

**DEFECTIVE PRODUCTS AND PRODUCT WARRANTY  
CLAIMS IN MINNESOTA**

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## I. INTRODUCTION

Warranty law is an important supplement to tort law principles governing liability for defective products. Warranties arise from promises or assertions associated with either the sale of a product or some other transfer of a product for value.<sup>1</sup> Such promises or assertions about a product may be express, made in the form of the seller's statements about the qualities or attributes of the product, or they may simply be implied as a matter of policy.

Although warranty law is generally regarded today as part of the body of contract law, the origins of warranty lie in tort.<sup>2</sup> Important developments in contract law form a critical part of the developmental history of products liability law. Once tort law rejected privity as a limitation on the negligence law duty to foreseeable victims of personal or property injuries resulting from defective products,<sup>3</sup> contract law incorporated the idea of warranties implied as a matter of law to make product manufacturers strictly liable for harms caused by defective products.<sup>4</sup> This led ultimately to the recognition that the manufacturer's strict liability was not based on an agreement between the manufacturer and the plaintiff but imposed instead by law for reasons of policy. "[T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort."<sup>5</sup>

Warranty law as it relates to the sale of products evolved as a

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1. A lease of a product, for example, would give rise to one or more warranties in the absence of a disclaimer.

2. See William L. Prosser, *Assault on the Citadel (Strict Liability to the Consumer)* 69 YALE L.J. 1099, 1103-10, 1124-27 (1960); William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-22 (1943). Warranty law developed out of the tort action of deceit.

3. This was most famously articulated in *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), but was stated even earlier in Minnesota in *Schubert v. J. R. Clarke Co.*, 49 Minn. 331, 51 N.W. 1103 (1892).

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

5. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963). Strict liability for defective products has evolved in Minnesota into a body of law that is partly true strict liability and partly negligence law. It is now clear that much of a product manufacturer's liability is not, in fact, truly "strict" but based instead upon negligence principles. "[N]egligence concepts are at the base of design defect and failure to warn claims . . . ." Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability*, 24 WM. MITCHELL L. REV. 1, 3 (1998).

matter of common law and then was eventually codified.<sup>6</sup> In Minnesota, warranty law is expressed in Chapter 336 of the Minnesota Statutes, Minnesota's version of the Uniform Commercial Code (U.C.C.), and in judicial interpretations of that statute, particularly Article 2 governing the sale of goods.<sup>7</sup> Additional important sources of warranty law in Minnesota include state statutes designed to protect consumers against certain deceptive and unfair trade practices<sup>8</sup> and the federal Magnuson-Moss Warranty Act.<sup>9</sup>

There is substantial similarity between Minnesota warranty law under the U.C.C. and products liability in tort,<sup>10</sup> but there are also important differences.<sup>11</sup>

## II. EXPRESS WARRANTY

### A. *Generally*

A product seller's representation about the product may give rise to an express warranty under the U.C.C., so long as the representation is one of fact, rather than opinion, and so long as the representation becomes part of the basis of the bargain.<sup>12</sup> A

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6. The common law regarding warranties and most other aspects of the sale of chattels was first codified in Great Britain in the Sale of Goods Act of 1893, and then in the very similar Uniform Sales Act of 1906 in the United States Article 2 of the Uniform Commercial Code supplanted the Uniform Sales Act in nearly every state during the 1950s and 1960s but did not make a significant change in the longstanding principles applicable to warranty law. The U.C.C. took effect in Minnesota in 1966. State and federal legislation aimed specifically at consumer protection was enacted in the 1970s.

7. Article 2 of the U.C.C. superceded Minnesota's version of the Uniform Sales Act, MINN. STAT. ch. 512 (1961).

8. *See infra* Part VIII.G2.

9. *See infra* Part VIII.G1.

10. Indeed, four states (Delaware, Massachusetts, Michigan and Virginia) do not overtly use tort doctrine at all but instead have evolved the law regarding an implied warranty of product quality to deal with the problems of defective products.

11. These differences are rooted primarily in general contract law doctrine and include the doctrine of privity, the ability of sellers to contractually disclaim warranties and limit damages for breach of warranty, the requirement of notice of breach, different statutes of limitation governing contract and tort claims, and other matters.

12. MINN. STAT. § 336.2-313(1)(a) (2002) (providing that "[a]ny 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.").

seller's representation may be oral<sup>13</sup> or written, pictorially communicated, or made by some other means including a sample or model.<sup>14</sup> Thus, the seller's oral statements made at the time of sale<sup>15</sup> may give rise to an express warranty. Information on a product's labeling or packaging or in advertisements for the product may also give rise to an express warranty. A sample or model may create a warranty that other, additional products will conform to the sample or model.<sup>16</sup>

Just as a defect may find its way into a product after the product has left the manufacturer's control, an express warranty may arise out of transactions made after the product has left the hands of the manufacturer. A retail seller, for example, may make a representation about the product not found in the product's label or packaging nor in the manufacturer's advertising. Such a representation may create an express warranty from that seller but not from the manufacturer or anyone else in the chain of the product's manufacture, distribution, or sale. This means, of course, that an express warranty claim may be available against a product seller but not against the product's manufacturer.

An express warranty claim also may be available against the seller or intermediate distributor of a product even where strict liability in tort claims against those parties is barred by Minnesota Statutes section 544.41. This provision shields non-manufacturers from strict liability in tort claims provided that the product manufacturer is identifiable, subject to jurisdiction, and not

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13. Oral representations giving rise to an express warranty are, of course, subject to the parole evidence rule. *See id.* § 336.2-202. If, for example, there is a written disclaimer of warranties, the buyer may find it difficult to introduce evidence of a prior or contemporaneous oral express warranty. *See infra* Part VIII.C.

14. *See* MINN. STAT. § 336.2-313(1)(b) and U.C.C. cmts. (2002) (providing the methods by which an express warranty may be created).

15. Post-sale statements may sometimes amount to a warranty. Minnesota Statutes § 336.2-313 U.C.C. Comment 7 provides that "[t]he 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)." So assurances and other statements made shortly after a technical sale is concluded may nevertheless become part of that transaction and form the basis for an express warranty.

16. *See* MINN. STAT. § 336.2-313(1)(c) (2002).

judgment-proof,<sup>17</sup> and so long as the non-manufacturer defendant did not (1) exercise significant control over the product's manufacture or design, (2) provide instructions or warnings to the manufacturer relevant to the defect, (3) have actual knowledge of the defect, or (4) create the defect—in other words, so long as the non-manufacturer was not negligent.<sup>18</sup>

Furthermore, an express warranty claim may be available in those rare instances where the product is not defective in tort law terms, but where the product does not meet the promise of the warranty. *Milbank Mutual Insurance Co. v. Proksch*<sup>19</sup> provides an example. There, the seller of a Christmas tree represented to the buyer that it was fire-retardant or fireproof. “While the [buyers] normally took their tree down immediately after Christmas, after discussing the matter [they] decided to keep the tree up longer because of its fireproofing treatment.”<sup>20</sup> At a New Year's Eve party, “two of the young people were throwing a pillow back and forth when it struck a lower branch of the tree. A small flame immediately appeared in the lower branches and the tree went up in flames in a matter of seconds”<sup>21</sup> causing substantial damage to the house. The court upheld the jury's determination that the seller's statements created an express warranty that the tree was fire retardant and less likely than an untreated tree to catch fire.<sup>22</sup> The buyers relied upon this representation in selecting this particular tree (a real tree that had been treated with a fire retardant). The warranty was breached when the tree so readily caught fire. Nothing about the tree was unmerchantable nor was it produced or sold negligently nor was it “defective” in tort law terms. On balance, the fire risks presented by a Christmas tree are not unreasonable and no consumer could reasonably expect a dried-out Christmas tree to be fireproof. However, the seller had represented that it *was* fireproof. That representation, not negligence nor a defect in the tree, was the basis for liability.

A cause of action for breach of an express warranty does not require a showing of fault.<sup>23</sup> Such a warranty represents a promise

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17. *See id.* § 544.41, subd. 2.

18. *See id.* § 544.41, subd. 3.

19. 309 Minn. 106, 244 N.W.2d 105 (1976).

20. *Id.* at 108, 244 N.W.2d at 106.

21. *Id.* at 108–09, 244 N.W.2d at 106–07.

22. *Id.* at 109–10, 244 N.W.2d at 107.

23. *See O'Laughlin v. Minn. Natural Gas Co.*, 253 N.W.2d 826, 829 (Minn. 1977) (stating that “[a] showing of negligence is not necessary for a breach of

by the seller to the buyer, about some aspect of the good's performance or quality, which the buyer relied upon in purchasing the good. The seller is liable if the representation that gives rise to the warranty is false. Whether an express warranty has been created, the scope of the warranty, and whether the warranty was breached are almost always questions of fact.

Finally, an express warranty cannot be disclaimed.<sup>24</sup> Section 336.2-316(1), the section of the U.C.C. dealing with warranty disclaimers, provides that “[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit the warranty shall be construed whenever reasonable as consistent with each other . . . .” The seller cannot give an express warranty with one hand and then take it away with the other.

#### B. *Representation of Fact*

The seller's statements regarding the good must be statements of fact and not simply expressions of the seller's opinion.<sup>25</sup> Statements of opinion about a product's attributes are at the heart of “sales talk.” These statements are typically recognizable to the buyer as subjective “puffing,” which should be regarded as no more than the seller's often-inflated opinion and should not be taken as the literal truth about the quality or performance of the product.

