SELLER'S LIABILITY TO REMOTE PURCHASERS AND NONPURCHASERS FOR PHYSICAL AND ECONOMIC LOSS IN BREACH OF WARRANTY ACTIONS IN NEW YORK: AN ANALYSIS OF THE PRIVITY DEFENSE AND THE VIEWS OF PROFESSOR SPEIDEL AND THE ARTICLE 2 STUDY GROUP

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I. INTRODUCTION

If any section of the Uniform Commercial Code (Code) requires revision it is U.C.C. § 2-318. Two of the underlying purposes and policies of the Code are to “simplify, clarify and modernize the law governing commercial transactions” and “to make uniform the law among the various jurisdictions.” Nonetheless, there has never been a national consensus as to the proper scope of the privity defense in breach of warranty actions arising from sales contracts. The Code offers three alternative provisions for overcoming the defense, and some states have adopted their own versions.

The recently released Preliminary Report of the Article 2 Study Group (Study Group) reflects this lack of consensus. Some members

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I wish to thank my colleague Bernard Harvith for helpful comments on a prior draft and Dean Martin H. Belsky for a summer research grant. I also wish to thank Jennifer Cleary, Class of 1990, and Susan Tully, Class of 1992, for research assistance, and Theresa Colbert, Bea Karp, and Emily Pedro for secretarial assistance.


3 U.C.C. § 2-318, Alternatives A, B & C (1989). For the text of these provisions, see infra notes 98, 104, and 128.


5 The American Law Institute and the Permanent Editorial Board appointed the Study Group in March 1988 to examine and propose changes to Article 2. The Study Group issued its Preliminary Report in March 1990 and the comment period expired September 1, 1990. The Study Group is now in the process of preparing its final report. The members of the Study Group include: Mr. Glenn Arendsen, Associate Counsel, Ford Motor Company; Professor Amelia Boss, Temple University School of Law; Professor Steven L. Harris, University of Illinois College of Law; Professor Frederick H. Miller, University of Oklahoma Law Center; Professor Charles W. Mooney, Jr., University of Pennsylvania Law School; President John E. Murray, Jr., Duquesne University School of Law; Professor Richard E. Speidel, Northwestern University School of Law; Professor James J. White, University of Michigan Law School; and Mr. Robert W. Weeks, Vice President and General Counsel, John Deere & Company. Article 2 Study Group, Preliminary Report (Mar. 1, 1990) [hereinafter Preliminary Report] (unpublished report available from Professor Speidel, Northwestern University School of Law).
of the Study Group believe that a direct sales contract or an equivalent relationship should be required in all breach of warranty actions even if the loss suffered is personal injury. Other members of the Study Group, including Professor Speidel, the Project Director and principal drafter of the Preliminary Report, believe that the privity defense should be abolished as to the implied warranty of merchantability against remote purchasers even if the loss suffered is economic. This Article analyzes the privity defense in the context of New York law. After a detailed analysis of the current status of the privity defense in New York, this Article argues that Professor Speidel’s rationale for extending a seller’s implied warranty of merchantability to remote purchasers also supports extending any seller-created warranty, whether express or implied, to any person, whether purchaser, remote purchaser, or nonpurchaser, who suffers any foreseeable injury.

II. CURRENT STATUS OF THE PRIVITY DEFENSE IN NEW YORK

A. Background

A cause of action for breach of warranty arises as an incident of a sales contract under Article 2 of the Code. Goods are defective for purposes of breach of warranty if they do not meet the express or implied quality term in the contract for sale. Unless excluded or modified, every contract for the sale of goods by a merchant contains an implied warranty that the goods are merchantable, which requires, among other things, that they “are fit for the ordinary purposes for which such goods are used.” The seller may also impliedly warrant that the goods are fit for a particular purpose. Unless excluded or modified, such a warranty exists “[w]here 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 . . . .” In addition,
the seller may expressly warrant that the goods are of a certain
quility.\textsuperscript{14}

Where the goods fail to meet the quality term in the contract, the
Code provides remedies designed to give the buyer the benefit of his
bargain by placing him in the position he would have been in if the
goods had been as warranted.\textsuperscript{15} The buyer has the right of rejection\textsuperscript{16}
and revocation of acceptance,\textsuperscript{17} and to recover his direct economic
loss based on the difference between the contract price, and either
the market price\textsuperscript{18} or, if he covers, the cover price.\textsuperscript{19} Alternatively,
the buyer may accept the goods and recover for his direct economic
loss "as determined in any manner which is reasonable," including
recovery for the diminished value of the goods or the cost to repair
the defect.\textsuperscript{20}

In addition, the buyer may recover for incidental\textsuperscript{21} and consequential
damages. Consequential damages are damages which do not necessarily
occur in the ordinary course of events from a breach of warranty,
but occur because of the special circumstances of the particular case.\textsuperscript{22}
Consequential damages include physical damage to persons or property
proximately caused by the breach.\textsuperscript{23} It also includes "any loss resulting
from [the] general or particular requirements and needs of [the buyer]
which the seller at the time of contracting had reason to know and
which could not reasonably be prevented by cover or otherwise."\textsuperscript{24} A
typical example of such damage is indirect economic loss such as lost
profits.

The preceding discussion is based mostly on default provisions.
Under Article 2, a seller need not give any express warranty,\textsuperscript{25} and
may ordinarily disclaim or modify implied warranties. Also, within limits, a seller who gives a warranty may modify the remedies otherwise available for breach as, for example, by limiting the buyer's remedy to repair or replacement of nonconforming goods. Thus, in many instances it is possible for the seller to shift to the buyer the risk that the goods will cause physical or economic loss.

Even where the seller gives a warranty there are certain limitations on a cause of action for its breach. The buyer must not only show the existence of the warranty and its breach, but must also show that the breach was the proximate cause of the loss sustained. In addition, the buyer is required to give certain notices to the seller in order to exercise and preserve remedies, and, the seller may have the right to cure the defect under the statute or pursuant to the contract. Moreover, there is authority in New York for the proposition that culpable conduct on the part of the plaintiff, such as assumption of the risk or contributory negligence, is a defense in breach of warranty actions. However, under New York's comparative negligence statute such conduct may not bar recovery but may

leases to "consumers"); N.Y. GEN. BUS. LAW § 198-b (McKinney Supp. 1990) (requiring a minimum written warranty in sales of "used motor vehicles" to "consumers").


28 One exception is that a seller may not ordinarily exclude or limit its liability for consequential damages for personal injury in the case of consumer goods. See N.Y. U.C.C. LAW § 2-719(3) (McKinney 1964).

29 Id. § 2-314 comment 13.

30 See id. §§ 2-602(1), 2-605(1), 2-607(3)(a), 2-608(2).

31 Id. §§ 2-508, 2-719.


33 N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1978). The comparative negligence statute on its face is not limited to negligence actions. Thus, it should also apply in breach of warranty and strict products liability in tort actions. Id., commentary at 386 (authored by Joseph M. McLaughlin).
diminish, by the proportion of plaintiff's culpable conduct, the amount otherwise recoverable for breach.\textsuperscript{34}

A cause of action for breach of warranty must be brought within four years after the action accrues.\textsuperscript{35} Ordinarily such actions accrue upon tender of delivery.\textsuperscript{36} However, “where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance,”\textsuperscript{37} as where the seller expressly warrants the quality of the goods for a fixed period such as one year, “the cause of action accrues when the breach is or should have been discovered.”\textsuperscript{38}

Assuming that a warranty exists and the other requirements for recovery are met, the question from the perspective of remote purchasers and nonpurchasers is to whom does the warranty extend. Historically, this question has been analyzed in terms of two paradigmatic issues: (1) whether a seller's warranty, made to its immediate buyer, extends to nonpurchasers who have a “horizontal” relationship with the buyer, such as members of his family or household, guests in his home, his employees, his lessees, or even bystanders; and (2) whether a seller's warranty extends “vertically” to remote purchasers and persons in horizontal privity with them.

The initial common law rule in New York was that a seller's warranty, whether express or implied, did not extend beyond the immediate purchaser, even where a breach of warranty resulted in personal injury.\textsuperscript{39} The theory was that since a warranty is a matter of contract, only a party to the contract may sue on it. Thus, “[t]here can be no warranty where there is no privity of contract.”\textsuperscript{40} However, subsequent judicial and legislative action has eroded much, but not all, of the privity requirement.

\textsuperscript{34}N.Y. CIV. PRAC. L & R. 1411, commentary at 386 (McKinney 1976) (authored by Joseph M. McLaughlin). By its terms, the comparative negligence statute applies in actions to recover for “personal injury,” “injury to property,” and “wrongful death.” N.Y. CIV. PRAC. L & R. 1411 (McKinney 1976). However, the term “injury to property” might be broad enough to encompass economic losses such as the diminished value of goods and lost profits. Cf. Lippes v. Atlantic Bank of N.Y., 69 A.D.2d 127, 139-41, 419 N.Y.S.2d 305, 512-13 (1st Dep't 1979) ( construing the term “injury to property” to include losses from commercial transactions).

\textsuperscript{35}N.Y. U.C.C. LAW § 2-725(1) (McKinney 1964).

\textsuperscript{36}Id. § 2-725(2).

\textsuperscript{37}Id.

\textsuperscript{38}Id.


\textsuperscript{40}Turner, 248 N.Y. at 74, 161 N.E. at 424. In Chysky, the court asserted that “[t]he benefit of a warranty, either express or implied, does not run with a chattel on its resale, and in this respect is unlike a covenant running with the land so as to give a subsequent purchaser a right of action against the original seller on a warranty.” 235 N.Y. at 472-73, 139 N.E. at 578.
B. Strict Products Liability in Tort

The development of strict products liability in tort as a cause of action separate and distinct from breach of warranty has eliminated the privity requirement in cases of physical injury to person and property. The court of appeals explicitly adopted the doctrine for New York in Codling v. Paglia. Although Codling and its predecessors ostensibly extended a seller's implied warranty of merchantability to nonprivity plaintiffs, it is now clear that strict products liability in tort and breach of warranty are independent causes of action in New York. Thus, in appropriate cases a plaintiff may base
its claim on either or both theories, although there can be only one recovery.

In contrast to an action based on breach of warranty, which seeks to enforce the intentions of the parties as embodied in a sales contract, strict products liability in tort seeks to protect persons from physical harm caused by defective products by imposing strict liability on manufacturers based upon standards set by courts as a matter of law.

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In DeCrosta v. A. Reynolds Constr. & Supply Corp., 49 A.D.2d 476, 375 N.Y.S.2d 655 (3d Dep't 1975), aff'd on other grounds, 41 N.Y.2d 110, 354 N.E.2d 1129, 396 N.Y.S.2d 257 (1977), the third department, in a closely divided decision, held that a cause of action in strict products liability in tort does not exist in favor of a person who seeks to recover property damage from a person with whom it has a direct contractual relationship. Id. at 480-81, 375 N.Y.S.2d at 658-59. The majority reasoned that the public policy which permits remote purchasers and nonpurchasers to recover damages in strict products liability in tort does not necessarily apply when a purchaser is in privity with the defendant. Id. at 480, 375 N.Y.S.2d at 658. In such cases, the majority reasoned it is possible for the immediate purchaser to protect itself through express warranties, implied warranties, and a negligence action. Id.; 375 N.Y.S.2d at 659. In addition, the majority feared that permitting a strict products liability in tort action would amount to requiring a manufacturer to guarantee forever to his immediate purchaser that the product is free from latent or hidden defects. Id.

The DeCrosta majority opinion seems wrong for the reasons stated by Justice Greenblatt in his dissent. Id. at 481, 375 N.Y.S.2d at 659 (Greenblatt, J., dissenting). First, the decision seems inconsistent with the court of appeals' opinion in Velez v. Crane & Clark Lumber Corp., in which the court left open the possibility that the immediate parties to a sales contract could limit among themselves the seller's liability for strict products liability in tort. See Velez, 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 623 (1973). Thus, as Justice Greenblatt suggested, the court of appeals assumed that in the absence of such a limitation, a cause of action in strict products liability in tort does exist between the seller and the immediate buyer. DeCrosta, 49 A.D.2d at 483, 375 N.Y.S.2d at 661 (Greenblatt, J., dissenting). The DeCrosta majority opinion also seems inconsistent with Victorson v. Bock Laundry Machine Co., in which the court of appeals stated that a cause of action in strict products liability in tort exists apart from any contract between the parties. See Victorson, 37 N.Y.2d at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 43. It therefore seems logical to assume, as did Justice Greenblatt, that such an action exists notwithstanding a contract between the parties. See DeCrosta, 49 A.D.2d at 483, 375 N.Y.S.2d at 661 (Greenblatt, J., dissenting). Justice Greenblatt also argued that the majority failed to recognize commercial reality in its assertion that "the immediate purchaser [could] exact whatever warranty he desires" from the seller. Id. at 481-82, 375 N.Y.S.2d at 660 (quoting id. at 480, 375 N.Y.S.2d at 659 (Herlihy, P.J.)). Many buyers do not have equal bargaining power with manufacturers and are therefore not in a position to negotiate contractual protection. Id. at 481, 395 N.Y.S.2d at 660. In any event, even if DeCrosta remains good law, it does not affect the rights of remote purchasers and nonpurchasers who have no direct contract with a defendant seller.

47 See Victorson, 37 N.Y.2d at 400, 335 N.E.2d at 276-77, 373 N.Y.S.2d at 41.
predicated on social policy. As articulated in Codling, this social policy is based on the fact that it is the manufacturer, rather than the injured party, who is in the best position to know and understand when goods are suitably designed and safely made for their intended purpose. Therefore, "[t]o impose this economic burden on the manufacturer should encourage safety in design and production; and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection." Although Codling placed the ultimate liability on manufacturers, subsequent cases have permitted plaintiffs to recover from intermediate sellers and others "responsible for placing the defective product in the marketplace" who may then seek reimbursement from the manufacturer.

