles it so smoothly. Products liability law requires but one theory, and the strict tort theory is the better suited of the options.[60] Oklahoma recognized this in *Barker*, and put privity back in the U.C.C.[61]

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59. Recovery for economic loss is, however, one factor favoring retention of the U.C.C. theory. Such recovery is not provided for under strict tort theory. However, when sought in a U.C.C. personal injury case, economic loss has been recovered even where it had been disclaimed under § 2-316. *See* Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968).

60. A bill recognizing that "there currently exists among the several states a diversity of laws regarding liability for products which cause harm to the user" and that "the diversity of laws, particularly in the area of substantive standards of care imposed and defenses available, has caused confusion and inequity," has been introduced into the U.S. House of Representatives. H.R. 6300, 95th Cong., 1st Sess., § 2a (1977). This proposed legislation reflects the language of § 402A and provides that products liability recovery shall be limited to actions arising under it. *Id.*, § 3.

61. Other states confining strict product liability recovery to strict tort theory include New Jersey, Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973); New York, Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); Ohio, Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 622 (1966), *aff'd* 6 Ohio St.2d 227, 218 N.E.2d 185 (1966); New Hampshire, Elliott v. Lanchance, 109 N.H.481, 256 A.2d 153 (1969); Wisconsin, Drake v. Whamo Mfg. Co., 373 F.Supp. 608 (E.D. Wis. 1974). *But see* Hoffman v. Simplot Aviation, 97 Idaho 32, 539 P.2d 584 (1975) (permitting actions under either theory); Dealers Transport Co. v. Battery Distributing Co., 402 S.W.2d 441 (Ky. 1966) (same); Wachtel v. Rosol, 159 Conn. 496, 271 A.2d 84 (1970) (same).