A good example of statements of opinion that do not give rise to an express warranty is *Frederickson v. Hackney*,<sup>26</sup> which involved the sale of a bull calf. The buyer purchased the animal under the assumption that, when mature, the calf would be a valuable breeding bull. Buyer and seller were both cattle breeders and the purchase price of the calf reflected the expectation that it would become a valuable sire. In fact, the animal was sterile when it reached maturity and was worth far less than expected. At the time of sale, the seller told the buyer that the buyer should

‘buy this bull and keep him’ for breeding purposes; that he would be a wonderful asset and would put [buyer] ‘on the map.’ ‘[Seller] told [buyer] further of his blood lines

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warranty”).

24. See *infra* Part VIII.B.

25. “[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.” MINN. STAT. § 336.2-313(2) (2002).

26. 159 Minn. 234, 198 N.W. 806 (1924).

and what a great record his relatives had made . . . ; that his father was the greatest living dairy bull;’ that if [buyer] would keep him, of course, he would be a help to build up [buyer’s] herd.<sup>27</sup>

The buyer claimed that these representations gave rise to an express warranty regarding the future reproductive capacity of the calf. The court disagreed, concluding that this was trade talk upon which the buyer had no right to rely. Several factors seem to have supported the court’s conclusion. There was no intent to mislead or carelessness on the part of the seller that might give rise to a fraud or misrepresentation claim.<sup>28</sup> Both parties were “desitute of knowledge or the means of forming an intelligent judgment”<sup>29</sup> as to the future breeding capacity of an animal only a few days or weeks old and fifteen to eighteen months removed from its first possible use for breeding purposes. Buyer “must have understood from the nature of the case that the information, experience, and knowledge of the vendor are not superior to his own”<sup>30</sup> so that the statements should have been regarded as no more than expressions of the seller’s opinion about what the future will prove concerning the desired traits of the good being sold.

Similarly, no warranty was made where the seller, in the sale of a partial interest in a commercial fishing business, “expressed a confident belief that the proposed company would obtain in a season 1,000,000 pounds of fish, and 400 kegs of caviar . . . .”<sup>31</sup> Even though this statement may have been based on the amount of fish caught in the past, it was merely a statement “of expectation, opinion, or hope, on which a purchaser has no right to rely”<sup>32</sup> because fluctuations in water levels and other factors may affect the catch of fish in the future.

By way of contrast, a representation that a stallion sold for breeding purposes was a “foal getter” constituted a warranty that the horse would produce foals a reasonable percentage of the time.<sup>33</sup> Here the buyer could reasonably take the seller’s statements to be representations of fact about a mature animal of breeding age

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27. *Id.* at 235, 198 N.W. at 806.

28. *Id.*

29. *Id.* at 236, 198 N.W. at 806.

30. *Id.* at 236, 198 N.W. at 807.

31. *Hansen v. Baltimore Packing & Cold-Storage Co.*, 86 F. 832, 834 (Minn. Cir. Ct. 1898).

32. *Id.* at 835.

33. *Brown v. Doyle*, 69 Minn. 543, 72 N.W. 814 (1897).

and not, as in *Frederickson*,<sup>34</sup> simply an opinion about how the animal would perform as a breeder in the more distant future.

While the context in which the statements are made is always important, representations that are specific and unambiguous, particularly if they relate to the safety of the product, are more likely to constitute an express warranty. Such statements are more than an expression of opinion or a prediction about the product, but a representation by the seller on which the buyer is entitled to depend in judging the real worth or value of the product.

In *McCormack v. Hanksraft*,<sup>35</sup> the court found that a product manufacturer's representations in an instruction booklet and in advertising gave rise to an express warranty. A parent purchased a steam vaporizer for use at night in her child's bedroom. The child, three years and nine months old at the time of injury, apparently tripped over the vaporizer's electric cord when she got up to go to the bathroom in the middle of the night. In so doing, she pulled the vaporizer off a stool upon which it had been placed, the top readily came off a glass jar which was part of the vaporizer, and scalding hot water spilled onto the child, causing severe burns. The court described the representations in the vaporizer's instruction booklet as follows:

The instruction booklet furnished by defendant did not disclose the scalding temperatures reached by the water in the jar, nor was any warning given as to the dangers that could result from an accidental upset of the unit. While plaintiff's mother realized that the unit could be tipped over by a sufficient external force, she justifiably relied upon defendant's representations that it was 'safe,' 'practically foolproof,' and 'tip-proof.' She understood this to mean that the unit was 'safe to use around (her) children' and that she 'didn't have to worry' about dangers when it was left unattended in a child's room since this was the primary purpose for which it was sold.

In its booklet and advertising, defendant in fact made the representations relied upon by plaintiff's mother. In addition to the simple operating instructions and pictorial 'cut-away' indicating how the steam is generated by the electrodes in the heating chamber, the booklet stated:

'WHY THE HANKSCRAFT VAPORIZER IS SUPERIOR

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34. *Frederickson v. Hackney*, 159 Minn. 234, 198 N.W. 806 (1924).

35. *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967).

## TO OTHERS IN DESIGN.

'Your vaporizer will run all night on one filling of water, directing a steady gentle flow of medicated steam exactly where it is needed. No attention is necessary.

'It's safe, too, and practically foolproof. Since the water itself makes the electric contact, the vaporizer shuts off automatically when the water is gone. The electric unit cannot burn out.'

The booklet also had a picture of a vaporizer sending steam over a baby's crib, alongside which was printed:

'For most effective use, the vaporizer should be placed at least four feet away from the person receiving treatment, and should not be placed above the patient's level.'<sup>36</sup>

These representations, the court concluded, were "sufficient to support a finding of liability upon a breach of an express warranty."

We are persuaded that whether the previously quoted language of the booklet, particularly in combination with the picture of a vaporizer sending steam over a body's [sic] crib, amounted to an express warranty that it was 'safe' for a user to let this vaporizer run all night in a child's room without attention was a jury question. No particular words are required to constitute an express warranty, and the representations made must be interpreted as an ordinary person would understand their meaning, with any doubts resolved in favor of the user. Since parents instinctively exercise great care to protect their children from harm, the jury could justifiably conclude that defendant's representations were factual (naturally tending to induce a buyer to purchase) and not mere 'puffing' or 'sales talk.'<sup>37</sup>

Again, the context in which the representations were made was important in concluding that these statements were representations of fact. The court emphasized that the seller was aware of the fact that the vaporizer contained scalding hot water, but that the buyer was not similarly aware, because the water, as visible to a user in the glass jar, never reached the boiling point. Moreover, the buyers, "relying upon their understanding of what defendant represented in its instruction booklet, were reasonably led to believe, up to the

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36. *Id.* at 329–30, 154 N.W.2d at 495.

37. *Id.* at 336, 154 N.W.2d at 498 (internal citations omitted).

time of plaintiff's injury, that since steam was generated only in the heating unit, the temperature of the water in the jar during the entire operation of the vaporizer remained the same as when put in" and that they at "no time discovered by touching or handling the unit when it was in use that the temperature of any part of the water in the jar became hot."<sup>38</sup>

Therefore, in this context, and unlike in *Frederickson*,<sup>39</sup> the seller had a level of knowledge about the product that was superior to the buyer's, and reason to believe that a buyer would take its representations about the safety of the good as statements of fact.

### C. *Basis of the Bargain*

The seller's representations of fact about the product must become part of the basis of the bargain before an express warranty arises.<sup>40</sup> The predecessor Uniform Sales Act section 512.12 provided in part: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty . . . if the buyer purchases the goods relying thereon."<sup>41</sup> When this language was replaced by the Uniform Commercial Code's formulation that "[a]ny affirmation of fact or promise . . . which relates to the goods and becomes part of the basis of the bargain creates an express warranty,"<sup>42</sup> it was natural to think that the different language had a different meaning; something different than the buyer's reliance on the seller's statements was incorporated into the new "basis of the bargain" language.

Official comment 3 to U.C.C. section 2-313 says, in part, that "no particular reliance . . . need be shown in order to weave [seller's representations] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof." One view is that the basis of the bargain requirement simply shifts the burden of proving non-reliance to the seller.<sup>43</sup> Other official comments to section 2-313 seem to fortify this view.<sup>44</sup> A number of courts have

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38. *Id.* at 329, 154 N.W.2d at 494.

39. *See supra* notes 26–30 and accompanying text.

40. *See supra* note 12 and accompanying text.

41. MINN. STAT. § 512.12 (1961).

42. *Id.* § 336.2-313(1)(a) (2002).

43. Mitchell J. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 UCLA L. REV. 281, 285 n.30 (1961).

44. MINN. STAT. § 336.2-313, U.C.C. cmt. 8 (2002) (stating that "all of the statements of the seller [become part of the basis of the bargain] unless good

concluded that reliance is not required in order for an express warranty to arise<sup>45</sup> while others continue to require reliance by the buyer as a necessary element in the creation of any express warranty.<sup>46</sup> Minnesota appears to be among those states that condition express warranty recovery on a showing of reliance, though the law on this point is not particularly clear.