An action in strict products liability in tort has several advantages over an action for breach of sales warranties. In addition to the fact that lack of privity is not a defense, the cause of action accrues upon the date of the injury, not upon tender of delivery as is the general rule in contract actions. Furthermore, the purpose of damages

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6 The rationale for permitting plaintiffs to recover from other persons in the distributive chain in addition to the manufacturer was stated in Mead v. Warner Pryyn Division, 57 A.D.2d 340, 394 N.Y.S.2d 483 (3d Dep't 1977) (relying on Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964)). The reasons given are that intermediate parties are an essential part of the overall production and marketing of goods to the public and should bear the costs of injuries resulting from products they sell. Id. at 341, 394 N.Y.S.2d at 484. Further, placing liability on such parties may encourage them to exert pressure on the manufacturer and thus provide an added incentive for the production of safe goods. Id. at 341-42, 394 N.Y.S.2d at 484. In addition, in some cases, such a person might be the defendant most reasonably available to the injured party. Id. at 341, 394 N.Y.S.2d at 484. Thus, imposing such liability affords maximum protection to the injured party and does not impose too great a burden on intermediate parties who may then seek recovery from the manufacturer. Id. at 344, 394 N.Y.S.2d at 485-86.
7 Codling, 32 N.Y.2d at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70.
in strict products liability in tort is not to award the injured party the benefit of his bargain as in a contract action, but rather the purpose is to make him whole by placing him in the position he occupied prior to the injury. Also, the technical notice requirements which apply in warranty actions do not apply in strict products liability in tort actions.

In addition, the efficacy of disclaimers of liability is drastically reduced in such actions. A seller may not disclaim liability to a remote user or bystander. However, it may be possible for the parties to a contract to restrict liability between themselves, but such a disclaimer between an intermediate seller and its buyer does not necessarily inure to the benefit of the manufacturer.

For present purposes, the most important limitation on strict products liability in tort in New York, as in most jurisdictions, is that only losses resulting from physical damage to person or property are recoverable in such actions; losses characterized as solely economic are ordinarily not recoverable. New York courts have drawn the line between physical damage to persons and property and economic loss based on whether the loss results from an unsafe product associated with an accident, or whether it results from a product's simply failing to perform as intended, unassociated with any accident.

An action in strict products liability in tort will lie where a dan-
gerous defect in a product is the proximate cause of an accident resulting in injury to person, or to property other than the defective product. New York courts have also permitted recovery where a dangerous defect is the proximate cause of an accident resulting in physical damage to nondefective parts of the defective product itself. In addition, recovery is permitted where a dangerous defect aggravates or enhances the injuries caused by an accident even though the defect does not itself cause the accident.

Permitting recovery damages in such cases on a theory of strict products liability in tort has been justified as being consistent with the safety concerns that underlie the cause of action. The underlying

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62 An example is where defective bolts cause the superstructure of a crane to fall to the ground resulting in considerable damage to nondefective parts of the crane itself. John R. Dudley Constr., Inc. v. Drott Mfg. Co., 66 A.D.2d 368, 372-74, 412 N.Y.S.2d 512, 514-16 (4th Dep’t 1979). See also Codling, 32 N.Y.2d at 342-43, 298 N.E.2d at 629, 345 N.Y.S.2d at 470 (defective steering mechanism caused plaintiff’s automobile to collide head on with another resulting in considerable damage to nondefective parts of plaintiff’s automobile); Maure v. Fordham Motor Sales, Inc., 98 Misc. 2d 979, 981-82, 414 N.Y.S.2d 882, 883-84 (Civ. Ct. 1979) (defective steering mechanism caused vehicle to collide with guardrail causing extensive damage to nondefective parts of the vehicle).
63 Bolm v. Triumph Corp., 33 N.Y.2d 151, 306 N.E.2d 769, 350 N.Y.S.2d 644 (1973). In Bolm, the court of appeals permitted an action in strict products liability in tort against both the distributor and the manufacturer of a motorcycle based on the theory that the placement of the luggage rack constituted a design defect which, while not causing the accident, did aggravate and enhance the injuries plaintiff suffered in a collision with an automobile. Id. at 158-60, 305 N.E.2d at 773-74, 350 N.Y.S.2d at 650-51. The court held that permitting such an action was consistent with the holding in Codling, and “[i]n neither sound policy nor reason can be found to justify a distinction between the liability of the manufacturer whose defective item causes the initial accident and that of the manufacturer whose defective product aggravates or enhances the injuries after an intervening impact.” Id. at 159, 305 N.E.2d at 773, 350 N.Y.S.2d at 650-51. See also Butler v. Pittway Corp., 770 F.2d 7, 10-11 (2d Cir. 1985) (holding that under New York law plaintiffs might recover from manufacturer of smoke detectors for certain physical damage to their house caused by a fire if they could prove that although the detectors did not cause the fire, their failure to sound a timely alarm created an unreasonably dangerous situation which aggravated the extent of damage to the house); Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 249-51 (2d Cir. 1981) (holding that under New York law plaintiffs could bring an action against vehicle manufacturer to recover damages on the theory that the injuries they suffered in an accident were aggravated by a defective door latch assembly which caused the doors to open during the collision, resulting in plaintiffs’ ejection from their van).
purpose of the cause of action is to encourage the manufacture and marketing of safe products which do not expose persons or their property to unreasonable risks of physical harm. The ultimate liability is placed on manufacturers because they are in the best position to recognize and cure defects. Thus, whether the unduly dangerous defect causes the initial accident, or whether it aggravates or enhances the injuries caused by an accident, or whether the physical loss is to persons, or to nondefective parts of the defective property itself, or to other property, the damage results from the tortious conduct of manufacturing and selling dangerously defective goods. Thus, recovery in strict products liability in tort is deemed appropriate.

On the other hand, where the loss relates to the parties' expectations as to product performance rather than safety, the loss is characterized as economic and is not recoverable. Such loss includes the diminished value of the defective product, including the cost to repair the defect, and consequential economic loss, such as lost profits, resulting from the goods simply failing to perform as intended, unassociated with any accident. Economic loss has also been held to include injury to other property caused by deterioration or breakdown of the defective product or otherwise by the defective product's simply failing to perform as intended, unassociated with any accident.

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68 Bolm, 33 N.Y.2d at 159, 305 N.E.2d at 773-74, 350 N.Y.S.2d at 650-51; John R. Dudley Constr., 66 A.D.2d at 371, 412 N.Y.S.2d at 514; Butler, 770 F.2d at 9-12.

69 Bolm, 33 N.Y.2d at 159, 305 N.E.2d at 773-74, 350 N.Y.S.2d at 650-51; John R. Dudley Constr., 66 A.D.2d at 372, 412 N.Y.S.2d at 514; Butler, 770 F.2d at 12.

70 See infra note 77 and accompanying text.

The principal New York case discussing the reasons why economic loss is not recoverable is Schiavone Construction Co. v. Elgood Mayo Corp. In Schiavone, the buyer ordered and purchased a "vehicular truck hoist" from a seller to be used in construction work in a subway tunnel. The seller apparently knew of the particular purpose for which the hoist was required and purported to sell the buyer a hoist designed for that purpose. The seller then entered into a contract with a manufacturer who purported to design and manufacture the hoist in accordance with the seller’s specifications. The contract provided that the hoist would be manufactured under the seller’s label; thus, the manufacturer’s name did not appear on the equipment nor on bills the seller sent to the buyer.

The buyer alleged that upon delivery the hoist would not operate because the shaft was improperly designed and did not fit properly to the drum, and the cable equalizer could not perform its intended function. Consequently, the buyer allegedly suffered direct economic loss in the form of the cost to repair the equipment, and consequential economic loss consisting of downtime, production loss, additional labor costs, and equipment rentals. The trial court held that the buyer could not recover its economic damages from the manufacturer based on breach of warranty or negligence; it did, however, permit the buyer to amend its complaint to plead a cause of action against the manufacturer based upon strict products liability in tort, alleging in substance that its economic damages were proximately caused by the manufacturer’s defective design of the hoist. A closely divided appellate division affirmed the trial court’s decision. However, in a one sentence memorandum opinion the court of appeals reversed and

of action in strict products liability lies against home builders to recover for damages caused by siding and sheathing failing to perform as intended); Estruch v. Volkswagenwerk, AG, 97 A.D.2d 977, 468 N.Y.S.2d 671, 672 (4th Dep’t 1983) (affirming dismissal of actions in tort to recover for property damage resulting from failure of automobiles to perform as promised), appeal dismissed, 61 N.Y.2d 604, 462 N.E.2d 155, 473 N.Y.S.2d 1025 (1984).

81 A.D.2d at 222, 439 N.Y.S.2d at 934. (Silverman, J., dissenting).
82 Id. at 222, 439 N.Y.S.2d at 934; id. at 227, 439 N.Y.S.2d at 937 (Silverman, J., dissenting).
83 Id. at 222, 439 N.Y.S.2d at 934; id. at 227, 439 N.Y.S.2d at 937 (Silverman, J., dissenting).
84 Id. at 222, 439 N.Y.S.2d at 934. (Silverman, J., dissenting).
85 Id. at 227-28, 439 N.Y.S.2d at 937 (Silverman, J., dissenting).
86 Id. at 222, 439 N.Y.S.2d at 934.
87 Id. at 223, 439 N.Y.S.2d at 934.
88 Id. at 222, 439 N.Y.S.2d at 934.
89 Id. at 227, 439 N.Y.S.2d at 937.
adopted the reasoning in Justice Silverman's appellate division dissenting opinion.\(^8\)

In reaching the conclusion that the buyer could not recover for its economic loss from the manufacturer, Justice Silverman emphasized the fact that strict products liability in tort is concerned with product safety and not product performance.\(^8\) In addition, he gave two policy reasons for not extending the principles of strict products liability in tort to permit recovery in such cases. First, he argued that the extent of economic loss, caused by the fact that a given product fails to perform as intended, will vary depending on the general or particular needs of individual buyers.\(^8\) Thus, an action to recover for economic loss in strict products liability in tort might expose manufacturers to liability for extensive and unforeseeable damages.\(^8\) Therefore, if liability was to be extended to include economic loss, Justice Silverman thought the decision should be made by the legislature "after investigation of [the] economic ramifications" rather than by courts in "the context of a particular case."\(^8\) Until such an investigation, he thought it best to leave "the owner of the product to its remedy based on its contract with the seller" and to leave "the seller to its remedies against the person from whom it bought the equipment based upon the contract between those parties."\(^8\)

Second, Justice Silverman argued that there is room in the market for goods of varying quality.\(^8\) Under the doctrine of strict products liability, goods must meet the standard set by courts for distribution within the state.\(^8\) It is appropriate to hold a manufacturer strictly liable in tort for physical damage to persons and property caused by the fact that its goods do not meet this standard.\(^8\) However, when the issue is simply whether the goods will perform in their intended manner, a seller should be permitted to offer its goods on the market with whatever warranty of quality it chooses,\(^8\) including selling them "as is" with no representations of quality at all. Presumably, the cost of the goods will reflect the quality term offered by the seller, and a

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\(^8\) See Cordling, 32 N.Y.2d at 340-41, 298 N.E.2d at 627-28, 345 N.Y.S.2d at 468-69.

\(^8\) See Schiaone, 81 A.D.2d at 229, 439 N.Y.S.2d at 933 (Silverman, J., dissenting).
buyer should be free to take advantage of lower costs in exchange for taking the risk that the goods will not perform as intended.\textsuperscript{92} If the buyer wants a higher quality term than that offered, he can bargain for it from his immediate seller if he has sufficient bargaining power, or he can seek out the goods from other sellers to the extent available.\textsuperscript{93} Thus, Justice Silverman concluded, the losses in such cases are more appropriately recoverable in contract rather than tort.\textsuperscript{94}

C. Breach of Warranty Actions Under U.C.C. Article 2

1. N.Y.U.C.C. § 2-318

In addition to a cause of action based on strict products liability in tort, a person who suffers personal injury resulting from a defective product may also have a cause of action based on breach of warranty under Article 2 of the Code. In New York, this is a result of a 1975 legislative amendment to N.Y.U.C.C. § 2-318.\textsuperscript{95} As noted, the official text of U.C.C. § 2-318 now offers three alternative provisions. The present Alternative A, which became part of the official text in 1951,\textsuperscript{96} became the law in New York when the legislature adopted the Code in 1962, effective September 27, 1964.\textsuperscript{97} On its face, this provision only extends a seller's warranty horizontally to a narrow class of nonpurchasers: natural persons in the buyer's family or household or guests in his home who suffer personal injury; it does not extend a seller's warranty to other nonpurchasers such as the buyer's employees or bystanders, nor does it extend a seller's warranty vertically.
to remote purchasers and persons in horizontal privity with them. The official comment, however, purports to explain that the section is neutral and is not designed to "enlarge or restrict the developing case law." Nonetheless, in applying Alternative A, New York courts have largely ignored the comment and have refused to expand the class of beneficiaries beyond those stated in the text.

In 1966 the Permanent Editorial Board amended the official text of U.C.C. § 2-318 to provide for Alternatives B and C. At that time the original provision became Alternative A. The New York Legislature's 1975 amendment to N.Y.U.C.C. § 2-318 adopted the essence of Alternative B. As a result, the present New York version of section 2-318 provides:

Third Party Beneficiaries of Warranties Express or Implied:

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.

U.C.C. § 2-318, Alternative A (1989). Professors White and Summers report that as of May 1, 1987, thirty jurisdictions, including the District of Columbia and the Virgin Islands, had adopted Alternative A or one similar. I J. WHITE & R. SUMMERS, supra note 4, § 11-3, at 532 n.5. However, at least one of the states listed has adopted the essence of Alternative B, see Md. COM. LAW CODE ANN. § 2-318 (1975).

Third Party Beneficiaries of Warranties Express or Implied:
A seller’s warranty whether express or implied extends to any natural person 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.

Thus, in New York today, where a cause of action accrues after the effective date of the 1975 amendment, any warranty, whether express or implied, created by any seller, whether manufacturer, wholesaler, or retailer, including a component parts seller, extends beyond the immediate purchaser to any natural person, whether remote purchaser or nonpurchaser, who suffers personal injury of his buyer or who is a guest in his home. See N.Y. U.C.C. LAW § 2-318 (McKinney Supp. 1990).

Official Comment 2 makes the point that the section “rests primarily upon the merchant-seller’s warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose.” N.Y. U.C.C. LAW § 2-318 comment 2 (McKinney Supp. 1990) (emphasis added). The operative words are “rests primarily.” On its face, the statute extends a seller’s warranty whether express or implied. Thus, in appropriate cases, the section extends not only a seller’s implied warranty of merchantability, but also its express warranty and any implied warranty of fitness for a particular purpose.


Cf. Martin v. Drackett Prods. Co., 100 Misc. 2d 728, 732-33, 420 N.Y.S.2d 147, 150 (Sup. Ct. 1979) (holding that remote purchaser may sue distributor of product under the 1975 amendment, but the distributor may also have been the manufacturer).