Prior to Minnesota's adoption of the U.C.C. and its "basis of the bargain" requirement for an express warranty, the supreme court concluded in *Midland Loan Finance Co. v. Madsen*,<sup>47</sup> that "[t]o enable a party relying upon breach of express or implied warranty to recover, it must be clear and definite that there was actual reliance upon the warranties involved."<sup>48</sup> *Midland* was a dispute over the assignment to the plaintiff finance company of a usurious sales contract by the defendant car dealer. The transaction at issue was the assignment of a loan, not the underlying sale of a car. The dispute, therefore, did not involve a sale of goods or the application of the Uniform Sales Act's requirement of reliance. The *Midland* court no doubt relied, therefore, on the longstanding common law requirement of reliance needed to show a causal connection between the seller's breach of warranty and the buyer's

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reason is shown to the contrary").

45. See, e.g., *Weng v. Allison*, 678 N.E.2d 1254, 1256 (Ill. App. Ct. 1997):

[T]he trial court's ruling that the statements of the seller could not have been part of the basis of the bargain simply because no reasonable persons could have relied upon those statements was erroneous. The trial court misconstrued the role of reliance in determining whether an affirmation of fact or description is part of the basis of the bargain. Affirmations of fact made during the bargain are presumed to be part of the basis of the bargain unless clear, affirmative proof otherwise is shown. It is not necessary, therefore, for the buyer to show reasonable reliance upon the seller's affirmations . . . .

*Id.* (internal citations omitted). See also *Martin v. Am. Med. Sys., Inc.*, 116 F.3d 102, 105 (4th Cir. 1997); *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991); *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Cal. Ct. App. 1985); *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646 (Del. Super. Ct. 1985); *Comp-U-Aid v. Berk-Tek, Inc.*, 547 N.W.2d 640 (Mich. 1995); and cases collected in James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2099 n.30 (1998).

46. See, e.g., *Machs., Inc. v. Lorraine Corp.* 633 F.2d 34, 44 n.7 (7th Cir. 1980); *Sprague v. Upjohn Co.*, No. 91-40035, 1995 WL 376934 (D. Mass. May 10, 1994); *State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami*, 557 So.2d 107 (Fla. Dist. Ct. App. 1990); *Wendt v. Beardmore Suburban Chevrolet, Inc.*, 366 N.W.2d 424, 428 (Neb. 1985); *Royal Bus.* and the cases collected in White, *supra* note 45, at 2100 n.31.

47. 217 Minn. 267, 14 N.W.2d 475 (1944).

48. *Id.* at 278, 14 N.W.2d at 481.

harm.

The 1966 Minnesota Code Comment to section 336.2-313(1)(a) describes that section as “substantially identical” to its predecessor, section 512.12 of the Uniform Sales Act.<sup>49</sup> The comment also describes the change from the Uniform Sales Act’s reliance language to the Minnesota U.C.C.’s basis of the bargain language as a “minor difference in terminology” which “brings about no great change in the results of cases.”<sup>50</sup> However, the official U.C.C. comment following section 336.2-313(1)(a) emphasizes that “[n]o particular reliance [on the seller’s affirmations of fact] need be shown in order to weave them into the fabric of the agreement” as an express warranty.<sup>51</sup> These comments do not make clear whether the Minnesota legislature intended to eliminate reliance as a requirement for express warranty under the U.C.C. There has been little judicial reflection on the question since the Code’s adoption.

In *Alley Construction Co. v. State*,<sup>52</sup> an action to recover on a highway construction contract, the plaintiff alleged both breach of warranty and breach of contract. After the plaintiff prevailed at trial, the defendant appealed, contending that the breach of warranty claim should not have been submitted to the jury since there was no evidence that plaintiff had relied upon the defendant’s construction specifications in the contract in submitting its bid.<sup>53</sup> Again, there was no sale of goods involved so the precise question at issue in this case was not whether reliance was a requirement under Minnesota’s U.C.C. for an express warranty. The supreme court readily found that “an inference of reliance properly arises” out of the very fact of the plaintiff’s bidding on the contract which included the defendant’s plans dictating construction specifications for the highway.<sup>54</sup> The court then went on, saying that “the [trial] court’s instruction on that issue properly covered the evidence to be considered and was in accordance with the applicable law . . . .”<sup>55</sup> Among the elements that the trial court instructed the jury that the plaintiff must prove

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49. MINN. STAT. § 336.2-313, Minnesota Code Comment (2002).

50. *Id.*

51. MINN. STAT. § 336.2-313, U.C.C. cmt. 3 (2002).

52. 300 Minn. 346, 219 N.W.2d 922 (1974).

53. *Id.* at 349, 219 N.W.2d at 924.

54. *Id.*

55. *Id.* at 351, 219 N.W.2d at 925.

were “[t]hat the Plaintiff relied on that warranty, or representation, and was induced thereby to bid on the contract.”<sup>56</sup> Therefore, *Alley Construction*, though not a case involving the sale of a good, appears to stand for the proposition that reliance must be shown to recover for breach of warranty under Minnesota law.

This is the conclusion the Court of Appeals for the Eighth Circuit reached in its effort to apply Minnesota law in a diversity case involving a purchase agreement for the sale of stock. The court concluded, in *Hendricks v. Callahan*,<sup>57</sup> that “the law of Minnesota appears to require some form of reliance’ on the part of the buyer as an element for a breach of express warranty claim.”<sup>58</sup> After analyzing what little Minnesota case law bears on this question and noting that the Minnesota Supreme Court has not expressly overruled the pre-U.C.C. *Midland*<sup>59</sup> case since the Code’s adoption in Minnesota, the Eighth Circuit concluded that “we are not persuaded that *Midland* no longer reflects the current law in Minnesota” and that “some form of reliance on the warranty” is required to succeed in a breach of warranty claim.<sup>60</sup> Of course, this dispute also did not involve a sale of goods and so the court’s analysis of Minnesota law is not directly on point as to whether reliance is required under Minnesota’s U.C.C. to prove the existence of an express warranty. Nevertheless, all indications are that reliance is a requirement under Minnesota law.

### III. IMPLIED WARRANTY OF MERCHANTABILITY

#### A. Generally

The warranty most likely to arise out of the sale of a product is an implied warranty of merchantability. A claim for breach of this warranty is, however, the least likely to add anything to tort-based claims for product defect. This is the case simply because a product that is “defective” in tort law terms is not merchantable and vice-versa.<sup>61</sup> Indeed, the courts have gone so far as to say that,

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56. *Id.* at 351, 219 N.W.2d at 926 n.1.

57. 972 F.2d 190 (8th Cir. 1992).

58. *Id.* at 192.

59. *Midland Loan Finance Co. v. Madsen*, 217 Minn. 267, 14 N.W.2d 475 (1944).

60. *Hendricks*, 972 F.2d at 194.

61. *See Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 53 (Minn. 1982)

in cases of personal injury, strict products liability tort claims have effectively preempted implied warranty claims.<sup>62</sup> However, there may be some instances in which the breach of an implied warranty of merchantability claim will succeed where a tort claim that the product is defective will not.<sup>63</sup>

The U.C.C., Minnesota Statutes section 336.2-314 provides that a warranty that goods are merchantable is implied in a contract for the sale of such goods if the seller is a merchant with respect to goods of that kind and so long as this implied warranty has not been excluded or modified by the seller.<sup>64</sup> This provision expanded the scope of prior law. Under the predecessor Uniform Sales Act, an implied warranty of merchantability arose only where there was a sale by description by a merchant who dealt in goods of that description. The U.C.C. language eliminated the “sale by description” requirement and also explicitly extended this warranty to sales of food or drink.<sup>65</sup> Under the Uniform Sales Act, problems sometimes arose in determining when a sale was “by description.” Sales of food or drink, especially when they were consumed on the premises where sold, were often determined to be the provision of a service and not a sale of goods giving rise to an implied warranty.<sup>66</sup> The new Code’s language was meant to eliminate these issues.

The implied warranty of merchantability amounts to an assurance, imposed upon the seller by law and not arising out of any agreement between the parties, that a product is “fit for

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(stating that: “This warranty is breached when the product is defective to a normal buyer making ordinary use of the product.”). While in many states the U.C.C.’s four-year statute of limitations in § 2-725 is longer than the typical two- or three-year statute of limitations for negligence or strict liability claims, that is not an advantage in Minnesota with its four-year statute of limitations for “any action based on the strict liability of the defendant and arising from the manufacture, sale, use or consumption of a product . . . .” MINN. STAT. § 541.05, subd. 2 (2002).

62. See *Masepohl v. Am. Tobacco Co.*, 974 F. Supp. 1245, 1253 (D. Minn. 1997); *Cont’l Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 463 (Minn. Ct. App. 1984).

63. That would be the case, for example where the buyer suffers only an economic loss. Then she may not pursue tort claims at all and must resort to a warranty theory for recovery of such losses. See MINN. STAT. § 604.101 (2002) (Minnesota’s economic loss statute).

64. MINN. STAT. § 336.2-314(1) (2002).

65. *Id.* § 336.2-314(1), U.C.C. cmt. 5 (2002).