See Kurtz, 147 A.D.2d at 552, 557 N.Y.S.2d at 408; Calabria v. St. Regis Corp., 124 A.D.2d
it is reasonable to expect that such person may use, consume, or be affected by the goods. Furthermore, the named beneficiaries receive the same warranty as the immediate purchaser. This is the effect of the second sentence of the section, which forbids a seller from excluding or limiting the operation of the section as by attempting to give the named beneficiaries a more limited warranty than that given to the immediate purchaser. 4

The named beneficiaries also receive no greater warranty than the immediate buyer. Section 2-318 is based on the assumption that a warranty is an incident of a sales contract between a promisor seller and a promisee buyer, but extends the seller's warranty to certain persons not parties to the contract as third party beneficiaries. Under classic third party beneficiary theory, the promisor may raise against the beneficiary defenses it has against the promisee. Thus, beneficiaries under section 2-318 take subject to disclaimers of warranty and limitations of remedy which are enforceable against the immediate purchaser. The Code drafters clearly intended this result.

Furthermore, at least in New York, the general rule is that the statute of limitations begins to run against a section 2-318 beneficiary when it begins to run against the immediate purchaser. An action for breach of a sales contract must be brought within four years after the cause of action accrues. The general rule is that a cause of action for breach of warranty accrues upon tender of delivery. There is an exception for cases where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time for such performance. In such cases, the cause of action accrues.

514, 516, 508 N.Y.S.2d 186, 188 (1st Dep't 1986); Atkinson, 102 Misc. 2d at 471, 423 N.Y.S.2d at 580.

Cf. Farina v. Niagara Mohawk Power Corp., 81 A.D.2d 760, 701, 438 N.Y.S.2d 645, 647 (3d Dep't 1981) (alternatively holding that defendant had no liability because it had "no reasonable expectation that decedent would be injured" by coming in contact with power line while helping friend remove CB antenna from rented premises).


Id. comment 2.

Id. The section caption to N.Y.U.C.C. § 2-318 is "Third Party Beneficiaries of Warranties Express or Implied." Id. § 2-318. "Section captions are part of this Act." Id. § 1-109 (McKinney 1964).

See E. FARNsworth, CONTRACTS § 10.9, at 772-75 (2d ed. 1990).


Id.

Id. § 2-725(1) (McKinney 1964).

Id. § 2-725(2).
when, within the time set for performance, the breach is or should have been discovered.\textsuperscript{122}

In a case falling within the general rule, the court of appeals has held that the beneficiary’s cause of action for breach of warranty under section 2-318 accrues when the remote seller tenders delivery to its immediate purchaser, not when a subsequent seller tenders delivery to the beneficiary.\textsuperscript{123} This conclusion perhaps was not inevitable; as the dissent argued, the court could have construed tender of delivery to mean tender of delivery to the beneficiary.\textsuperscript{124} Nonetheless, the result is consistent with the principle that a beneficiary under N.Y.U.C.C. § 2-318 takes subject to defenses the remote seller has against the immediate purchaser.

In cases which fall within the exception for warranties which explicitly extend to future performance of the goods and discovery of the breach must await the time for such performance, the statute of limitations perhaps also begins to run against the beneficiary when it begins to run against the immediate purchaser. However, in such cases the immediate purchaser’s cause of action does not accrue until, within the time set for performance, the breach is or should have been discovered.\textsuperscript{125} In many instances the breach may not be discovered until the beneficiary is injured. Even after the 1975 amendment, N.Y.U.C.C. § 2-318 only extends a seller’s warranty to natural persons who suffer personal injury. It is silent as to the rights of corporations,\textsuperscript{126} and to recovery for property

\textsuperscript{122} Id. For an analysis of this exception, see Williams, The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC, 52 GEO. WASH. L. REV. 67 (1980).


\textsuperscript{124} Heller, 64 N.Y.2d at 413-16, 477 N.E.2d at 438-39, 488 N.Y.S.2d at 136-37 (Meyer, J., dissenting).

\textsuperscript{125} See supra note 122 and accompanying text.

damage and compensatory and consequential economic loss.127 When
the legislature amended N.Y.U.C.C. § 2-318 in 1975 to provide for
the essence of Alternative B, it did not adopt Alternative C, which
appears to extend a seller's warranty in such cases.128 The next section
discusses the extent to which remote purchasers and nonpurchasers
may recover for physical and economic loss as a matter of common
law.

2. Common Law Development Beyond N.Y.U.C.C. § 2-318

(a) Economic Loss and Injury to Property

Beyond N.Y.U.C.C. § 2-318, the issue of privity as a defense in
breach of warranty actions remains a matter of common law. The
common law rule in New York, as in many jurisdictions,129 is that a
direct sales contract or an equivalent relationship130 is required to

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127 See infra notes 249-50.

128 The official text of U.C.C. § 2-318, Alternative C, provides:
Third Party Beneficiaries of Warranties Express or Implied:1
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.


Note that this provision, taken literally, goes beyond the personal injury cases covered by
Alternatives A and B by extending a seller's warranty to any person, including corporations,
for any injury, including property damage or economic loss, if it is reasonable to expect such
person to use, consume or be affected by the goods. But see 1 J. White & R. Summers, supra
note 4, § 11-5, at 536 (arguing that the elimination of the words "injury to person" in Alternative
C does not necessarily authorize recovery of economic loss). However, except with respect to
personal injury, Alternative C's second sentence, by negative implication, permits a seller to
limit or exclude the operation of the section with respect to remote parties who suffer property

As of May 1, 1987, ten jurisdictions had adopted Alternative C or a similar provision, according
to Professors White and Summers. 1 J. White & R. Summers, supra note 4, § 11-5, at 533
n.19. However, at least one of the states listed has adopted the essence of Alternative A, see
ARK. STAT. ANN. § 4-2-318 (1987). The authors also report that several states had adopted
nonuniform provisions. 1 J. White & R. Summers, supra note 4, § 11-5, at 533 n.11.

Anderson LaRocca Anderson, 73 N.Y.2d 417, 424, 539 N.E.2d 91, 94, 541 N.Y.S.2d 335, 338
(1989) ("The long-standing rule is that recovery may be had for pecuniary loss arising from
negligent representations where there is actual privity of contract between the parties or a
relationship so close as to approach that of privity.").
recover for economic loss, \(^{131}\) including diminished value or cost to repair the defect\(^ {132}\) and consequential economic loss, \(^ {133}\) even though resulting from a breach of a seller's express\(^ {134}\) or implied warranty. \(^ {135}\)

New York law, however, is equivocal on the issue of whether a direct sales contract or an equivalent relationship is required for recovery of property damage resulting from a breach of warranty. A threshold question is where should the line be drawn between injury to property and economic loss. As noted, for purposes of strict products liability in tort, New York courts have drawn this line based on whether the injury results from a defective product proving unsafe to use, consume or be affected by the manufacturer or seller of goods could reasonably have expected the injured or damaged person to use, consume or be affected by the goods.\(^ {136}\) (dictum)).


\(^ {132}\) See, e.g., Chenango, 114 A.D.2d at 730, 494 N.Y.S.2d at 834; Steckmar, 89 Misc. 2d at 213, 415 N.Y.S.2d at 948, County of Westchester, 555 F. Supp. at 292.


\(^ {135}\) See supra notes 60-70 and accompanying text.

\(^ {136}\) See, e.g., 1 J. WHITE & R. SUMMERS, supra note 4, § 11-4, at 534-35 (asserting that injury to property in breach of warranty actions is equivalent to physical injury to property in strict products liability in tort actions). See also Chenango, 114 A.D.2d at 729-30, 494 N.Y.S.2d at 834 (damage to apparently unrelated roofing components resulting from defective roofing material's failing to perform as intended, unassociated with any accident, treated as economic loss.
is no basis for making such a distinction in breach of warranty actions. Under Article 2, a seller is liable for consequential damages resulting from breach of warranty, including injury to property, regardless of whether the breach relates to safety or performance. Thus, in breach of warranty actions, when the loss is to property other than the defective product itself, the damage should be deemed injury to property regardless of whether it results from an accident associated with the defective product proving unsafe, or whether it results from the defective product's simply failing to perform as intended, unassociated with any accident, and apart from whether the loss to the other property is characterized as physical damage or diminished value.

Thus, for example, if a defect in a harvesting machine causes a fire which destroys plaintiff's corn crop, the loss to the crop is characterized as physical injury to property and is recoverable in strict products liability in tort. On the other hand, if the loss to the crop results from the defect simply causing the machine to break down, preventing a timely and effective harvest, the loss is characterized as economic and is not recoverable in tort. However, in either case, the loss to the crop itself may be properly characterized as injury to property for purposes of breach of warranty. Profits lost from the sale of the crop would, of course, be economic loss.
If a line is to be drawn between injury to property and economic loss for purposes of breach of warranty, the place to draw it is at the defective product itself. Apart from whether the breach relates to safety or performance, damage to parts of the defective product itself, associated with the inherent nature of the defect, may properly be considered economic loss as relating to the diminished value of the product, while damage to parts of the defective product itself, which are unrelated to the defect, may be properly considered injury to property. Under this theory, injury to property for purposes of breach of warranty encompasses injury to property other than to the defective product itself, and injury to parts of the defective product which are unrelated to the inherent nature of the defect, regardless of the nature of the breach. Whether privity is required for recovery is, of course, a different question.

There are breach of warranty cases in New York which have required privity for recovery for injury to property as defined above. Some of these treated the injury to property as economic loss, others required privity even though the property damage resulted from the defective

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143 For example, in County of Westchester v. General Motors Corp., 555 F. Supp. 290 (S.D.N.Y. 1983), a defective air conditioning system in buses repeatedly failed causing damage to the air conditioning condensers, which were primary components of the system. Id. at 292. The court, applying New York law, apparently treated the damage to the condensers as economic for purposes of both strict products liability in tort and breach of express and implied warranties, on the theory that the loss suffered related to the inherent nature of the defect in the system itself. Id. at 292-93.

144 Cf. supra note 62 (treating physical damage to nondefective parts of defective product, resulting from an accident, as injury to property for purposes of strict products liability in tort).

145 Cf. supra note 61 (treating physical damage to property other than to the defective product itself, resulting from an accident, as injury to property for purposes of strict products liability in tort). But cf. supra note 70 and accompanying text (treating as economic loss, for purposes of strict products liability in tort, injury to other property caused by the deterioration or breakdown of the defective product or otherwise by the defective product's simply failing to perform as intended, unassociated with any accident).

146 See supra note 144.

147 But see supra note 137 (citing authorities which treat injury to property in breach of warranty actions as the equivalent to physical injury to property in strict products liability in tort actions).

148 See County of Chenango Indus. Dev. Agency v. Lockwood Greene Eng'rs, Inc., 114 A.D.2d 729, 494 N.Y.S.2d 832 (3d Dep't 1985), appeal dismissed, 67 N.Y.2d 757, 490 N.E.2d 1233, 500 N.Y.S.2d 1027 (1986); Antel Oldsmobile-Cadillac, Inc. v. Sirius Leasing Co., 101 A.D.2d 688, 475 N.Y.S.2d 944 (4th Dep't 1984). In Chenango, the court treated as economic loss damage to apparently unrelated roofing components caused by defective roofing materials' failing to perform as intended. 114 A.D.2d at 729-30, 494 N.Y.S.2d at 834. In Antel, the court apparently treated the erasure of stored computer data, resulting from the breakdown of a defective computer system, as economic loss for purposes of both strict products liability in tort and breach of warranty. 101 A.D.2d at 688-89, 475 N.Y.S.2d at 945. However, the court found privity based upon an agency relationship. Id. at 689, 475 N.Y.S.2d at 946.
product causing an accident and was therefore recoverable in strict products liability in tort.\textsuperscript{149}

There are also cases which have ostensibly required privity for recovery for property damage, but which factually appear to have involved economic loss rather than injury to property.\textsuperscript{150} In addition, some cases have denied recovery on grounds other than that injury to property as such is not recoverable in the absence of privity. Two based their decisions on the theory that privity is necessary to recover damages for breach of warranty as against a component parts seller;\textsuperscript{151}

\textsuperscript{149} See Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc., 57 A.D.2d 993, 394 N.Y.S.2d 744 (3d Dep't 1977). In Potsdam Welding, a seller supplied filtration equipment, including plastic tube settlers, to a water filtration plant. \textit{Id.} at 994, 394 N.Y.S.2d at 745. While the plaintiff was performing welding work, in connection with the construction of the plant, a spark fell on one of the tube settlers resulting in a fire which caused substantial damage to the plant. \textit{Id.} After settling claims, plaintiff's insurer brought an action in the plaintiff's name against the seller seeking indemnification based on the apparent theory that a defect in the settlers caused the fire which damaged the plant. \textit{Id.} The court held that the plaintiff had a cause of action against the seller based on strict products liability in tort, but had no cause of action based on breach of implied warranty in the absence of privity. \textit{Id.} at 995, 394 N.Y.S.2d at 746. However, if plaintiff's insurer paid a claim to the owner for damage to the plant allegedly caused by a breach of the seller's warranty, perhaps the insurer could have been subrogated to the rights of the owner who apparently did have a contract with the seller. See also Maure v. Fordham Motor Sales, Inc., 98 Misc. 2d 979, 982-83, 414 N.Y.S.2d 882, 884 (Civ. Ct. 1979) (action based on strict products liability in tort permitted to recover for injury to nondefective parts of defective property, but action for breach of implied warranty not permitted without privity); Smith v. Squire Homes, Inc., 38 A.D.2d 879, 879-80, 329 N.Y.S.2d 243, 245-46 (4th Dep't 1972) (strict products liability tort in action permitted against component parts manufacturer to recover for injury to property but no action for breach of warranty permitted against such defendant in absence of privity).


\textsuperscript{151} Smith v. Squire Homes, Inc., 38 A.D.2d 879, 880, 329 N.Y.S.2d 243, 245-46 (4th Dep't 1972) (no action permitted against manufacturer of defective furnace which caused damage to mobile home in which it was installed); Magnolia Indus., Inc. v. S. & S. Zipper Mfg. Co., 17 U.C.C. Rep. Serv. (Callaghan) 377, 378-79 (N.Y. Sup. Ct. 1975) (no action permitted against manufacturer of defective zippers which caused damage to handbags in which they were installed).