66. See BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES*, §2:20 (2d ed. 2002).

ordinary purposes for which such goods are intended.”<sup>67</sup> It is based upon the policy of incorporating into every sale of goods a *quid pro quo*; a product of fair quality in exchange for a fair price paid.<sup>68</sup>

*B. Sale of Goods*

The implied warranty provisions of the U.C.C. apply to sales of goods but not to sales of services. When there is a mixed sale of both goods and services, the prevailing rule is that the predominant aspect of the sale is what determines whether it is a sale of goods or services. If the predominant aspect of the sale is one of goods and the provision of services is secondary, then the entire transaction is treated as a sale of goods. The Minnesota Supreme Court has taken a liberal view of what amounts to a sale of goods. In *O’Laughlin v. Minnesota Natural Gas Co.*,<sup>69</sup> the defendant had selected and installed an under-floor furnace that provided heated air to the room above through a floor grate. The plaintiff was injured when she passed out, allegedly from the accumulation of carbon monoxide due to improper installation of the furnace, fell unconscious on to the hot furnace grate and suffered serious burn injuries. As to whether there was a sale of goods by the defendant, the court had this to say:

While the scope section of Article 2 of the Uniform Commercial Code applies to “transactions in goods” (*see* Minn. St. 336.2-102), the warranty sections specifically require a sale. (*See* Minn. St. 336.2-314 and Minn. St. 336-2-315.) The present situation presents something slightly different from a pure sale situation where goods are sold to a customer and do not require the performance of any substantial amount of services. Plaintiffs do not allege that the furnace was defective when it left the manufacturer or that the furnace malfunctioned, but instead claim that the installation of the furnace by [the

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67. *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 885 S.W.2d 603 (Tex. Ct. App. 1994) (applying Minnesota law), *question certified*, 955 S.W.2d 853 (Tex. 1996), *certified question answered*, 565 N.W.2d 16 (Minn. 1997), *modified*, 953 S.W.2d 733 (Tex. 1997).

68. *See Asbestos Prods. Inc. v. Ryan Landscape Supply Co.*, 282 Minn. 178, 180, 163 N.W.2d 767, 769 (1968) (stating that “[t]he doctrine of implied warranty [of merchantability] . . . originated and is used to promote high standards of business and to discourage sharp dealings. It rests upon the principle that ‘honesty is the best policy’ and contemplates business transactions in which both parties may profit.” (internal citations omitted)).

69. 253 N.W.2d 826, 827 (Minn. 1977).

defendant] was faulty. Thus, the issue raised is whether the implied warranties of the Uniform Commercial Code apply to the improper installation of a product.

Although the issue is a matter of some dispute in other jurisdictions, the particular instance involved here is controlled by a previous Minnesota decision under the Uniform Sales Act, *Kopet v. Klein*, 275 Minn. 525, 148 N.W.2d 389 (1967). In *Kopet*, the defendant sold a water softener to the plaintiff and the purchase price included the cost of installation. After the defendant seller installed the unit in the plaintiff's home, it failed to function properly and the buyer brought an action for breach of warranty. On appeal, this court stated (275 Minn. 529, 148 N.W. 389): "Defendant asserts that the court erred in informing the jury that breach of implied warranty could arise by faulty installation of the unit. Essentially, the question raised by this contention seems to be whether the installation of the unit was part of the sale covered by the warranty. In Vold, Sales (2 ed.) §1, p. 4, the author states: 'In certain types of sales, too, certain services, such as to deliver elsewhere, or to *install*, are many times included.' (emphasis added.)

The rule thus seems to be that the warranty applies where the sale involves not only a transfer of a chattel but also some related service, such as construction. We think the rule applies to this case. Plaintiff had never owned a water softener before and he knew nothing about how to install or operate one when he made the purchase from defendant. We think it clear from the record that plaintiff was purchasing an *installed* water softener."

Thus, on the basis of *Kopet* there can be little doubt that the installation of the furnace by [defendant] was covered by the implied warranties under the Uniform Commercial Code. (citations omitted.)

The Eighth Circuit essentially concluded that "where installation or some similar service is related to the sale of goods, the implied warranties of the U.C.C. cover the service as well as the goods" and "emphasized that implied warranties are favored under Minnesota law . . . ." <sup>70</sup> It did not explicitly discuss the question as one of whether the predominant aspect of the transaction was for

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70. *LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 346 n.6 (8th Cir. 1981).

goods or services. However, “[w]hile the [court] apparently liberally construed the U.C.C. implied warranty provisions in *O’Laughlin* and *Kopet*, it did not expressly reject the prevailing ‘predominant aspect’ test for determining whether such mixed sales contracts create implied warranties.”<sup>71</sup>

The *O’Laughlin* court certainly implied, but did not specifically say, that the transaction was for an installed furnace and that for purposes of a breach of implied warranty claim, the predominant aspect of the transaction was the sale of a good. The provision of the services required to install it in the plaintiff’s home was a secondary aspect of the transaction so that the entire transaction should be considered one for the sale of a good.

*O’Laughlin* and *Kopet* together certainly do not clearly stand for the proposition that all mixed sales of goods and services in Minnesota create an implied warranty of merchantability. They may suggest, however, that the courts will be liberal in finding an implied warranty to arise out of such mixed sales.

Another issue that may arise in a transaction for goods is whether the nature of the transaction is a “sale” or something sufficiently close to a sale to warrant an implied warranty. Some courts have held that no warranty arises where the transaction is not sufficiently complete at the time of injury to conclude that there was intent on the part of the injured party to buy the good,<sup>72</sup> where the product is leased rather than sold,<sup>73</sup> or where there is a bailment.<sup>74</sup> However, other cases show that where an offer to sell combines with an intent to buy, the absence of a technical sale is not a barrier to concluding that an implied warranty exists.<sup>75</sup>

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71. *Id.*

72. *See, e.g.,* *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1347 (11th Cir. 1986) (shopper injured by lid of cookie jar while examining the good but before she had formed any intent to buy).

73. *See, e.g.,* *Bechtel v. Paul Clark, Inc.*, 412 N.E.2d 143, 149–50 (Mass. App. Ct. 1980) (car with defective brakes).

74. *See, e.g.,* *Watford v. Jack LaLanne Long Island, Inc.*, 151 A.D.2d 742, 743–44 (N.Y. App. Div. 1989) (use of rowing machine at health club).

75. *See* *Fender v. Colonial Stores, Inc.*, 225 S.E.2d 691 (Ga. Ct. App. 1976). The plaintiff in *Fender* was injured by an exploding Coke bottle as she placed it on the defendant’s checkout counter. The court held that the defendant had offered the good for sale by placing it on the shelf, plaintiff had accepted the offer by removing it from the shelf, and that there was, therefore, a contract for sale which gave rise to an implied warranty. Official comment 1 to U.C.C. § 2-314 says that “[t]he seller’s obligation applies to present sales *as well as contracts to sell* . . . .” (emphasis added). *See also* *Keaton v. ABC Drug Co.*, 467 S.E.2d 558 (Ga. 1996). The plaintiff in *Keaton* was injured when she reached up to pull a bottle of bleach

Leases of goods in Minnesota are now subject to the provisions of Article 2A of the U.C.C. that include warranty provisions essentially identical to those in Article 2 which apply to the sale of goods.<sup>76</sup> There is no Minnesota case law specifically interpreting the meaning of “sale” in section 336.2-314 but the supreme court’s indication that implied warranties are favored under Minnesota law<sup>77</sup> suggests that Minnesota courts will interpret the concept of a “sale” broadly for purposes of determining whether an implied warranty has arisen out of the transaction.

*C. Seller is a Merchant with Respect to Goods of that Kind*

According to the language of section 336.2-314, the seller of a good must be “a merchant with respect to goods of that kind” before the transaction gives rise to an implied warranty of merchantability. In general, this language is meant to exclude occasional or isolated sales by one who does not sell regularly (one who is not a “merchant”) and sales by one who does not deal regularly in that type of good (even if a merchant, one must be a merchant “with respect to goods of [the] kind” sold to the plaintiff). So the isolated sale of a used car by one not in the business of selling cars,<sup>78</sup> or the somewhat regular sale of a repossessed car by a bank is not a sale by a merchant with respect to goods of that kind.<sup>79</sup>

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from a high shelf and bleach spilled due to an unseen loose cap on the bottle. The court concluded that her action of reaching up to grasp the bottle was sufficient to show her intent to purchase the good.

76. See MINN. STAT. §§ 336.2A-210 to -316 (2002). The U.C.C. Comment to § 336.2A-210 describes the purposes of these sections as follows:

All of the express and implied warranties of the Article on Sales (Article 2) are included in this Article, revised to reflect the differences between a sale of goods and a lease of goods. \* \* \* The lease of goods is sufficiently similar to the sale of goods to justify the decision. Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 Ill. L.F. 446, 459–60. Many state and federal courts have reached the same conclusion.

77. See *Asbestos Prods. Inc. v. Ryan Landscape Supply Co.*, 282 Minn. 178, 180, 163 N.W.2d 767, 769 (1968) (“The doctrine of implied warranty is essentially an equitable one favored by this court and should be given effect when it is possible to do so.”).

78. See, e.g., *Ballou v. Trahan*, 334 A.2d 409, 409–10 (Vt. 1975) (private sale of a used car; defendant not a “merchant”); *Prince v. LeVan*, 486 P.2d 959 (Alaska 1971) (sale of a used fishing boat by owner who is not a boat dealer).

79. *Donald v. City Nat'l. Bank of Dothan*, 329 So.2d 92 (Ala. 1976).

*D. Fitness for Ordinary Purposes*

A “merchantable” good is one that is “fit for the ordinary purposes for which such goods are used.”<sup>80</sup> This “fitness for ordinary purposes” concept is the core of the implied promise made by the seller. It means that the goods are reasonably suitable for the ordinary uses for which goods of that kind are sold.<sup>81</sup> In addition to being suitable for purposes for which they are sold, merchantable goods must be reasonably safe for their ordinary uses. Substandard goods do not match this promise. Obvious examples of products that are not fit for ordinary purposes include a clothes dryer that overheats and catches fire,<sup>82</sup> a ladder that collapses when used properly,<sup>83</sup> dried milk that is infested with insects,<sup>84</sup> and CB radios that fail to withstand normal levels of shock and vibration.<sup>85</sup> Other examples are not so obvious. A snowblower that provides no warning of the risks of attempting to remove clogged snow before turning the machine off is not merchantable since a product that fails to warn users of foreseeable risks associated with its use is defective and, therefore, not merchantable.<sup>86</sup> Failure on the part of the seller of a liquor business to provide to the buyer proper documentation of the inventory makes the liquor defective. Even though the liquor itself was not defective, the lack of documentation could result in the confiscation of the undocumented liquor and suspension or revocation of the new owner’s liquor license by state regulators. This meant that the undocumented goods breached the implied warranty of merchantability.<sup>87</sup>

On the other hand, goods do not have to be flawless or perfectly safe in order to be merchantable. When General Motors designed a door-mounted seatbelt that was awkward to use, it did

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80. MINN. STAT. § 336.2-314(2)(c) (2002).

81. “Under Minnesota law goods or products to be merchantable must be such as are fit for the ordinary purposes for which such products are used . . .” *Minn. Mining & Mfg.*, 885 S.W.2d at 637.

82. *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31, 36 (S.D. 1983).

83. *Lariviere v. Dayton Safety Ladder Co.*, 525 A.2d 892, 897-98 (R.I. 1987).

84. *Land O’Lakes Creameries, Inc. v. Commodity Credit Corp.*, 185 F. Supp. 412, 422-23 (D. Minn. 1960), *aff’d*, 308 F.2d 604 (8th Cir. 1962).

85. *Indus. Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 797 (D. Minn. 1980).

86. *Hayes v. Ariens Co.*, 462 N.E.2d 273, 275 (Mass. 1984).

87. *Loden v. Drake*, 881 P.2d 467 (Colo. Ct. App. 1994).

not breach an implied warranty of merchantability.<sup>88</sup> The restraint system was more difficult to use than anticipated but still performed its ordinary function adequately so it was not unfit for ordinary purposes. Similarly, the lack of leg protection on a motorcycle neither made it a defective product nor unfit for its ordinary purposes since the risk of a leg injury in the event of a side collision with a car was obvious to users.<sup>89</sup>

Finally, the implied warranty of merchantability is not breached unless the product is inadequate or unsafe when used for an “ordinary purpose.” Generally, this means an intended or reasonably foreseeable use of the product. The plaintiff must prove that he made proper use of the product, that he exercised due care for his own safety, that he was not aware of the defect and that he did not mishandle the product.<sup>90</sup> A beer bottle that breaks when intentionally thrown against a utility pole is not unmerchantable<sup>91</sup> nor are safety glasses that shatter when subjected to forces far greater than could reasonably be expected,<sup>92</sup> nor is a twenty-year-old used front axle and steering mechanism, installed by the plaintiff on his tractor, which fails.<sup>93</sup>

Hence, unless the good is defective in some way, it is fit for its ordinary purposes.

#### *E. Other Merchantability Standards*

Although fitness for ordinary purposes is the primary standard for determining whether a good satisfies its implied warranty of merchantability, the language of section 336.2-314 also provides additional criteria for determining whether goods are merchantable. Section 336.2-314 provides that, in order for goods to be merchantable, they must be at least such as

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88. *Gen. Motors Corp. v. Brewer*, 959 S.W.2d 187 (Tex. 1998).

89. *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162 (5th Cir. 1992) (applying Mississippi law). Risks that are obvious to the ordinary consumer will not ordinarily render the product unfit for ordinary purposes. The U.C.C. disclaimer provisions of § 336.2-316 provide, in subsection 3(b), that “there is no implied warranty with regard to defects which an examination [of the product by the buyer] ought in the circumstances to have revealed . . .” MINN. STAT. § 336.2-316, U.C.C. cmt. (2002).

90. *Rients v. Int’l Harvester Co.*, 346 N.W.2d 359 (Minn. Ct. App. 1984).

91. *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980).

92. *Am. Optical Co. v. Weidenhamer*, 457 N.E.2d 181 (Ind. 1983).

93. *Rients*, 346 N.W.2d 359.

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

Some of these criteria may be irrelevant and others redundant in the case of any particular good or product. Goods that cannot “pass without objection in the trade under the contract description,” fungible goods which are not of “fair average quality,” goods that are not of “even kind, quality and quantity” from one unit to another, and goods that are not adequately packaged and labeled, are all substandard or defective in some way. Each of these criteria seems to be synonymous with fitness for ordinary purposes.

The requirement that goods “pass without objection in the trade” has been the focus of litigation because the seller has argued that goods meeting this criterion do *not* breach the implied warranty of merchantability. A product does not have to be perfect or even state-of-the-art to meet existing trade standards.<sup>94</sup>

Goods that fail to “conform to the promises or affirmations of fact made on the container or label” may not be defective in the tort law sense. The failure to meet the promise may make the product unsafe, but it may also make the product unsuitable for the buyer’s needs. This criterion for merchantability is meant, similar to an express warranty, to hold the seller to a promise—a representation about the goods. Unlike an express warranty,

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94. See, e.g., *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1099 (11th Cir. 1983) (applying Florida law) (stating that an older model photocopier was not unmerchantable simply because it was not the best copier on the market or even equal to competitor’s copiers so long as it met “existing standards of the trade at the time of sale”); *Wis. Elec. Power Co. v. Zallea Bros.*, 443 F. Supp. 946, 953 (E.D. Wis. 1978) (concluding that steam pipe expansion joints, which corroded and cracked after a short period of use, were nevertheless merchantable since they met the design standards in the industry).

however, the buyer is not required to show reliance on the seller's representation<sup>95</sup> in order to show that there is an implied warranty of merchantability because of promises or affirmations made on the container or label.

Finally, the "must be at least such as" language in section 336.2-314 leaves open the possibility that there may be other attributes of merchantability, at least in some cases.

There is relatively little case law, and virtually none in Minnesota, applying the merchantability criteria in section 336.2-314 that are in addition to fitness for ordinary purposes.

#### IV. IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

##### A. *Generally*

The implied warranty of fitness for a particular purpose has some attributes of both an express warranty and an implied warranty of merchantability, though it is conceptually distinct from either. This warranty is essentially an implied promise by the seller of a product that the product will meet the particular or special needs of the buyer. It is similar to an express warranty in that it is rooted in the premise that the seller has made a representation to the buyer about some attribute of the product—in this instance, that the product will meet the buyer's particular needs. It is similar to an implied warranty of merchantability in that the representation arises by implication from the transaction between seller and buyer. It is, however, distinct from the implied warranty of merchantability in that it promises that the product will safely and effectively serve the particular, as distinct from the ordinary, purposes of the buyer. Thus, the product may be free of defects, yet breach an implied warranty of fitness for purpose, because it does not satisfy the buyer's special purposes.<sup>96</sup>

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95. *See supra* Part II.C.

96. A good example of a product that is not defective or unmerchantable, but nonetheless breaches the implied warranty of fitness for a particular purpose is found in *Emerald Painting, Inc. v. PPG Indus., Inc.*, in which the defendant advised the plaintiff, a painting contractor, to use a particular epoxy paint and sealer to paint concrete surfaces in accordance with the specifications in a contract. 472 N.Y.S.2d 485 (N.Y. App. Div. 1984). The paint and sealer were not compatible with each other and, as a consequence, the paint peeled off the surface to which it had been applied. *Id.* at 486. Neither the paint nor the sealer was defective, but the combination of the two failed to serve the particular needs of the plaintiff. *Id.* at 486–87.

Minnesota Statutes section 336.2-315 provides that:

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

The buyer, in order to establish the existence of this warranty, thus must prove that (1) the seller knew or should have known of the buyer's particular purpose for the product; (2) the seller knew or should have known that the buyer was relying on the seller's skill and judgment in selecting and furnishing the product; and (3) the buyer actually relied on the seller.

The seller need not be a merchant with respect to goods of that kind as is required in order for an implied warranty of merchantability to arise,<sup>97</sup> nor is a technical sale necessarily required.<sup>98</sup>

*B. The Seller's Knowledge of the Buyer's Particular Purpose*

The seller must know or have reason to know that the buyer plans to use the product for some special use that is different from the product's ordinary uses. Unless the buyer can first establish that the seller was or should have been aware of the buyer's particular purpose, it will be impossible to show that the seller implicitly represented that the product would satisfy that purpose. The plaintiff may show that he communicated his particular purpose for obtaining the product to the seller.<sup>99</sup>

A classic example of a buyer's communication of special need to a seller giving rise to an implied warranty of fitness for a

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97. See *supra* Part III.C.