Both Magnolia Industries and Squire Homes relied on Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 592 (1963). In that pre-Code case, the administratrix of a passenger who died in an airplane crash sued the plane manufacturer and the manufacturer of the plane's altimeter to recover for breach of their implied warranties. \textit{Id.} at 435, 191 N.E.2d at 595. The court permitted the cause of action against the plane manufacturer, but as to the altimeter manufacturer the court held that "for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer . . . of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." \textit{Id.} at 437, 191 N.E.2d at 595. On its facts, Goldberg has been superseded by N.Y.U.C.C. § 2-318. See supra note 110 and accompanying text.
the other held that plaintiffs could not recover from a remote seller because they were "neither the purchaser nor (contemplated) user of the product" nor third party beneficiaries of a contracting party.152

On the other hand, there is some authority in the second department for the proposition that privity is not required to recover damages for injury to property resulting from breach of warranty. In one case, a defect in a product caused a fire which damaged plaintiffs' property.153 The court held the defendants liable "on the principle that a defect in a potentially hazardous product subjects the distributor-vendor and the manufacturer to liability to a purchaser for breach of implied warranties."154 However, in reaching this conclusion the court cited Goldberg v. Kollsman Instrument Corp.,155 which is a precursor of strict products liability in tort. Thus, it is unclear whether the action sounded in contract or in tort. Similarly, in a subsequent case, the court stated in dictum that "we do not agree with the trial court's conclusion that privity is necessary in a breach of warranty action against a remote manufacturer who made no express representations and where the plaintiff did not sustain personal injury but only property damage . . . ."156 This dictum is also problematic in that the court cited Codling v. Paglia,157 again making it unclear whether such an action can arise in contract as well as in tort.158

However, in a third case, the second department held that the lower court had erred in dismissing plaintiff's causes of action against a remote component parts seller "based upon breach of implied warranty and strict liability"159 since "a jury could find that the paper was inherently dangerous and not fit for use."160 This case is also

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154 Id.

155 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). In Goldberg, the court treated breach of warranty as "a tortious wrong." Id. at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594. See supra notes 42-44 and accompanying text.


159 Id. (emphasis added).
somewhat problematic since the remote component parts seller apparently made post-purchase representations concerning the product to the plaintiff. There is some authority for the proposition that such a relationship overcomes any lack of privity at the time of sale.

(b) Equivalent Relationships

(1) Express Warranty Under Randy Knitwear

Even where a direct sales contract is ostensibly a requirement for recovery of damages resulting from a breach of warranty, New York courts have sometimes found the required "privity" in other relationships. One of the most important cases in this regard is Randy Knitwear, Inc. v. American Cyanamid Co. In this pre-Code case, the court of appeals held that a remote purchaser could maintain an action against a manufacturer for breach of an express warranty to recover for economic loss notwithstanding the fact that the plaintiff did not buy the product directly from the manufacturer.

American Cyanamid (Cyanamid) expressly represented that fabrics treated with its chemical resins "Cyana" would not shrink. It made this representation in trade journals, in direct mailings, and on labels and tags designed to accompany "Cyana" treated garments. Relying on the representation, plaintiff purchased "Cyana" treated fabric from intermediate sellers and used it to manufacture children's clothes which it sold to its customers. When these clothes subsequently shrank and lost their shape from ordinary washing, plaintiff brought an action against Cyanamid based on breach of the express representation to recover for the damages it allegedly suffered.

A unanimous court of appeals held that Cyanamid's express representation, that "Cyana" treated fabrics would not shrink, extended to plaintiff notwithstanding the fact that he was a remote purchaser.
In reaching this result, the court reasoned that the privity defense was a court-created rule which it could modify for "modern-day needs" and in the interests of fairness and justice.\(^{169}\) The court emphasized that plaintiff purchased the fabric in foreseeable reliance on the representation.\(^{170}\) It pointed out that in the world of mass marketed goods, the warranty that often induces the sale is that made by sellers through advertising and labels to persons with whom there is no direct sales contact.\(^{171}\) In such cases, the court concluded, the user or consumer should not be limited "to warranties made directly to him by his immediate seller."\(^{172}\)

The court also noted that permitting a direct cause of action would conserve judicial resources by avoiding the "circuity of action" that might result if in the end the manufacturer would be liable for breach of its express warranty, but only after the remote purchaser sued its immediate seller, who then sued the manufacturer.\(^{173}\) On the other hand, the court noted that permitting a direct action would also avoid the injustice that could result if, despite the manufacturer's breach of its express warranty, the plaintiff could not recover from the manufacturer for lack of privity, and could not recover from the immediate seller, either because that person gave a more limited warranty than the manufacturer or because it disclaimed warranties entirely.\(^{174}\)

Although Randy Knitwear arose under the pre-Code Uniform Sales Act, New York courts have generally assumed that the decision remains good law today.\(^{175}\) This assumption seems well founded. Certainly, neither N.Y.U.C.C. § 2-313 nor § 2-318 affect the case

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\(^{169}\) Id. at 16, 181 N.E.2d at 404, 226 N.Y.S.2d at 370.

\(^{170}\) Id.

\(^{171}\) Id. at 12-13, 181 N.E.2d at 402-03, 226 N.Y.S.2d at 367-68.

\(^{172}\) Id. at 13, 181 N.E.2d at 402, 226 N.Y.S.2d at 368.

\(^{173}\) Id.

\(^{174}\) Id. at 14, 181 N.E.2d at 403, 226 N.Y.S.2d at 368-69.

since the former says as much in a comment\textsuperscript{176} and the latter is neutral on the extension of warranties.\textsuperscript{177}

In addition, although the representations in \textit{Randy Knitwear} were made in advertisements, direct mailings, and on garment tags and labels, the principles of the case presumably apply to any express representations concerning goods, which otherwise create an express warranty, that are made directly to a nonprivity purchaser, including those made in purchase orders, on cards or in warranty books that accompany the goods, or otherwise.\textsuperscript{178} Further, while it was unclear from the facts exactly what type of economic loss the remote purchaser in \textit{Randy Knitwear} sought to recover, the court did make it clear that the type of injury suffered is irrelevant to the cause of action.\textsuperscript{179}

\textsuperscript{176} N.Y. U.C.C. Law § 2-313 comment 2 (McKinney 1964). The New York version of the Uniform Sales Act defined an express warranty as “any affirmation of fact or any promise by the seller relating to the goods . . . if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.” UNIF. SALES ACT § 12, N.Y. PERS. PROP. LAW § 93 (repealed 1964). N.Y.U.C.C. § 2-313 dropped the requirement that the “affirmation . . . or . . . promise . . . induce the buyer to purchase the goods,” and that the buyer purchase “the goods relying thereon.” Instead, N.Y.U.C.C. § 2-313(1)(a) provides: “Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.” N.Y. U.C.C. Law § 2-313(1)(a) (McKinney 1964). The term “basis of the bargain” is ambiguous and its exact dimensions are unclear. However, N.Y.U.C.C. § 2-313. Official Comment 2 does make it clear that the change in language was not intended to affect cases such as \textit{Randy Knitwear}. The comment states in part:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract.

\textit{Id.} comment 2.

\textsuperscript{177} See N.Y. U.C.C. Law § 2-318 comment 3 (McKinney Supp. 1990); \textit{infra} text accompanying notes 249-68.


\textsuperscript{179} The court stated that:

The policy of protecting the public from injury, physical or pecuniary, resulting from
Thus, in an appropriate case an injured party may recover not only for economic loss, compensatory or consequential, but also for physical injury to person\textsuperscript{180} or to property.\textsuperscript{181}

Moreover, although \textit{Randy Knitwear} involved a remote purchaser, subsequent cases have extended a seller’s express warranty to non-purchasers who suffer injury resulting from use of a product.\textsuperscript{182} There

misrepresentations outweighs allegiance to an old and outmoded technical rule of law which, if observed, might be productive of great injustice.

Since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved.


\textsuperscript{181} Cf. \textit{Oddo} v. General Motors Corp., 22 U.C.C. Rep. Serv. (Callaghan) 1147, 1150 (N.Y. Sup. Ct. 1977) (quoting from \textit{Randy Knitwear}, court held that manufacturer could not avoid liability on theory of lack of privity with remote purchaser who sought rescission after electrical system burst into flames causing damage to new automobile within one hour of delivery).

\textsuperscript{182} County of Chenango Indus. Dev. Agency v. Lockwood Greene Eng’rs, Inc., 114 A.D.2d 728, 730, 494 N.Y.S.2d 832, 834-35 (3d Dep’t 1985) (remote seller’s express representations made in advertising and sales literature extended to building owner who hired contractor to install roofing material), appeal dismissed, 67 N.Y.2d 757, 490 N.E.2d 1233, 500 N.Y.S.2d 1027 (1986); \textit{Funk}, 23 A.D.2d at 771, 258 N.Y.S.2d at 554 (express representation that automobile was equipped with “safety windshield” extended to wife even though husband purchased the car); \textit{Tirino}, 72 Misc. 2d at 1008, 341 N.Y.S.2d at 65 (express representation on packaging extended to user of product regardless of who purchased it). Cf. \textit{Calabria}, 124 A.D.2d 514, 508 N.Y.S.2d 186; \textit{Unifiex}, Inc. v. Olivetti Corp. of Am., 86 A.D.2d 586, 445 N.Y.S.2d 993 (1st Dep’t 1982). In \textit{Calabria}, the court held that a deliveryman’s cause of action against a remote seller inter alia for breach of an express warranty printed on an injury-causing box was brought timely for purposes of the statute of limitations. 124 A.D.2d at 515-16, 508 N.Y.S.2d at 187-88. The court assumed that the cause of action arose under N.Y.U.C.C. § 2-318 and did not discuss whether such an action might also exist under \textit{Randy Knitwear}. In \textit{Unifiex}, the court found “privity” between the manufacturer of a computer system and the buyer’s lessee based in part on the assertion that the manufacturer’s agent made representations concerning the product to the lessee as part
is even authority for the proposition that a seller's express warranty can extend directly to nonusers of a product. In a pre-Code case, the plaintiff received a geologist's hammer as a gift. The manufacturer represented in advertising to the trade and on the neck of the hammer that it was unbreakable. While the plaintiff's father was using the hammer to open a rock, a chip of the hammer broke off and landed in the plaintiff's eye. The first department gave a number of reasons why the plaintiff might properly be characterized as a user rather than a nonuser. Nonetheless, in an alternative holding, the court held that the manufacturer's express warranty extended to the plaintiff even if he was considered a nonuser.

Although the court discussed Randy Knitwear, it also considered the breach of warranty to be a tortious wrong separate and apart from the sales contract; as such, the case is a precursor of strict

of a separate agreement. 86 A.D.2d at 539, 445 N.Y.S.2d at 965.

The following dictum in Randy Knitwear supports this result.

The manufacturer places his product upon the market and, by advertising and labeling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.

Randy Knitwear, 11 N.Y.2d at 13, 181 N.E.2d at 402-03, 226 N.Y.S.2d at 368 (emphasis added).

But cf. Butler v. Caldwell & Cook, Inc., 122 A.D.2d 559, 505 N.Y.S.2d 288 (4th Dep't 1986), appeal dismissed, 73 N.Y.2d 849, 534 N.Y.S.2d 321, 537 N.Y.S.2d 483 (1988). In Butler, the plaintiffs sued the builders of their homes for damages caused by defective siding and sheathing. The court upheld the dismissal of their action labeled "Express Warranty" because they failed to state the terms of the warranties and their reliance thereon. Id. at 560, 505 N.Y.S.2d at 290. However, the court also stated: "Also properly dismissed were the causes of action in favor of remote purchasers based on express warranties. No facts were pleaded indicating that the warranties were for the benefit of third parties." Id.


Id. at 92, 331 N.Y.S.2d at 825.

Id.

Id., 331 N.Y.S.2d at 826.

Id. at 95, 331 N.Y.S.2d at 828-29. The court thought the plaintiff could be characterized as a user since, as the owner he had a "nexus" to the product. Id., 331 N.Y.S.2d at 828. Furthermore, since the plaintiff was engaged with his father in finding and collecting rocks, the father's use of the hammer could constitute a joint use by father and son. Id., 331 N.Y.S.2d at 828-29. See also Pimm v. Graybar Elec. Co., 27 A.D.2d 309, 311, 278 N.Y.S.2d 913, 915 (4th Dep't 1967) (holding that plaintiff could be considered a "user" since the seller could have anticipated his relationship to the product).


Id. at 95-96, 331 N.Y.S.2d at 829-30.

Id., 331 N.Y.S.2d at 829.
products liability in tort.\textsuperscript{191} Furthermore, today the plaintiff would also have a cause of action for breach of the seller's express warranty under N.Y.U.C.C. § 2-318.\textsuperscript{192} Nonetheless, such a plaintiff is not precluded from also basing his cause of action on breach of express warranty under \textit{Randy Knitwear}.\textsuperscript{193} Certainly to the extent that an injured party is able to prove that his injury resulted from foreseeable reliance on express representations made by the seller in advertising, on the product itself, or otherwise, the policies underlying \textit{Randy Knitwear} seem to apply regardless of whether the plaintiff is a remote purchaser, user, or nonuser.

The court in \textit{Randy Knitwear} emphasized the fact that the plaintiff bought the goods in reliance on the manufacturer's representations.\textsuperscript{194} However, there is an argument that, at least under certain circumstances, a seller's express warranty made to remote parties is enforceable even in the absence of reliance. \textit{Randy Knitwear} arose under the pre-Code Uniform Sales Act which required reliance as an essential element for the creation of an express warranty.\textsuperscript{195} However, under the Code, a seller's express representation can create an express warranty if it becomes part of the "basis of the bargain."\textsuperscript{196} Thus, as section 2-313, Official Comment 3 states, reliance is no longer necessary for the creation of an express warranty.\textsuperscript{197} Rather, the

\textsuperscript{192} See supra notes 104-13 and accompanying text.
\textsuperscript{193} See supra notes 44-45.
\textsuperscript{195} See supra note 176.
\textsuperscript{196} N.Y. U.C.C. Law \textsection 2-313(1)(a) (McKinney 1964).
\textsuperscript{197} Id. \textsection 2-313 comment 3. Official Comment 3 provides that:

\textit{The present section deals with affirmations of fact by the seller . . . exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the}
comment suggests that once express representations are made they become part of the agreement, but that nonreliance is one fact that the seller may attempt to establish to take such representations, once made, out of the agreement. The issue is one of fact and requires clear, affirmative proof on the part of the seller.