98. An implied warranty of fitness for a particular purpose may arise in a lease contract. MINN. STAT. § 336.2A-213 (2002). Given the Minnesota Supreme Court's declaration that implied warranties are "favored" under Minnesota law, perhaps other transactions not technically amounting to a sale could also give rise to this warranty. See *Asbestos Prods. Inc. v. Ryan Landscape Supply Co.*, 282 Minn. 178, 180, 163 N.W.2d 767, 769 (1968) ("The doctrine of implied warranty is essentially an equitable one favored by this court and should be given effect when it is possible to do so.").

99. See *Luther v. Standard Conveyor Co.*, 252 Minn. 135, 89 N.W.2d 179 (1958) (applying the predecessor Uniform Sales Act provision, Minnesota Statutes § 512.15 subd. 1, which provided that the buyer must have made known, expressly or by implication, the particular purpose for which the goods were required).

particular purpose is *Klein v. Sears Roebuck & Co.*<sup>100</sup> The buyer of a riding lawnmower made his purchase contingent upon the seller inspecting the buyer's property and the seller's determination that the mower was safe for use on his hilly property. After inspection of the buyer's property, the seller confirmed that the mower was suitable for the buyer's use so long as it was driven straight up the steeper hills. When driven vertically up a hill, the mower tipped over backwards and injured the buyer. The court affirmed the verdict for the plaintiff for breach of an implied warranty of fitness for a particular purpose.<sup>101</sup> Another good example is found in *Barrington Corp. v. Patrick Lumber Co.*,<sup>102</sup> where the plaintiff ordered windows that the defendant-seller knew had to conform to Tennessee Valley Authority (TVA) energy efficiency specifications. The defendant supplied windows that it claimed were "TVA windows" which in fact were not in compliance with the TVA standards. The windows were not inherently defective, but they breached the implied warranty of fitness for purpose since they did not fulfill the buyer's particular purpose. This warranty arose because the buyer had communicated his particular purpose to the seller.

The buyer may also make his intended special need for or use of the product evident to the seller from the context of the transaction.<sup>103</sup> This most often occurs in situations where the seller and buyer have dealt often enough with one another so that the seller is familiar with the buyer's business practices and needs.

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100. 773 F.2d 1421 (4th Cir. 1985) (applying Maryland law).

101. *Id.* at 1425. The exchange between buyer and seller also gave rise to an express warranty because of the seller's explicit representation that the mower was safe for operation on the buyer's property. *See id.* at 1424. If, after the buyer had made his special needs known, the seller had simply delivered the mower and made no explicit representation of any kind, then only an implied warranty of fitness for purpose would have arisen.

102. 447 So.2d 785 (Ala. Civ. App. 1984).

103. *See* *Riviera Imports, Inc. v. Anderson Used Cars, Inc.*, 268 Minn. 202, 207, 128 N.W.2d 159, 163 (1964) (stating "[t]he seller may be informed of the intended use by the buyer by implication"). U.C.C. Comment 1 states that "the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended . . . if the circumstances are such that the seller has reason to realize the purpose intended . . ." MINN. STAT. § 336.2-315, U.C.C. cmt. 1 (2002). The implied warranty of fitness for a particular purpose discussed in *Riviera*, a case decided under the Uniform Sales Act, would constitute an implied warranty of merchantability under the U.C.C. because the purpose for which a car buyer needs an accurate certificate of title is an ordinary, not a particular or special, purpose for obtaining a car's title.

The seller may also have “reason to know” of the buyer’s special need because a third party has made the seller aware.<sup>104</sup>

Finally, the “particular purpose” that gives rise to this warranty is different than the ordinary purposes for which the product is used. A “particular purpose” means a specific use of the goods that is peculiar to the nature of the buyer’s needs, whereas an “ordinary purpose” envisages a use customarily made of the goods.<sup>105</sup> The Minnesota Court of Appeals failed to see this distinction in *Willmar Cookie Co. v. Pippin Pecan Co.*,<sup>106</sup> where the court held that a pecan supplier had breached the implied warranty of fitness for a particular purpose by supplying moldy pecans when it knew that the buyer wanted the pecans for resale. Whether or not the nuts were to be resold, human consumption is an ordinary, not a particular, purpose of food. Since the nuts were not fit for human consumption, they were simply not merchantable.

In *Nelson v. Wilkins Dodge, Inc.*,<sup>107</sup> the buyer of a pickup truck alleged breach of both the implied warranty of merchantability and that of fitness for a particular purpose. The buyer claimed that a fitness for particular purpose warranty arose out of a conversation with the dealer at the time of sale. In this conversation, the dealer promised that the truck was fit for driving at sustained high rates of speed. In reversing the trial court’s grant of summary judgment for the defendant, the Minnesota Supreme Court said:

Defendant suggests that the warranty of fitness for a particular purpose is inapplicable in this case because sustained high-speed driving is an ordinary purpose for which an automobile is used. The implied warranties of merchantability and fitness often overlap, however, and though it is a close question, both should be applicable here.<sup>108</sup>

Minnesota courts are not alone in confusing the two concepts. However, according to a leading authority on the U.C.C., “[s]uch confusion under the Code is inexcusable. Sections 2-314 and 2-315 make plain that the warranty of fitness for a particular purpose is narrower, more specific, and more precise.”<sup>109</sup>

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104. CLARK & SMITH, *supra* note 66, § 6:1.

105. See MINN. STAT. § 336.2-315, U.C.C. cmt. 2 (2002).

106. 357 N.W.2d 111 (Minn. Ct. App. 1984).

107. 256 N.W.2d 472 (Minn. 1977).

108. *Id.* at 476 n.2 (citations omitted).

109. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 9-10 at 369 (5th ed. 2000).

Even though the buyer's particular or special need for a product can be brought home to the seller in a variety of ways and can be inferred from the overall context of the transaction, the seller still has plenty of opportunity to argue that he had no reason to know of the buyer's particular needs. If, for example, the buyer is in control of installation or application of the product, it is much less likely that the seller would have reason to know of a particular use intended by the buyer.<sup>110</sup> Similarly, where the defendant is a manufacturer of the product that was sold by a retailer who dealt directly with the buyer, the lack of privity between manufacturer and buyer very likely means that the manufacturer did not impliedly represent anything about the product's fitness for the buyer's particular purpose. This contrasts, of course, with the rule regarding the implied warranty of merchantability where a breach occurs if there is a defect in the product when it leaves the manufacturer's hands despite the lack of privity between the manufacturer and the consumer.<sup>111</sup>

*C. The Seller's Knowledge of the Buyer's Reliance*

The seller must also have reason to know that the buyer is relying on her skill and judgment to provide a product suitable for the particular needs of the buyer. For example, in *Freeman v. Case Corp.*,<sup>112</sup> the evidence showed that the plaintiff had purchased a particular model of mower-equipped tractor for mowing his lawn "after seeing and admiring one owned by an acquaintance,"<sup>113</sup> and that he did not seek the seller's advice about the purchase.<sup>114</sup> In such circumstances, the seller had no reason to know that the buyer was relying on the seller's skill and judgment to furnish a product fit for the buyer's particular needs. The court concluded, as a matter of law, that there was no implied warranty of fitness for a particular purpose that arose from the sale. Similarly, in *Laird v. Scribner Coop, Inc.*,<sup>115</sup> the evidence showed that the buyer of feed corn had considerable experience with grain and hogs and had in

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110. See, e.g., *Friendship Heights v. Koubek*, 573 F. Supp. 100 (D. Md. 1983); *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164 (D. Conn. 1984).

111. See *infra* Part VI.C.

112. 924 F. Supp. 1456 (W.D. Va. 1996), *rev'd on other grounds*, 118 F.3d 1011 (4th Cir. 1997).

113. *Id.* at 1461.

114. *Id.* at 1464.

115. 466 N.W.2d 798 (Neb. 1991).

fact trained the feed corn seller's manager. The court had no difficulty in concluding that there was "no credible evidence upon which one could conclude that [the buyer] relied on [the seller's] skill and knowledge to select this particular feed corn."<sup>116</sup>

In general, if the buyer's expertise is greater than that of the seller, if the seller supplies a product that satisfies specifications provided by the buyer,<sup>117</sup> or if the buyer or his agent thoroughly inspects the goods prior to sale, it is much less likely that the buyer can show that he relied on the seller's skill and judgment rather than upon his own.

#### *D. The Buyer's Reliance on the Seller*

The buyer must actually rely on the seller's skill and judgment in selecting a product fit for the buyer's need or no implied warranty of fitness for purpose arises. Generally speaking, if the buyer can show that he made his particular need evident to the seller and also made evident that he was relying on the seller to provide a product that would meet that particular need, there is a very strong implication that the buyer did in fact rely on the seller to provide a suitable product. Courts and counsel tend to combine the seller's "reason to know" of the buyer's reliance and the buyer's reliance in fact into a single "reliance" element. The buyer's actual reliance is a critical element of the claim. Even if the seller knew of the buyer's particular or special needs and believed that the buyer was relying upon her to provide a suitable product, the seller's failure to provide a suitable product is simply not the cause of any resulting harm to the buyer where the buyer did not in fact rely on the seller.

### V. PLEADING A WARRANTY THEORY

#### *A. Generally*

The typical complaint in a products liability suit tends to plead everything but the kitchen sink and sometimes even throws in the sink for good measure. Perhaps this is tactically sound but there may be virtue in being more selective. A "shotgun" approach to pleading has the potential for confusing the issues and diffusing

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116. *Id.* at 804.

117. *See, e.g.,* Cent. Warehouse Lumber Co. v. Redlinger & Hansen Co., 193 Minn. 42, 257 N.W. 656 (1934).

the focus on a party's strongest arguments. Therefore, a buyer aggrieved with a product's performance should think carefully about whether to plead breach of warranty claims and about which warranty claims to plead.

*B. Implied Warranty of Merchantability*

A plaintiff should plead a claim for breach of an implied warranty of merchantability only in the most limited circumstances. A product that is not merchantable is not merchantable because it is "defective" in tort law terms.<sup>118</sup> The plaintiff's argument that the product is not merchantable is essentially an argument that the product is not fit for ordinary purposes.<sup>119</sup> Therefore, plaintiff's evidence and arguments are very likely to be exactly the same as those brought to bear in an effort to show that the product is defective because it is not reasonably safe. In such instances, pleading and arguing both tort and warranty theories adds nothing to the strength of the plaintiff's case and creates the possibility of confusing the court, or the jury, or both. Moreover, not pleading the merchantability warranty claim avoids any of the issues of whether the seller is a merchant,<sup>120</sup> whether the transaction was a sale of goods,<sup>121</sup> whether notice of revocation was timely given,<sup>122</sup> or whether the warranty has been disclaimed.<sup>123</sup>

However, the buyer may have suffered only economic harm as a consequence of the product being unmerchantable. In that instance, the claimant cannot, under the economic loss statute,

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118. The comments to the revised, but as-of-yet unadopted, U.C.C. § 2-314 explicitly note that there is:

disagreement over whether the concept of defect in tort and the concept of merchantability in Article 2 are coextensive where personal injuries are involved, i.e., if goods are merchantable under warranty law, can they still be defective under tort law, and if goods are not defective under tort law, can they be unmerchantable under warranty law? The answer to both questions should be no, and the tension between merchantability in warranty and defect in tort where personal injury or property damage is involved should be resolved as follows: When recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law.

U.C.C. Revised Article 2, § 2-314, cmt. 7. *See also supra* Part III.A.

119. *See supra* Part III.D.

120. *See supra* Part III.C.

121. *See supra* Part III.B.

122. *See infra* Part VII.A.

123. *See infra* Part VIII.D.

bring a tort claim and must resort to a warranty claim.<sup>124</sup> In such cases, it is important to remember that although the statute of limitations period for warranty claims is the same as for strict products liability tort claims, the limitation period for a breach of warranty claim begins to run upon breach, which usually occurs when the product is delivered to the buyer, whereas the limitation period for a tort claim does not begin to run until the buyer is harmed by the defective product.<sup>125</sup>

### C. *Express Warranty*

Claims for breach of an express warranty or the warranty of fitness for a particular purpose are especially important to a plaintiff in instances where it will be difficult or impossible to show that the product is defective in tort law terms. The essence of both of these warranty claims is that the seller, either explicitly or implicitly, has made a representation about the product that is not true. The product may be free of defects but still not fulfill the promise made by the seller. It is also possible that the seller has made an express warranty that effectively promises that the product is merchantable, such as a promise that the product is “free of all defects.” Unlike the implied warranties, this express promise cannot then be disclaimed once it has been made.<sup>126</sup>

It is also quite possible that facts that give rise to an express warranty claim may also form the basis for a negligent or even intentional misrepresentation claim or simply a basic negligence claim.

### D. *Implied Warranty of Fitness for a Particular Purpose*

The implied warranties of merchantability and of fitness for a particular purpose represent very different implied promises about a product and the distinction between the two implied warranties is quite clear. An implied warranty of merchantability promises that the good is fit for all *ordinary* purposes for which such a good is

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124. See MINN. STAT. § 604.101 (2002).

125. See MINN. STAT. § 336.2-725(1) (2002) (requiring that an action for breach of a contract for sale be commenced within four years of the breach, unless the parties have agreed to a shorter period); § 541.05 subd. 2 (stating “[a]ny action based on the strict liability of the defendant and arising from the manufacture, sale, use or consumption of a product shall be commenced within four years”).

126. See *infra* Part VIII.B.

obtained. An implied warranty of fitness for a particular purpose promises that the good is fit for a *particular* purpose or need of the buyer. A particular purpose is, by definition, something other than an ordinary purpose.<sup>127</sup> Even though the courts sometimes confuse the two,<sup>128</sup> counsel should keep this distinction clear. In particular, it is important to remember that a buyer must show reliance on the seller in order to show that there is an implied warranty of fitness for purpose. No reliance need be shown to establish that there is an implied warranty of merchantability.<sup>129</sup>

It is also useful to remember that the warranty of fitness for purpose can only be disclaimed in writing, whereas the warranty of merchantability can be disclaimed orally.<sup>130</sup> Furthermore, the disclaimer must mention fitness. Therefore, a defendant may be able to prove that she effectively disclaimed the implied warranty of merchantability but, unless there is a written disclaimer, the buyer may still have an implied warranty of fitness for a particular purpose.

Of course, a product or good may breach both of these implied warranties if the product is unsuitable in more than one way; for example, one feature of the product breaches the merchantability warranty and another feature breaches the fitness-for-particular-purpose warranty.

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127. See *supra* Part IV.B.

128. *Id.*

129. See, e.g., *Schenck v. Pelkey*, 405 A.2d 665 (Conn. 1978). The plaintiff alleged in his complaint that a defective swimming pool slide that had caused personal injury was not “reasonably fit for the purpose for which it was purchased.” *Id.* at 670. The trial court interpreted this as a complaint that the product breached the § 2-315 implied warranty of fitness for a particular purpose. *Id.* In order to establish this warranty, the buyer must show reliance which he could not do. *Id.* The appellate court later saved the day for the plaintiff when it determined that, although the complaint “refers somewhat confusingly to ‘fitness,’” the plaintiff’s complaint should be understood to refer instead to merchantability and that plaintiff’s essential complaint was that the good was not suitable for “the ordinary purpose for which such goods are used.” *Id.* at 671.

130. See *infra* Part VIII.D.

VI. EXTENSION OF WARRANTIES—THIRD-PARTY BENEFICIARIES  
PRIVITY

A. *Generally*

Negligence law long ago rejected privity of contract as a defense to liability for failure to take reasonable care.<sup>131</sup> Courts generally came to conclude that the duty of care that lies at the heart of negligence law does not arise out of a contract between the plaintiff and the defendant, but is imposed independently as a matter of policy. Therefore, a contractual relationship between plaintiff and defendant is irrelevant to the question of liability for negligence. Consequently, contract law doctrine—including the doctrine of privity—is also irrelevant. However, this broad, general conclusion suggests, at least by implication, that a contract between the seller of a product and a person claiming to have been harmed by the product is critical to a claim for breach of contract, including claims for breach of warranty.

Historically, the general rules of contract law provided that only those who were a party to a contract could sue under it for breach of warranty. Around the turn of the twentieth century, however, courts began to create exceptions to the general privity defense of product manufacturers. The culminating event in this history was the decision of the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors*,<sup>132</sup> which concluded that, even where the basis for the seller's liability was a contract, privity should not bar recovery. The *Henningsen* court described the changed commercial circumstances that justified a change in the law:

There is no doubt that under early common-law concepts of contractual liability only those persons who were parties to the bargain could sue for a breach of it. In more recent times a noticeable disposition has appeared . . . to break through the narrow barrier of privity when dealing with sales of goods in order to give realistic recognition to a universally accepted fact. The fact is that the dealer and the ordinary buyer do not, and are not expected to, buy goods . . . exclusively for their own consumption or use. Makers and manufacturers know this and advertise and market their products on that assumption; witness the "family" car, the baby foods, etc. The limitations of privity

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131. See *supra* note 3 and accompanying text.

132. 161 A.2d 69 (N.J. 1960).

in contracts for the sale of goods developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality . . . . With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of “consumer” was broader than that of “buyer.” He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life and limb, then society’s interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer.<sup>133</sup>

In *Henningsen*, the wife of the buyer of a new car was injured when, ten days after the car had been purchased, she lost control of the car and it crashed apparently because of a faulty steering mechanism. Among other claims brought by the injured driver was a breach of implied warranty of merchantability claim against Chrysler Corporation, the manufacturer of the car. Chrysler argued that “since it was not a party to the sale by the dealer . . . there is no privity of contract between it and the plaintiffs, and the absence of this privity eliminates any such implied warranty.”<sup>134</sup> The court, however, observed that, in the modern marketplace, a buyer’s remedies “and those of persons who properly claim through him should not depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest . . . upon the demands of social justice.”<sup>135</sup> Further, as to the wife, who was not a party to the contract of sale,

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133. *Id.* at 80–81. See generally William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1960) (discussing the fall of the privity requirement in products liability cases after the *Henningsen* decision).

134. *Henningson*, 161 A.2d at 80.