Where a seller puts goods into the stream of commerce and makes express representations concerning them in advertisements, on labels or in documents that accompany the goods, or otherwise, the trier of fact might conclude that the seller intended to give the injured party the benefit of a warranty even in the absence of reliance. This would certainly seem to be the case where a seller encloses a warranty book inside packaging so that a purchaser cannot notice it until after the sale. What other reason can there be for putting warranty books inside packaging if the seller does not intend to give purchasers the benefit of an express warranty without reliance? If the trier of fact does conclude that the seller intended to give the injured party the benefit of a warranty even in the absence of reliance, then nonreliance is not a fact which can relieve the seller from liability for breach of its express representations. In addition, in an analogous case involving express warranties made in the sale of a business, the court of appeals recently held that once representations become part of a bargain, the fact that the buyer has doubts as to the existence of the facts represented does not necessarily relieve the seller of its responsibility to perform.

Finally, the theory of recovery in Randy Knitwear is different from

agreement requires clear affirmative proof. The issue normally is one of the fact. 
Id. (emphasis added).

In addition, see N.Y.U.C.C. § 2-313, Official Comment 7 which provides that:

The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).

Id. comment 7.
206 See id. comment 3.
207 Id. 
209 CBS, Inc. v. Ziff-Davis Publishing Co., 75 N.Y.2d 486, 503, 504, 553 N.E.2d 997, 1001, 554 N.Y.S.2d 449, 453 (1990) (holding on facts where buyer doubted truth of asserted facts after signing the sales agreement, but before closing, that reliance requires "no more than reliance on the express warranty as being a part of the bargain between the parties" and that "the fact that the buyer has questioned the seller's ability to perform as promised should not relieve the seller of his obligations under the express warranties").
the theory of recovery under N.Y.U.C.C. § 2-318. The theory of the statutory provision is that certain persons are third party beneficiaries of express and implied warranties made in the contract between a remote seller and its immediate purchaser. As such, the beneficiaries are subject to some of the same limitations that are enforceable against the immediate purchaser including disclaimers of warranty, limitations on remedy, and the running of the statute of limitations.

By contrast, the theory of *Randy Knitwear* seems to be that through advertisements, labels, and the like, the seller has made an express warranty directly to the injured party. The injured party’s rights, therefore, do not depend on the contract between the remote seller and its purchaser, and the injured party should not be subject to limitations that appear in that contract. Rather, the injured party should only be subject to limitations, such as disclaimers and limitations on remedy, which are made directly to him as part of the express warranty.

Furthermore, since the injured party’s rights do not depend on the contract between the remote seller and its immediate purchaser, the statute of limitations should not begin to run against him when it begins to run against the immediate purchaser. Instead, in cases falling within the general rule of N.Y.U.C.C. § 2-725, the statute of limitations should begin to run against a remote party upon tender of delivery to him. Tender of delivery occurs when the seller purports to be ready and able to perform all of its obligations.

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1 See *supra* notes 115-16 and accompanying text.
2 See *supra* notes 117-25 and accompanying text.
3 See *supra* notes 164-74 and 178 and accompanying text.
4 See *supra* notes 120-25 and accompanying text.
5 N.Y. U.C.C. LAW § 2-725(2) (McKinney 1964).
6 Tender of delivery is not defined in N.Y.U.C.C. § 2-725. However, N.Y.U.C.C. § 2-503 deals with the manner of seller’s tender of delivery. The section states that: “Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article . . . .” *Id.* § 2-503(1).
7 This does not define tender of delivery as such; rather, it sets out the manner of seller’s tender of delivery to a buyer. However, a comment explains that in Article 2 the term “tender” is used in two senses. “In one sense it refers to ‘due tender’ which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed.” *Id.* § 2-503 comment 1. In addition, “it is used to refer to an offer of goods . . . under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation.” *Id.* However, “[u]sed in either sense, . . . ‘tender’ connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner.” *Id.* Although neither N.Y.U.C.C. § 2-503 nor its comments deal explicitly with the case of a seller making a warranty directly to remote parties, the section does suggest, as asserted in the text, that a seller tenders when it purports to be ready and willing to perform all of its obligations.
seller’s express warranty extends directly to a remote purchaser, the seller seems to purport to perform all of its obligations to the purchaser when that person purchases the product, not when the remote seller tenders delivery to its immediate purchaser. Similarly, where a seller’s express warranty extends to nonpurchasers, the seller seems to purport to perform its obligations to a user of the product when the user takes possession of the goods, and against a nonpurchaser when that person suffers injury caused by the goods.\footnote{Defining tender of delivery as suggested does make a seller’s period of exposure to liability vary depending on when a remote purchaser purchases the product, when a user takes possession, and when a nonuser suffers injury. Such variation, however, results principally from the seller having made a warranty that extends to remote purchasers and nonpurchasers, not because of jurisdictional variations as to the period of limitations.} Defined tender of delivery as suggested does make a seller’s period of exposure to liability vary depending on when a remote purchaser purchases the product, when a user takes possession, and when a nonuser suffers injury. Such variation, however, results principally from the seller having made a warranty that extends to remote purchasers and nonpurchasers, not because of jurisdictional variations as to the period of limitations.\footnote{An analogous result should obtain in cases which fall within the exception for warranties that explicitly extend to future performance of the goods and where discovery of the breach must await the time for such performance. In such cases, the cause of action for breach of warranty accrues when, within the time set for such performance, the breach is or should have been discovered. Where a seller makes an express warranty that extends directly to a remote plaintiff, this exception should be interpreted to mean when, within the time set for such performance, the breach is or should have been discovered by the injured party.}

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(2) Other Relationships

In addition to express warranties under Randy Knitwear, New York courts have sometimes found the required privity based on agency, assignment, third party beneficiary, and other relationships.\footnote{Even under pre-Code law, a seller’s warranty extended to his buyer’s undisclosed principal. Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 211 N.Y. 68, 155 N.E. 88 (1914) (Cardozo, J.).}
recent decisions have permitted lessees under lease and lease sales agreements to bring causes of action against remote sellers on various theories, including that: (1) the nominal lessor acted as the seller's agent;\(^{213}\) (2) the remote seller's authorized agent made express representations to the lessee about the goods as part of a separate agreement;\(^{214}\) (3) the seller promised the lessor in the sales contract to give the lessee the benefit of its warranties, thus making the lessee a third party beneficiary of the sales contract;\(^{215}\) (4) the lessor assigned the seller's express warranty to the lessee in the lease agreement;\(^{216}\)

of implied warranty. \textit{Id.} at 71-72, 105 N.E. at 90. Pre-Code law also applied agency and third party beneficiary theories to permit actions for breach of warranty by family members against the buyer's immediate seller, to recover for personal injury resulting from food purchased by the buyer. The seminal decision on agency theory was \textit{Ryan v. Progressive Grocery Stores, Inc.}, 255 N.Y. 388, 175 N.E. 105 (1931) (Cardozo, C.J.). Where agency theory did not easily apply, as in a parent acting as agent for its injured infant, a few cases held that the child was a third party beneficiary of the contract between the parent and the immediate seller. See, e.g., \textit{Parish v. Great Atl. & Pac. Tea Co.}, 13 Misc. 2d 33, 62-63, 177 N.Y.S.2d 7, 36-37 (N.Y. Mun. Ct. 1958); \textit{Singer v. Zabelin}, 24 N.Y.S.2d 962, 967 (N.Y. City Ct. 1941).

Shortly before New York's adoption of the Code, the court of appeals simply held that to avoid "injustice and impracticality . . . [a]t least as to food and household goods, the presumption should be that the purchase was made for all the members of the household." \textit{Greenberg v. Lorena}, 9 N.Y.2d 195, 209, 173 N.E.2d 772, 775-76, 213 N.Y.S.2d 39, 42 (1961).

In \textit{Antel Oldsmobile-Cadillac, Inc. v. Sirius Leasing Co.}, 101 A.D.2d 688, 476 N.Y.S.2d 944 (4th Dep't 1984). In \textit{Antel}, the lessee alleged that the manufacturer sold the equipment to the lessor "as part of a total transaction with [the lessor acting] as a conduit, instrumentality and/or agent of [the manufacturer] and [the lessee] was required to pay sales tax on the equipment . . . ." \textit{Id.} at 689, 475 N.Y.S.2d at 945-46.

In \textit{Uniflex, Inc. v. Olivetti Corp. of Am.}, 86 A.D.2d 538, 445 N.Y.S.2d 993 (1st Dep't 1982). In \textit{Uniflex}, the lessee brought an action against the manufacturer of a leased computer system to recover for damages resulting from the computer's failing to perform as intended. \textit{Id.} at 538, 445 N.Y.S.2d at 995. The court held that the manufacturer's agent's separate express agreement established privity with the manufacturer for purposes of the lessee's cause of action labeled breach of contract. \textit{Id.} at 539, 445 N.Y.S.2d at 995. It is unclear from the opinion whether the court also held that the separate agreement established privity for purposes of the lessee's cause of action labeled breach of implied warranty. See \textit{id}. For another case which may stand for the proposition that a seller's express warranty made directly to a remote party establishes privity for purposes of an implied warranty, see \textit{Brandt & Brandt v. Porsche/Audi Manhattan, Inc., N.Y.L.J.}, Oct. 31, 1986, at 12, col. 5 (N.Y. Sup. Ct. 1986). \textit{Aff'd}, 130 A.D.2d 986, 514 N.Y.S.2d 920 (1st Dep't 1987), discussed \underline{infra} note 216; for cases reaching a contrasting result, see \underline{infra} note 217.

\(^{214}\) \textit{Uniflex}, 86 A.D.2d at 539, 445 N.Y.S.2d at 995.

\(^{215}\) \textit{Stuart Becker & Co. v. Steven Kessler Motor Cars, Inc.}, 135 Misc. 2d 1069, 1072-73, 517 N.Y.S.2d 692, 695 (Sup. Ct. 1987). See also \textit{Brandt, N.Y.L.J.}, Oct. 31, 1986, at 12, col. 5. In \textit{Brandt}, the court held that a remote seller's express warranty made to the lessor, as a remote purchaser of the vehicle, extended to the lessee, who subsequently exercised an option to purchase, because the lessor had assigned its warranty rights to him in the lease agreement. \textit{Id.} The court apparently also held that the remote seller's implied warranty extended to the lessee through the assignment in the lease. \textit{Id.}, col. 6. However, the assignment in the lease only gave the lessee the rights its lessor had against the remote seller; and as against the remote seller, the lessor presumably had no rights based on an implied warranty in the absence of privity. \textit{Id.} Perhaps the court meant to say that the assignment in the lease gave plaintiff such
and (5) the lessor and the lessee "should properly be viewed as a single unit for purposes of avoiding the doctrine of privity." Nonetheless, other decisions have denied lessees breach of warranty actions against remote sellers for a lack of privity.

There are also cases which have applied similar theories in construction contracts to permit owners a breach of warranty action against their contractors' immediate seller to recover for losses resulting from goods purchased for the job. A recent case held that a contractor purchased the goods as agent for the owner; and there is a pre-Code case which suggests that an owner can be a third party beneficiary of the contract between a contractor and its seller. However, one recent case denied an owner an action for breach of an implied warranty against a remote seller without any discussion of whether the contractor purchased the goods as the owner's agent, or whether the owner was a third party beneficiary of any contract that existed between the seller and the contractor. In addition, another recent case rejected the plaintiffs' theory that they were in rights against the remote seller as the lessor had, whatever those rights might be. Or, perhaps the court thought that the remote seller's express warranty made to the lessor in and of itself established privity for purposes of the implied warranty.

Carbo Indus., Inc. v. Becker Chevrolet, Inc., 112 A.D.2d 336, 340-41, 491 N.Y.S.2d 786, 790 (2d Dep't), appeal dismissed, 66 N.Y.2d 1035, 499 N.Y.S.2d 1030 (1985). In Carbo, the court held that the manufacturer's express warranty, and the dealer's express and implied warranties, which were made to the lessor as purchaser, extended to the lessee. Id. at 338-40, 491 N.Y.S.2d at 789-90. However, neither the lessor nor the lessee were permitted a cause of action to recover economic losses against the manufacturer for breach of an implied warranty for a lack of privity. Id. at 340-41, 491 N.Y.S.2d at 790. In Stuart Becker, a manufacturer sold a vehicle to a dealer, who apparently sold it to a lessor, who leased it to a lessee. 135 Misc. 2d at 1070, 517 N.Y.S.2d at 693. The court held that the manufacturer's implied warranty extended to the lessee on the ground that the lessor and the lessee should be viewed as a "single unit" to avoid application of the doctrine of privity. Id. at 1073, 517 N.Y.S.2d at 695. In reaching this result, the court apparently also treated the lessor and the dealer as a single unit based on the assertion that they were "associated." Id. at 1070, 517 N.Y.S.2d at 693.


privity with certain manufacturers of building materials because the builders, with whom the plaintiffs were in privity, acted as agents for the manufacturers. The court, without explanation, stated that the facts were distinguishable from other cases in which an agency relationship had been established.

Beyond the cases discussed above, there are at least two New York decisions which may stand for the proposition that an express representation made to a remote party establishes privity for the purposes of an implied warranty. There is also another decision which avoided the privity defense as to implied warranties on the ground that a manufacturer's post-purchase registration card, issued to a remote purchaser, overcame any lack of privity with respect to the original purchase.

On the other hand, it has been held that the mere fact that a remote seller uses a subsequent seller as an agent for purposes of warranty repair does not, in of itself, create a privity relationship between the ultimate purchaser, and either the remote seller or the seller making the repairs. There are also cases which have implicitly held that the warranties of manufacturers and intermediate sellers do not extend to ultimate purchasers merely because a product is purchased from the manufacturer's authorized dealer.

However, where a manufacturer uses intermediate sellers as part of a mass marketing strategy to sell goods to ultimate purchasers, it would seem that the intermediate sellers act as a conduit for the

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223 Id. The court said that the case was distinguishable from Utica, 106 A.D.2d 863, 864, 483 N.Y.S.2d 540, and Antel Oldsmobile-Cadillac, Inc. v. Sirius Leasing Co., 101 A.D.2d 688, 475 N.Y.S.2d 944 (4th Dep't 1984). For a discussion of these cases, see supra notes 213 and 219 and accompanying text.
227 Luciano v. World-Wide Volkswagen Corp., 127 A.D.2d 1, 4, 514 N.Y.S.2d 140, 142 (3d Dep't 1987).
228 See, e.g., Pronti v. DML of Elmira, Inc., 103 A.D.2d 916, 917, 478 N.Y.S.2d 156, 157 (3d Dep't 1984); Miller, 99 A.D.2d at 454, 471 N.Y.S.2d at 282; Hole v. General Motors Corp., 83 A.D.2d 715, 716, 442 N.Y.S.2d 638, 640 (3d Dep't 1981); Ayanru v. General Motors Acceptance Corp., 130 Misc. 2d 440, 443, 495 N.Y.S.2d 1018, 1021 (Civ. Ct. 1985); Falker, 119 Misc. 2d at 378-79, 463 N.Y.S.2d at 369. See also Brandt, N.Y.L.J., Oct. 31, 1986, at 12, col. 5-6 (privity could not be based on theory that an agency relationship existed between automobile dealer and distributor and importer of vehicle since each were separate, independent entities).
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manufacturer and as its agent for purposes of sale. An argument can also be made that in such cases an ultimate purchaser is a third party beneficiary of warranties made by the manufacturer and intermediate sellers relating to product performance. Certainly, a seller's warranty extends to persons the parties to a sales contract intend to benefit. Where a manufacturer and intermediate sellers, as part of a mass marketing scheme, warrant in sales contracts among themselves that the product has certain performance characteristics, it seems reasonable to conclude that the parties intend not only to benefit themselves, but also to benefit the ultimate purchaser: the very person they wanted to buy the product and, as the only person in the chain of distribution to use it, the principal person concerned with warranties relating to its performance.

Where an injured party's breach of warranty action against a remote seller depends on a relationship with some other person, to whom the seller's warranty directly extends, the statute of limitations presumably begins to run when it begins to run against the other party.

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[229] See Miller, 99 A.D.2d at 455, 471 N.Y.S.2d at 283 ("The plaintiff should have the opportunity of demonstrating that customers, although dealing with a franchised agent, are, for practical purposes, relying on and dealing with the manufacturer.") (Kupferman, J.P., dissenting); Hyde v. General Motors Corp., N.Y.L.J., Oct. 30, 1981, at 5, col. 3, col. 4 & at 6, col. 1 (N.Y. Sup. Ct. 1981) (denying remote seller's motion to dismiss for lack of privity based partly on buyer's assertion that it bought the product from seller's authorized dealer).


[231] A threshold question in lease cases is which statute of limitations applies. Warranties analogous to those in sales contracts may arise between parties to a lease agreement. See Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., 58 A.D.2d 482, 396 N.Y.S.2d 427 (2d Dep't 1977); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (Civ. Ct. 1969), rev'd on other grounds, 64 Misc. 2d 910, 316 N.Y.S.2d 535 (App. Term 1970), and cases cited therein. The six-year statute of limitations for contracts in general applies between the lessor and lessee where the transaction between them is a true lease. Owens v. Patent Scaffolding Co., 50 A.D.2d 886, 886, 376 N.Y.S.2d 948, 949 (2d Dep't 1975), But cf. U.C.C. § 2A-506 (1989) (providing for a four-year statute of limitations in lease transactions; Article 2A has not yet been adopted in New York). On the other hand, the Code's four-year statute of limitations applies between the lessor and lessee if the transaction between them is a disguised sale. See Industralease Automated & Scientific Equip. Corp., 58 A.D.2d at 486-87, 396 N.Y.S.2d at 430. However, where a lessee is suing a remote seller for breach of sales warranties made in a sales contract, the Code's four-year statute of limitations should apply regardless of whether the transaction between the lessee and the lessor is a true lease or a disguised sale. But see Uniflex, 86 A.D.2d at 539, 445 N.Y.S.2d at 995 (apparently holding that whether the Code's four-year statute of limitations or the six-year statute of limitations for contracts in general applies to lessee's action against a remote seller for breach of its sales warranties depends on whether the lease between the lessor and lessee is a true lease or a disguised sale); Antel Oldsmobile-Cadillac, Inc. v. Sirius Leasing Co., 101 A.D.2d 688, 689, 475 N.Y.S.2d 944, 945-46 (4th Dep't 1984) (applying the six-year statute of
In addition, the injured party presumably also takes subject to disclaimers of warranty and limitations on remedy which are enforceable against the other person.

3. The Effect of the Magnuson-Moss Act on the Privity Defense in Breach of Warranty Actions

There is a split of authority on the effect of the federal Magnuson-Moss Act\(^{222}\) on the privity defense in breach of warranty actions. Clearly, the privity defense is inconsistent with the intent of the Act. Congress intended to protect consumers from being misled by written warranties which appear to grant warranty protection, but which in reality narrow such protection by disclaiming or modifying implied warranties.\(^{223}\) Thus, the Act provides in sections 2308 and 2304(a)(2) that a "supplier"\(^{224}\) with respect to a "limited warranty,"\(^{225}\) or other "warrantor"\(^{226}\) with respect to a "full . . . warranty,"\(^{227}\) who makes a "written warranty"\(^{228}\) to a "consumer"\(^{229}\) in connection with a "consumer product"\(^{230}\) may not, with one exception, disclaim or modify any implied warranty with respect to the product.\(^{241}\) However, the privity defense has the effect of a disclaimer and is therefore contrary to the policy of the Act. As a result, some courts, including one in New York, seem to have concluded that within the scope of the Act a written warranty made by a supplier to a consumer in connection with a consumer product establishes privity for purposes of implied warranties as a matter of federal law.\(^{242}\)

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\(^{223}\) Id. § 2301(4) (1988).

\(^{224}\) Id. § 2303(a)(2).

\(^{225}\) Id. § 2301(5).

\(^{226}\) Id. § 2303(a)(1).

\(^{227}\) Id. § 2301(6).

\(^{228}\) Id. § 2301(3).

\(^{229}\) Id. § 2301(1).

\(^{230}\) The exception is that a "supplier" who gives a "limited warranty" may limit the duration of implied warranties to the duration of any written warranty. See id. §§ 2303(a), 2304(a)(2), 2308(a), (b).

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Other courts, including another in New York, have concluded that the Magnuson-Moss Act defers to state common law privity rules.\(^\text{243}\) This interpretation is consistent with the literal wording of the statute. The Act defines an implied warranty as “an implied warranty arising under State law (as modified by sections 2308 and 2304(a)).”\(^\text{244}\) It further states that “[n]othing in this chapter . . . shall . . . supersede any provision of State law regarding consequential damages for injury to the person or other injury.”\(^\text{245}\) Thus, the Act clearly defers to state law regarding implied warranties except as modified in sections 2304 and 2308.\(^\text{246}\) Sections 2308 and 2304(a)(2) prohibit “suppliers” and other “warrantors” from disclaiming or modifying implied warranties in certain cases.\(^\text{247}\) On their face, however, these sections do not purport to prohibit courts from imposing the equivalent of a disclaimer in form of a privity requirement. As the Senate Commerce Committee Report states with respect to section 2308, “implied warranties, created by operation of law, can only be limited by operation of law and not ‘expressly or impliedly’ by an express warranty.”\(^\text{248}\) Nonetheless, since privity is a common law rule which is inconsistent with the policy of the Act, it makes sense for state courts to abolish the requirement in cases falling within its scope.


The reason most often given in New York cases for requiring privity for recovery for injury to property\(^\text{249}\) and economic loss\(^\text{250}\) is

\(^{\text{245}}\) Id. § 2301(7) (1988).
\(^{\text{246}}\) Id. § 2311(1)(b).
\(^{\text{247}}\) Id. §§ 2304(a)(2), 2308.
\(^{\text{248}}\) Id.
that N.Y.U.C.C. § 2-318 only extends a seller's warranty to non-privity plaintiffs in personal injury actions.\(^\text{251}\) However, N.Y.U.C.C. § 2-318 is neutral on the extension of warranties beyond the statutory minimum;\(^\text{252}\) it neither overrules pre-Code cases such as Randy Knitwear,\(^\text{253}\) which extend a seller's express warranty beyond personal injury actions, nor does it prevent courts from expanding the rights of nonprivity plaintiffs in the future.\(^\text{254}\)

When New York originally adopted the Code, the official text of section 2-318, now Alternative A, only extended a seller's warranty to a narrow class of persons in horizontal privity with the immediate purchaser—natural persons in his family or household and guests in his home—who suffered personal injury.\(^\text{255}\) However, Official Comment 3 explicitly stated: "Beyond this, the section 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."\(^\text{256}\) This comment makes it clear that section 2-318 was intended to be neutral as to the extension of a seller's warranty to remote purchasers. However, the language “warranties, given to his buyer, who resells” is perhaps somewhat equivocal on the issue of the extension of a seller's warranty to non-purchasers, for example employees, who are in horizontal privity with a buyer who does not resell.\(^\text{257}\) Nonetheless, the Editorial Board Note

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\(^{252}\) See infra notes 253-68 and accompanying text.


\(^{254}\) See Falker, 119 Misc. 2d at 379, 463 N.Y.S.2d at 369 (stating, in dictum, that N.Y.U.C.C. § 2-318 and related sections support the elimination of privity requirements in property damage and economic or commercial loss cases); Mendelson v. General Motors Corp., 105 Misc. 2d 345, 348, 432 N.Y.S.2d 132, 134 (Sup. Ct. 1980) ("Although [N.Y.U.C.C. § 2-318] removes the privity bar only where the plaintiff is 'injured in person,' it has been said that it does not prevent the courts from abolishing the vertical privity requirement when a nonprivity buyer seeks recovery for direct economic loss. However, the courts in New York have not done so." (citation omitted)), aff'd, 81 A.D.2d 831, 441 N.Y.S.2d 410 (2d Dep't 1981). But see supra notes 129-62 & 249-51 and infra notes 269-70 and accompanying text (discussing the privity requirement in economic loss and injury to property cases in New York).


\(^{256}\) Id. comment 3.

\(^{257}\) Cf. Szrama v. Alumo Prods. Co., 118 Misc. 2d 1008, 1010, 462 N.Y.S.2d 156, 158 (Sup. Ct. 1983) ("By this comment [3], it is clear that old section 2-318 was a limitation only with regard to horizontal privity, and any case law existing with regard to vertical privity would be unaffected.")
on the 1966 amendment to U.C.C. § 2-318 is written as if the section was designed to be neutral as to the developing case law generally. 258

Furthermore, the Permanent Editorial Board did not intend to affect the neutrality of the section when it amended the official text in 1966 to provide for Alternatives B and C. 259 Alternative B, upon which present New York law is based, extends a seller's warranty to natural persons, whether remote purchasers or nonpurchasers, who suffer foreseeable personal injury; 260 while Alternative C appears to extend a seller's warranty to persons, natural or corporate, who suffer any foreseeable injury—personal injury, property damage, or economic loss. 261 The amendment also made conforming changes to the official comments. 262

Although amended Official Comment 3 only refers to Alternative A as being neutral, 263 the 1966 amendment should not be read as affecting the neutrality of the section generally. The amendment clearly resulted from the fact that a number of states had enacted nonuniform versions of section 2-318. 264 The Editorial Board hoped that offering alternative provisions would prevent the adoption of separate variations among the states. 265 Thus, their concern in promulgating the changes was with achieving uniform language, not with achieving a uniform result.

In addition, the New York Legislature's 1975 amendment to N.Y.U.C.C. § 2-318 should not be viewed as in any way affecting the
neutrality of the section. The legislative purpose in enacting the 1975 amendment was to expand the rights of plaintiffs in personal injury actions who did not have a cause of action under the literal wording of the original version of the section. This is made clear by the memorandum of the amendment’s Assembly sponsor, which states in part: “The purpose of this bill is to extend more intelligently the warranty provided to a purchaser of goods under the [Code]. Present law provides that the warranty shall extend to the purchaser, his family, or guests in his home. This is too limited.”

The amendment, of course, adopted the essence of Alternative B rather than Alternative C. Nonetheless, the legislative history supports the conclusion that the amendment was limited to expanding the rights of persons under the statutory provision. There is nothing to indicate that in adopting the essence of Alternative B, rather than Alternative C, the legislature intended to restrict the rights of plaintiffs by overruling pre-Code cases or otherwise interfering with judicial authority to expand the rights of nonprivity plaintiffs as a matter of common law.

In addition to N.Y.U.C.C. § 2-318, another reason given in New York for requiring privity is the technical point that since an action for breach of warranty is a contractual remedy which seeks to give the parties the benefit of their bargain, there can be no warranty in the absence of a contractual relationship. A related reason given is that “[t]o extend the seller’s implied warranty to remote parties not in privity . . . would impair traditional rights of parties to make their own contract and discard the principle that a buyer should pick his seller with care and recover any economic loss from that seller.”

III. TOWARDS A SELLER’S LIABILITY FOR FORESEEABLE INJURY

A. Professor Speidel and the Extension of a Seller’s Implied Warranty of Merchantability to Remote Purchasers Who Suffer Economic Loss

The Study Group is in agreement that a major revision of U.C.C. § 2-318 is required, and that whatever the revision, a seller’s liability

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366 See supra notes 103 and 128 and accompanying text.
367 Memorandum of Assemblyman Silverman, supra note 266, at 110.
to remote parties for breach of warranty should not depend on the type of injury suffered, i.e., the same result should obtain regardless of whether the loss is injury to person, injury to property, or economic loss.271 There is, however, disagreement as to exactly what revision is required.

Some members of the Study Group believe that privity should be required in all breach of warranty actions, even where the loss is personal injury.272 No reasons are given in the Preliminary Report to support this position. Nonetheless, there is apparent agreement that even if this view prevails, courts should continue to have the power to define what relationships beyond direct sales contracts amount to privity, at least as to remote purchasers.273 The Preliminary Report explicitly contemplates a cause of action where a seller makes an express warranty directly to a remote purchaser which forms the basis of a bargain between them;274 and in cases where a remote purchaser is a true third party beneficiary of a seller's warranty, or is an assignee of a seller's warranty made directly to his assignor.275 However, the Preliminary Report also contemplates that under this view "a remote seller should be able to exclude or limit liability to its dealer through an appropriate clause, regardless of the type of injury suffered by the ultimate purchaser."276

Other members of the Study Group believe that the privity defense should be entirely abolished as to the implied warranty of merchantability against remote purchasers.277 Professor Speidel, the Project Director of the Study Group and the principal drafter of the Preliminary Report, has provided the rationale for this position in an excellent article.278 Although his article is ostensibly addressed to recovery for economic loss, his reasoning applies regardless of the type of injury sustained.

One of Professor Speidel's principal objections to the privity defense in economic loss cases is that it puts "large investments made by both commercial and consumer buyers . . . potentially at risk."279 He concludes, however, that apart from privity "a manufacturer or producer owes a duty to foreseeable commercial or consumer purchasers

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272 Id. at 33-34.
273 See id. at 34.
274 Id. at 32.
275 Id. at 33-34.
276 Id. at 34.
277 Id. at 34-35.
278 Speidel, supra note 7.
279 Id. at 37.
to furnish through the distributional chain goods of at least mer­chantable quality, as that duty is defined and limited by Article 2."

Professor Speidel’s basic theoretical point is that warranty liability need not be based on privity, real or supposed. Rather, it can be based on the reality of “overlapping and continuing exchange relationships” which exist “in an indirect marketing system . . . vertically among manufacturers, distributors, and purchasers, and horizontally among insurance carriers and others who encounter the product or deal with the parties to the sale or lease.” He argues that based on such a “relational perspective,” courts can “construct a ‘bargain of sorts’ between remote sellers and buyers” which permits warranty liability without privity even in the absence of a revision of U.C.C. § 2-318.

Many of Professor Speidel’s specific points are consistent with the reasoning in New York decisions. In Codling v. Paglia, the court of appeals predicated strict products liability in tort on the fact that manufacturers are in the best position to know and understand when goods are suitably designed and safely made for their intended purpose. Thus, liability is imposed on manufacturers, and others in the chain of distribution, in order to encourage the manufacture and marketing of safe products which do not expose persons or their property to unreasonable risks of physical harm.

Professor Speidel argues that a similar policy justifies extending a seller’s implied warranty of merchantability to remote purchasers in economic loss cases apart from any privity requirement. He notes that merchant sellers, particularly manufacturers, are not only in the best position to know and understand when goods are safe for their intended purpose, but are also in the best position to know and understand when goods are fit to perform in their intended manner so as to avoid economic loss to the ultimate purchaser. In economic analysis terms, “[a]s the person in control of the goods, the merchant seller, not the commercial buyer or even the retailer, is the ‘least-cost-loss-avoider.’” Thus, he argues, extending the seller’s mer-
chantability warranty provides needed "incentives for the manufacturer to improve both fitness and safety." Further, "[t]he failure of the seller to take this precaution will increase, rather than minimize, the joint costs of loss avoidance and the actual losses caused." Thus, "the outcome will be inefficient because the manufacturer, who is in the best position to do so, failed to take cost-effective steps to conform the goods to the applicable standard of merchantability." In addition, although Professor Speidel does not appear to address this point directly, presumably purchasers are willing to pay a higher cost per unit for goods for the added assurance that products are not only safe, but are also at least merchantable.

Professor Speidel's reasoning is also consistent with Randy Knitwear, Inc. v. American Cyanamid Co. All members of the Study Group support warranty liability where a seller makes express representations directly to a remote purchaser which forms the basis of a bargain between them. In Randy Knitwear, the court of appeals permitted such an action in favor of a remote purchaser who suffered economic loss resulting from foreseeable reliance on a manufacturer's express representation made in advertisements, and on labels and tags designed to accompany the goods.

Professor Speidel argues in effect that the implied warranty of merchantability has "a strong representational component" which is analogous to an express warranty. His point is that when the merchantability warranty is not disclaimed, "[t]he relational perspective fosters the conclusion that by putting described and advertised products in the distributive chain at a competitive price, a merchant seller represents to all foreseeable purchasers that the goods are, at least, merchantable." He also argues that reliance is neither required, realistic, nor nec-
necessary to impose implied warranty of merchantability liability on remote sellers.\textsuperscript{300} He notes that U.C.C. § 2-314(1) neither requires reliance for the creation of the merchantability warranty nor limits the warranty to persons who have a direct contract with the seller.\textsuperscript{301} He points out that “proof of reliance by the buyer in complex markets is an unrealistic requirement . . . . [given] the risk of poor information processing by ordinary purchasers.”\textsuperscript{302} Additionally, he argues that reliance is not necessary to impose warranty liability on sellers since such liability may be based on the fact that the seller made the representation in furtherance of its own economic activity, from which it benefited when the goods were sold to the ultimate purchaser.\textsuperscript{303}

In addition, Professor Speidel notes that eliminating the privity defense, as to the merchantability warranty against remote purchasers, would avoid the circuity of action that might result if the ultimate purchaser can recover from its seller, who then seeks to recover from the manufacturer.\textsuperscript{304} He also points out that eliminating the defense in such actions would prevent the unjust enrichment that might result where a manufacturer receives and retains a “sound price” from an intermediate seller with whom it has privity, for goods warranted as merchantable but which are not, and the ultimate purchaser cannot recover from its seller because of disclaimers or insolvency, and cannot recover from the manufacturer because of a lack of privity.\textsuperscript{305} He further argues that eliminating the privity defense would advance the policy of securing a fair exchange between the parties by “insur[ing] that there is a rough equivalence between the price paid and the quality actually supplied”\textsuperscript{306} and would lessen “the risk that the manufacturer will, behind the privity barrier, engage in forms of unprovable fraud in the manufacture and distribution of goods.”\textsuperscript{307}

Professor Speidel also addresses the arguments against the abolition of the privity defense. Recall that in \textit{Schiavone Construction Co. v. Elgood Mayo Corp.},\textsuperscript{308} Justice Silverman gave two policy reasons for not extending the principles of strict products liability in tort to

\begin{itemize}
  \item \textsuperscript{300} Id. at 42-44.
  \item \textsuperscript{301} Id. at 42.
  \item \textsuperscript{302} Id. at 43; see also Whitman, \textit{Reliance as an Element in Product Misrepresentation Suits: A Reconsideration}, 35 Sw. L.J. 741 (1981) (identifying factors which make a reliance requirement "antiquated").
  \item \textsuperscript{303} Speidel, \textit{supra} note 7, at 43-44.
  \item \textsuperscript{304} See id. at 46-47; \textit{supra} note 173 and accompanying text.
  \item \textsuperscript{305} Speidel, \textit{supra} note 7, at 46. \textit{See supra} note 174 and accompanying text.
  \item \textsuperscript{306} Speidel, \textit{supra} note 7, at 45.
  \item \textsuperscript{307} Id. at 47.
  \item \textsuperscript{308} 81 A.D.2d 221, 439 N.Y.S.2d 933 (1st Dep't 1981), rev'd, 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720 (1982).
\end{itemize}
include recovery for economic loss: that there is room in the market for goods of varying quality and that such an action might result in manufacturers being held liable for extensive and unforeseeable losses. These are legitimate concerns in a tort action where liability is imposed as a matter of social policy, damages are designed to put injured parties in the position they occupied prior to the injury, and a seller's ability to limit or disclaim liability is drastically curtailed.

Professor Speidel acknowledges that the concern that remote sellers might be liable to "to unforeseeable buyers for unlimited amounts of economic loss" creates "practical obstacles" to elimination of the privity defense in economic loss cases. He argues, however, that such objections are "overcome" in warranty actions by limiting remote sellers' liability to "persons reasonably expected to purchase the goods" and by subjecting such persons to the same limitations on recovery that apply in direct sales contracts "including those spelled out in Article 2, as well as others found in the relevant sources of agreement that structure the 'bargain of sorts' between the parties."

Some of the specific limitations on recovery that Professor Speidel points to which limit a remote seller's liability for extensive losses include the following: by complying with certain technical requirements, and within certain limits, a seller may modify the warranty which would otherwise exist or, if he chooses, disclaim warranties entirely and sell his goods with no quality term at all; even where a seller gives a warranty, he may, within limits, modify his liability for breach by agreeing only to repair or replacement of defective parts or to refund of the purchase price; and, even if a seller gives a warranty and does not limit the available remedies, his liability for consequential economic loss under Article 2 is limited to losses which he had reason to know of at the time of contracting. Additionally,
a seller is not liable for consequential economic loss if the loss could have been reasonably prevented by cover or otherwise.322

Further protection is afforded sellers, Professor Speidel notes, by requiring that remote purchasers "have the same notice and loss avoidance responsibilities as a buyer with privity, both before and after the nonconformity was discovered."323 He specifically cites to Code sections that require a buyer to examine the goods before entering into a sales contract,324 to assert its rights timely,325 to give timely notice of any breach,326 and to bring its action within the applicable statute of limitations.327 He also points out that a seller may have the right to cure any defect328 and may also have "defenses based upon misuse of the product by the buyer, failure by the buyer to take reasonable action to avoid the consequences of breach, and the possibility that other buyer conduct will reduce the seller's total exposure under a comparative fault or causation approach."329

B. Beyond Professor Speidel: The Extension Of Any Seller-Created Warranty to Any Person Who Suffers Foreseeable Injury

I support Professor Speidel's position that the privity defense should be abolished with respect to the implied warranty of merchantability against remote purchasers. However, I believe the law should go further and abolish the privity defense entirely as to any seller-created warranty, whether express or implied, with respect to any person, whether purchaser or nonpurchaser, who suffers any foreseeable injury.

1. Express Warranties and Implied Warranties of Fitness for a Particular Purpose

As noted, the Study Group is in agreement that a remote purchaser should have a cause of action against a seller who makes an express

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323 Speidel, supra note 7, at 53.
324 Id. at 50 (citing U.C.C. § 2-316(3)(b) (1989)).
325 Id. (citing U.C.C. §§ 2-602(1), 2-608(3) (1989)).
326 Id. (citing U.C.C. § 2-607(3)(a) (1989)).
327 Id. (citing U.C.C. § 2-725 (1989)).
328 Id. Professor Speidel notes that such rights may be "derived from the statute, an obligation contained in the agreement of the parties, or a voluntary undertaking." Id. For the statutory basis of cure, see U.C.C. § 2-508 (1989).
329 Speidel, supra note 7, at 50-51.
warranty directly to him if the representation becomes part of the basis of a bargain between them.\(^{330}\) However, neither Professor Speidel’s article nor the Preliminary Report specifically address the issue of whether a remote purchaser should have a cause of action against a seller based on an express warranty that is not made directly to him, but which is made directly to the seller’s immediate purchaser or to some other person.\(^{331}\)

A similar question arises with respect to the implied warranty of fitness for a particular purpose. Such a warranty is created when the seller, at the time of contracting, has reason to know of the particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to provide goods suitable for that purpose.\(^{332}\) Professor Speidel maintains that “the goods should not be impliedly warranted as fit for the buyer’s particular purposes unless, at a minimum, the buyer informs the seller of those purposes”\(^{333}\) so that “the seller is protected against losses from needs or risks peculiar to the buyer that have not been communicated at the time of contracting.”\(^{334}\) Similarly, the Preliminary Report states that “if the goods are otherwise merchantable but do not satisfy the buyer’s particular purposes, the requirements of [U.C.C.] § 2-315 must be met. The effect of this is to require privity of contract.”\(^{335}\) In cases “[w]here a buyer has special needs and the goods are complex, one would expect direct bargaining (or a sufficient nexus between the parties) before the seller is required to assume the risk that the goods do not satisfy the buyer’s needs.”\(^{336}\)

These statements make sense if they mean that a seller cannot, and should not, be deemed to have warranted directly to a buyer that goods are fit for some particular purpose unless the statutory requirements for the creation of such a warranty are met, and that as a practical matter some direct bargain or other nexus between the parties would be necessary for this to occur. However, it does not necessarily follow from this that an injured party cannot, or should not, have an action against a remote seller for losses resulting from breach of any implied warranty of fitness for a particular purpose.

\(^{330}\) See supra note 274 and accompanying text.

\(^{331}\) Under Randy Knitwear, a seller’s express warranty can extend to a person with whom the seller has no direct sales contract. 11 N.Y.2d 5, 11-16, 181 N.E.2d 399, 401-04, 226 N.Y.S.2d 363, 367-70 (1962).


\(^{333}\) Speidel, supra note 7, at 49.

\(^{334}\) Id. at 50.

\(^{335}\) Preliminary Report, supra note 5, pt. 3, at 33.

\(^{336}\) Id.
or an express warranty, that may exist between the seller and its immediate purchaser or some other person.

Take, for example, *Schiavone Construction Co. v. Elgood Mayo Corp.*\(^{337}\) In that case a manufacturer may have expressly and impliedly warranted to an intermediate seller that a truck hoist was fit for the particular purpose of tunnel work\(^{338}\) and an ultimate purchaser allegedly suffered economic loss because the hoist failed to perform as intended.\(^{339}\) On such facts I believe that the manufacturer’s warranties, made to the intermediate seller, should extend to the ultimate purchaser despite the absence of a direct sales contract or an equivalent relationship between them. As the first department’s majority opinion in *Schiavone* stated:

>We have here a relatively simple case of a complicated piece of equipment that will not work. Surely the manufacturer of such a piece of equipment should be held to have contemplated that his equipment would be used for the purpose for which it was designed. Its failure to do so should impose liability upon him in favor of the person injured.

It is time that the vestiges of the citadel of privity not be relied upon to bar the courthouse doors to suit against a manufacturer by a remote purchaser of his equipment who is unable, because of its inherent defects, to use it.\(^{340}\)

2. The Rights of Nonpurchasers

I also believe that any seller-created warranty, whether as to merchantability, fitness for a particular purpose, or express, should extend to any injured party, whether purchaser or nonpurchaser, “who may reasonably be expected to use, consume or be affected by the goods.”\(^{341}\) However, without giving any reasons, the Study Group has recom-

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\(^{338}\) *Schiavone*, 81 A.D.2d at 222, 439 N.Y.S.2d at 934. The manufacturer apparently purported to manufacture the hoist in accordance with the intermediate seller’s specifications. *Id.* See U.C.C. §§ 2-313(1)(a), (b), 2-315 (1989) (providing for the creation of express warranties and implied warranties of fitness for a particular purpose).

\(^{339}\) See supra note 77 and accompanying text.

\(^{340}\) *Schiavone*, 81 A.D.2d at 226-27, 439 N.Y.S.2d at 936-37. The majority, however, would have permitted an action based on strict products liability in tort rather than breach of warranty. *Id.* at 226, 439 N.Y.S.2d at 936.

mended that “persons permitted to assert breach of warranty claims under Article 2 should be limited to buyers” as that term is defined in U.C.C. § 2-103(1)(a), i.e., persons who buy or contract to buy goods. Similarly, Professor Speidel states that “[t]he class of potential plaintiffs is limited to buyers and lessees of the goods from dealers—persons reasonably expected to purchase the goods.” His reason for limiting the class of plaintiffs to purchasers from dealers, including apparently those who purchase under lease purchase agreements, is to overcome the supposed objection that liability without privity would expose sellers to liability “to an indeterminate class of potential plaintiffs.”

Permitting nonpurchasers to bring warranty actions without privity would not expose sellers to liability “to an indeterminate class of potential plaintiffs” or otherwise impose an unfair burden on sellers. In all cases, a seller would only be liable to foreseeable plaintiffs, i.e., persons the seller should reasonably expect “to use, consume or be affected by the goods.” Furthermore, in cases where the damage is physical injury to person or property caused by an unsafe product associated with an accident, a seller is already liable for the loss as a matter of tort law in jurisdictions such as New York which have adopted strict products liability in tort, regardless of whether the injured party is a purchaser or nonpurchaser. Thus, the principal effect of permitting nonpurchasers a warranty action in such cases, as the Preliminary Report itself suggests, is to permit recovery where the tort statute of limitations has run, but the warranty statute of limitations has not. In this regard, there seems to be no justification for distinguishing between remote purchasers and their family, guests in their homes, their employees, their lessees, or any other person who suffers foreseeable physical injury resulting from a breach of warranty. Drawing such a line between purchasers and nonpurchasers in product safety cases makes the law appear arbitrary.

In cases where the loss results from a product’s simply failing to perform as warranted, unassociated with any accident, a seller’s liability to nonpurchasers would be limited to users of the product, since nonusers are not likely to suffer this type of loss.

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142 Preliminary Report, supra note 5, pt. 3, Rec. A2.3(15)(C), at 36.
144 Speidel, supra note 7, at 53.
145 Id.
147 See supra notes 41-42.
149 Cf. Speidel, supra note 7, at 35 n.94 (“Because the plaintiff in economic loss cases is normally a purchaser, the problem of ‘horizontal’ privity is minimized: the plaintiff-buyer is the only party who will ‘use, consume or be affected’ by the goods.”).
cases suggest that the practical effect of permitting such actions would be to permit actions by true lessees and owners under construction contracts who have the product incorporated into their structures.\textsuperscript{350} In many of these instances privity might exist anyway based on agency, assignment, third party beneficiary, and other relationships,\textsuperscript{361} although the extent to which the Study Group would permit courts to find privity in such cases is unclear.\textsuperscript{352} Regardless, I do not believe remote sellers should escape liability to nonpurchasers, who suffer injury resulting from a breach of warranty, simply on the ground that the plaintiff did not itself purchase the product.

3. Rationale

Extending any seller-created warranty, whether express or implied, to nonpurchasers as well as to purchasers can be justified on grounds analogous to those advanced by Professor Speidel for extending the implied warranty of merchantability to remote purchasers. In the first place, while U.C.C. § 2-313 requires that a seller's representation become part of the basis of a bargain for the creation of an express warranty,\textsuperscript{353} and U.C.C. § 2-315 requires reliance for the creation of the warranty of fitness for a particular purpose,\textsuperscript{354} neither section limits those warranties once created to persons with whom the seller has a direct contract. As Professor Speidel has argued with respect to the merchantability warranty, warranty liability to remote parties need not be based on reliance, but may be based on the fact that the seller has made representations concerning the product in furtherance of its own economic activity.\textsuperscript{355} Furthermore, it is apparent that regardless of the type of warranty created and to whom it is initially made, as between a seller, particularly a manufacturer, and an injured party, whether a purchaser or nonpurchaser, it is the seller who is in the best position to know whether products are suitably designed and manufactured so as to perform in a manner consistent with the warranty the seller itself sets for its own product; and

\textsuperscript{350} See supra notes 212-23.
\textsuperscript{351} For a discussion of this principle see supra notes 212-23 and accompanying text.
\textsuperscript{352} Compare Preliminary Report, supra note 5, pt. 3, at 34 ("the court should have power to define what amounts to privity") with id., pt. 3, Rec. A2.3(15)(C), at 36 ("persons permitted to assert breach of warranty claims under Article 2 should be limited to buyers").
\textsuperscript{353} U.C.C. § 2-313 (1989).
\textsuperscript{354} Id. § 2-315.
\textsuperscript{355} See Speidel, supra note 7, at 43-44.
permitting such actions without privity would provide needed incentives in this regard.\textsuperscript{358}

Furthermore, just as Professor Speidel notes with respect to the merchantability warranty, eliminating the privity defense, regardless of the warranty created or person injured, would (1) prevent the unjust enrichment that might result where a seller receives a “sound price” from its purchaser for goods that do not meet the warranty terms, and the injured party has no action against the person with whom it dealt because of disclaimers or insolvency, and no action against the manufacturer due to a lack of privity;\textsuperscript{357} (2) conserve judicial resources by avoiding the circuitry of action that might result if the injured party can recover from a person with whom it dealt, who then seeks to recover from its seller;\textsuperscript{358} (3) advance the policy of securing a fair exchange between the parties by “insur[ing] that there is a rough equivalence between the price paid and the quality actually supplied;”\textsuperscript{359} and (4) lessen “the risk that the manufacturer will, behind the privity barrier, engage in forms of unprovable fraud in the manufacture and distribution of goods.”\textsuperscript{360} Also, just as Professor Speidel notes with respect to the merchantability warranty, regardless of the type of warranty created or person injured, a remote seller is protected from unforeseeable and unlimited losses by limiting its liability to plaintiffs who suffer a foreseeable injury, and by subjecting those plaintiffs to the same limitations on recovery and to the same “notice and loss avoidance responsibilities,” as a person in privity with the seller.\textsuperscript{361}

**C. Meshing Warranty Liability Without Privity Into Article 2**

There remains the question of meshing warranty liability without privity into Article 2.\textsuperscript{362} Where any warranty, whether an express

\textsuperscript{356} See id. at 13, 47-48; supra notes 284-93 and accompanying text.
\textsuperscript{357} Speidel, supra note 7, at 46.
\textsuperscript{358} See id. at 46-47.
\textsuperscript{359} See id. at 45.
\textsuperscript{360} See id. at 47.
\textsuperscript{361} Id. at 53; see id. at 13, 48-53; supra notes 313-29 and accompanying text.
\textsuperscript{362} In this regard, the Study Group has requested that the Drafting Committee provide “concrete answers” to the following eight questions:

1. Should a remote buyer be afforded a right of rejection or revocation as against the remote seller?
2. Should a remote buyer be allowed to recover the price it paid for the goods, or should its recovery be limited to the price the remote seller received for the goods?
3. How does the Code’s notice requirement for breach apply? Must the remote buyer
warranty or an implied warranty of merchantability or fitness for a particular purpose, is created between a seller and its immediate purchaser, the warranty should extend to any person, whether remote purchaser or nonpurchaser, who suffers any injury, whether to person, property, or economic, if it is reasonable for the seller to expect that such person may "use, consume or be affected by the goods." However, since his rights with respect to such warranties depend on the seller's contract with its immediate purchaser, the injured party should be subject to any otherwise enforceable disclaimers of warranties and limitations on remedies which appear in that contract. Further, to provide sellers with uniform periods of exposure to liability, the statute of limitations should begin to run against the injured party when it begins to run against the immediate purchaser. But, a seller should not be permitted to limit the extension of warranties as by providing in the contract with its purchaser that its warranties given to the buyer do not extend to remote parties. This latter point is based on the theory that while a seller may disclaim warranties and limit remedies, it has an obligation to any person who suffers any foreseeable injury to supply goods that conform to any warranty that is created.

However, in cases where a seller makes an express warranty directly to a remote party, as in Randy Knitwear, Inc. v. American Cyanamid Co., the latter should be treated as if he had a direct sales contract with the seller. Thus, in addition to the express warranty, a merchant

notify the remote seller to preserve its remedies for breach, or is notification to the immediate seller sufficient?

4. Is a remote seller afforded a right to cure? Is such a right additional to the immediate seller's right to cure?

5. May a seller in its contract with its own buyer prevent assignability, thereby limiting any warranties solely to its own buyer?

6. In the absence of an enforceable disclaimer or limitation of consequential damages, may a remote buyer recover consequential such as lost profit from a remote seller?

7. May a remote buyer sue for breach of an express warranty on which there is no reliance?

8. What is the effect of a disclaimer in the contract between remote seller and its buyer on the suit by remote buyer against remote seller?


Id. comment 1.


Compare U.C.C. § 2-318, Alternatives A & B (1989) ("A seller may not exclude or limit the operation of this section.") with id., Alternative C ("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.").

seller should also be deemed to have made to the injured party an implied warranty that the goods are merchantable.\footnote{§ 2-314(1) (1989) (providing that a warranty of merchantability is implied in a sales contract “if the seller is a merchant with respect to goods of that kind”).} Further, since his rights with respect to the creation of such warranties do not depend on the contract between the seller and its immediate purchaser, such a direct beneficiary should not be subject to disclaimers of warranty and limitations on remedy which appear in that contract. Rather, he should only be subject to such disclaimers and limitations that are made directly to him as part of the express warranty. For the same reason, the statute of limitations should begin to run when it begins to run against him, not when it begins to run against the immediate purchaser. Also, any rights such a direct beneficiary has based on warranties made directly to him should be separate and distinct from any rights he may have based on warranties created in the contract between the seller and the immediate purchaser.

In addition, any warranties made by a seller directly to a remote party should extend to any other person who suffers any injury resulting from their breach if it is reasonable to expect such person to use, consume, or be affected by the goods. Such persons should be subject to any disclaimers of warranty and limitations on remedy enforceable against the party to whom the warranty directly extends, and the statute of limitations should begin to run when it begins to run against that party.

In applying the remedy sections of Article 2, the injured party, in appropriate cases and pursuant to the conditions set out in the Code, should have the right of rejection\footnote{U.C.C. §§ 2-601 to 2-605 (1989).} and revocation of acceptance\footnote{Id. § 2-608.} against the remote seller,\footnote{Generally, New York courts have denied buyers rescission as against remote sellers. See Ayanru v. General Motors Acceptance Corp., 130 Misc. 2d 440, 495 N.Y.S.2d 1018 (Civ. Ct.} and to recover damages for either cover\footnote{Id.}.
or nondelivery,\textsuperscript{373} or, to accept the goods\textsuperscript{374} and recover damages “as determined in any manner which is reasonable”\textsuperscript{375} including recovery for the diminished value of the goods or the cost to repair.

In applying these sections, the injured party should recover for its loss. Thus, as Professor Speidel has said, the reason for imposing liability suggests that recovery should not be limited to the price the remote seller received for the goods from its purchaser, but rather the injured party should be allowed in appropriate cases to recover the “price” it paid for the goods.\textsuperscript{376} Since there is no direct contract between the parties as to price, Professor Speidel suggests the terms “price” and “contract price” be read as “a reasonable price at the time for delivery”\textsuperscript{377} to the injured party, and that “value of goods accepted” be read as “either the contract price, i.e., a ‘reasonable price’ at the time of delivery, or their market value.”\textsuperscript{378} Also, “acceptance” in this context should mean acceptance by the injured party.\textsuperscript{379}

Absent an effective disclaimer, a beneficiary should have the right to recover for consequential damages including injury to person or property and lost profits if he can make out the elements of recovery. For the recovery of consequential economic loss, U.C.C. § 2-715(2)(a) requires that the seller at the time of contracting have reason to know of the loss and that the loss could not be prevented by cover or otherwise.\textsuperscript{380} Where warranties are made directly to a remote party, “at the time of contracting” should mean at the time of contracting with him.\textsuperscript{381} Otherwise, it should mean at the time the seller “contracts” with its buyer or other person to whom the warranty directly extends. All notices required to preserve remedies against a remote seller should be given directly to him or his authorized agent or dealer.

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\textsuperscript{373} U.C.C. § 2-712 (1989).
\textsuperscript{374} Id. § 2-713.
\textsuperscript{375} Id. § 2-666; see also id. § 2-607 (discussing some of the effects of acceptance).
\textsuperscript{376} Id. § 2-714(1).
\textsuperscript{377} See Speidel, supra note 7, at 54-55.
\textsuperscript{378} Id. at 55 (quoting U.C.C. § 2-305(1)(a) (1989)).
\textsuperscript{379} Id.
\textsuperscript{380} Id. But cf. U.C.C. § 2-607 comment 5 (1989) (assuming that a remote party “has nothing to do with acceptance”).
\textsuperscript{381} U.C.C. § 2-715(2)(a) (1989).
\textsuperscript{382} See id.
from whom the goods were purchased, and he should have the right to cure defects either under the statute or pursuant to contract, and such right should be separate from any such right of any intermediate seller.

IV. SUMMARY

Judicial and legislative action has eroded much of the privity defense in breach of warranty actions in New York. The adoption of strict products liability in tort as a cause of action separate and distinct from breach of warranty has eliminated the privity defense in cases of physical injury to person and property, including injury to non-defective parts of the defective product itself. In addition, the 1975 legislative amendment to N.Y.U.C.C. § 2-318 has eliminated the privity defense as to personal injury in breach of warranty actions arising under Article 2 of the Code.

Beyond N.Y.U.C.C. § 2-318, the issue of privity as a defense in breach of warranty actions remains a matter of common law in New York. The general rule is that a seller’s warranty, whether express or implied, does not extend to persons with whom the seller has no direct sales contract who seeks to recover for economic loss. New York law is equivocal on whether a direct sales contract is necessary to recover for injury to property. However, even where a direct sales contract is ostensibly a requirement, New York courts have sometimes found the required “privity” in equivalent relationships. In addition to cases where a seller makes an express warranty directly to an injured party, “privity” has sometimes been found based upon agency, assignment, third party beneficiary, and other relationships.

The Study Group is divided on what revisions should be made with respect to the privity defense. Some members believe that a direct sales contract or equivalent relationship should be required in all breach of warranty actions even if the loss is personal injury. However, Professor Speidel has argued that the privity defense should be abolished as to remote purchasers with respect to the implied warranty of merchantability even if the loss is economic. This Article has argued that his reasoning supports the elimination of the privity.
defense as to any seller-created warranty, whether express or implied, with respect to any person, whether remote purchaser or nonpur-
chaser, regardless of whether the loss is economic or injury to person or property, if the seller could reasonably expect such person "to use, consume or be affected by the goods."384

384 Id. § 2-318, Alternatives A, B & C.