135. *Id.* at 83 (quoting *Mazetti v. Armour & Co.*, 135 P. 633, 635 (1913)) (internal quotations omitted).

the cause of justice in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against defendant Chrysler.<sup>136</sup>

*Henningsen* presented issues of both vertical and horizontal privity. The distinction between the two is important because both the courts and the U.C.C. treat the concepts differently. Vertical privity refers to the relationship among those in the chain of manufacturing, distribution and sale of a product to the ultimate buyer. Those adjacent to one another in this chain are in vertical privity with each other. So, for example, the manufacturer and a distributor who obtained the product directly from the manufacturer would be parties in vertical privity with one another. Likewise, the retail seller and the ultimate buyer would be in vertical privity with one another. However, the manufacturer and the ultimate buyer are not in vertical privity since they have no direct contractual nexus. Horizontal privity refers to the relationship between those who may be injured or otherwise affected by the product and the buyer of the product; in other words, those who wish to stand in the shoes of the buyer and have the benefits of any warranties obtained by the buyer. These non-buyers may include members of the buyer's family, visitors in the buyer's home, the buyer's employees, and others. The court in *Henningsen* concluded that the lack of *vertical* privity between Chrysler, the car's manufacturer, and the buyer, Mr. Henningsen, did not bar Mrs. Henningsen's warranty claims against Chrysler. Nor was her claim barred by the lack of *horizontal* privity between Chrysler and the injured Mrs. Henningsen, who as a non-buyer was outside the chain of the car's distribution.

*B. U.C.C. Section 2-318—Horizontal Privity*

In the wake of *Henningsen*, the law regarding privity began to change rapidly so that, at the time the U.C.C. was being adopted by many states in the mid-1960s, the common law doctrine of privity varied greatly from one state to another. The Official Text of the U.C.C. provided three alternatives for section 2-318, the section

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136. *Id.* at 99-100.

titled “Third Party Beneficiaries of Warranties Express and Implied.” These three alternatives reflected the differences in state common law. Each alternative describes the extent to which warranty protection extends to others beyond the buyer of the product. About half the states adopted Alternative A, the most restrictive, or a similar provision.<sup>137</sup> Minnesota, however, adopted a close equivalent of Alternative C, the broadest version of the Code’s alternatives for section 2-318.<sup>138</sup> Section 336.2-318 of Minnesota’s U.C.C. provides as follows:

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.<sup>139</sup>

This language addresses the issue of horizontal privity and says, in essence, that the absence of such privity does not bar a warranty claim by non-buyers so long as they are persons “who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.” Non-buyer beneficiaries of the buyer’s warranties are not limited to natural persons or members of the buyer’s family and household, or guests in the buyer’s home as is the case in those jurisdictions that have adopted the more restrictive language of Alternative A or B of the U.C.C.

Of course, section 336.2-318 presumes that there is a warranty in the first place that has arisen from the transaction between seller and buyer. If no express warranty was made and the implied warranties were disclaimed under section 336.2-316,<sup>140</sup> then the product is not warranted and questions regarding third party beneficiaries will not arise. If the seller has contractually limited an express warranty to, for example, the first buyer, then there is no express warranty attached to the good once it passes into the hands of a subsequent buyer.<sup>141</sup> If there is a warranty, however, then the seller cannot exclude or limit the operation of section 336.2-318’s extension of that warranty’s protection to third persons who may

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137. See WHITE & SUMMERS, *supra* note 109, at 402 n.3.

138. Compare U.C.C. § 2-318, Alternative C (2003), with MINN. STAT. § 336.2-318 (2002).

139. MINN. STAT. § 336.2-318 (2002).

140. See *infra* Part VIII.D.

141. See *infra* Part VI.D.

reasonably be expected to use the warranted product.

*C. Vertical Privity*

On its face, section 336.2-318 addresses only the issue of horizontal privity by extending warranty protection to third persons who may reasonably be expected to use warranted products.<sup>142</sup> Issues of vertical privity are left to common law development.<sup>143</sup> Vertical privity is very unlikely to arise as an issue in a products liability case since the claim ordinarily will be brought in tort. In such a case, contract law concepts are simply not relevant. As a consequence, there is little Minnesota case law directly addressing the question of whether privity bars claims brought against remote sellers in the chain of a product's distribution with whom the buyer did not contract directly. In general, however, the case law leaves little doubt that privity is rarely, if ever, a bar to a warranty claim made by what *Henningsen* called a "remote purchaser" —one who did not buy the product directly from the seller against whom the claim is brought.

For example, in *TCF Bank & Savings, F.A. v. Marshall Truss Systems, Inc.*,<sup>144</sup> TCF brought negligence and breach of warranty claims against the manufacturer of roof trusses used in the construction of the plaintiff's bank building. Marshall Truss had supplied the trusses to Robert L. Carr Co., a general contractor who constructed the bank building for Pipestone Federal Savings and Loan Association. About two years after it was built, TCF purchased the building from Pipestone. The defendant contended that TCF was not a party to the contract for the sale of the roof trusses and therefore was barred from recovery under that contract. The court concluded that TCF, "upon purchase of the building from Pipestone, assumed Pipestone's rights under the warranty provisions."<sup>145</sup> The court of appeals appears to treat this as a question of horizontal privity, observing that:

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142. See *Transp. Corp. of Am. v. Int'l Bus. Machs. Corp.*, 30 F.3d 953, 958–59 (8th Cir. 1994).

143. See MINN. STAT. § 336.2-318, U.C.C. cmt. 3 (2002) (stating that "[b]eyond [the language of the section which extends warranty protection horizontally to non-buyers], 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").

144. 466 N.W.2d 49 (Minn. Ct. App. 1991).

145. *Id.* at 52.

[u]nder section 336.2-318, a seller's express or implied warranty 'extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.' 'Person' includes organizations. Minn. Stat. § 336.1-201(30). Pipestone, as owner of the building, could reasonably be expected to be affected by the sale of the trusses to the contractor who built the building, thus it was covered by the U.C.C. warranty provisions.<sup>146</sup>

The problem with this rationale, of course, is that Pipestone was a buyer of the trusses as part of the building, not a non-buyer outside the chain of the product's distribution to whom the quoted language of section 336.2-318 is meant to refer. The trusses were sold, in a chain of transactions, by Marshall Truss to Carr, then to Pipestone, and finally to TCF. None of these parties was outside the distributive chain, so no horizontal privity issue arises, only a question of vertical privity.

*TCF Bank & Savings* is not the only case in which section 336.2-318 is cited as the basis for concluding that vertical privity is no bar to remote buyers' claims against the manufacturer of the good, even though that section, addressing the issue of horizontal privity, does not presume to say anything about vertical privity and indeed "is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."<sup>147</sup> In *Nelson v. International Harvester*,<sup>148</sup> farmers bought combines manufactured by the defendant from dealers or other farmers. The combines caught fire resulting in their destruction. The owners of the combines brought breach of warranty claims against the combine manufacturer. The defendant argued that it was not a party to any of the sales transactions involving the plaintiffs because the plaintiffs were sub-purchasers in the distributive chain who were not in vertical privity with the product manufacturer. The court of appeals, appearing to rely on section 336.2-318, concluded that "there is no question that the farmers here could have brought a warranty action against the manufacturer."<sup>149</sup>

In *SCM Corp. v. Deltak Corp.*,<sup>150</sup> a case involving the sale of a

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146. *Id.*

147. See MINN. STAT. § 336.2-318, U.C.C. cmt. 3 (2002).

148. 394 N.W.2d 578 (Minn. Ct. App. 1986).

149. *Id.* at 581.

150. 702 F. Supp. 1428, 1433-34 (D. Minn. 1988).

superheater by the manufacturer to an intermediary who then sold it to the plaintiff, the federal district court made the same mistake. The plaintiff was a sub-purchaser in the distributive chain, not a non-buyer outside the chain of the product's distribution to whom section 336.2-318 refers. The court nevertheless relied on that section:

Under Minnesota law, privity of contract is not a prerequisite for recovery in an action for breach of warranty. . . . As noted, Minnesota has adopted section 2-318 of the Uniform Commercial Code . . . .<sup>151</sup>

In all of these cases, the plaintiff alleged breach of an implied warranty of merchantability resulting in economic loss. In *SCM*, the plaintiff also alleged that an express warranty and an implied warranty of fitness for a particular purpose had been breached. Under the economic loss rule, these claimants had to resort to breach of warranty claims because they could not sue in tort. In none of these opinions is there any indication that any party raised the distinction between horizontal and vertical privity as an issue nor is there any indication that the courts really thought about that distinction. It is therefore unclear what a Minnesota court would conclude if faced directly with the issue of whether vertical privity is, under any circumstances, a bar to a breach of warranty claim. It is difficult to ignore or explain away the clear indication in the U.C.C. that section 336.2-318 does not address the question of vertical privity at all and that the U.C.C. leaves the resolution of that issue to common law development.<sup>152</sup> Therefore, the *reason* given by the courts in these cases for concluding that there was no privity bar to the plaintiffs' claims is unconvincing and, indeed, appears to be just plain wrong.

This does not mean, however, that the courts in these cases

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151. *Id.* at 1432 (internal citations omitted).

152. *See* MINN. STAT. § 336.2-318, U.C.C. cmt. 3 (2002). *See also* Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc., 831 P.2d 724 (Wash. 1992). *Touchet* observes that § 2-318:

limits only horizontal privity, that is, privity between the seller and the immediate purchaser. The type of privity at issue here is *vertical* privity – privity between a manufacturer and end users down the distribution chain. Unlike horizontal privity, which is governed by statute, development of vertical privity is found in case law. \*\*\* Official Comment 3 is most emphatic that this section is otherwise intended to be neutral on the question of whether a seller's warranties extend to other than the original buyer.

*Id.* at 729.

reached the wrong results. The most sound and convincing rationale for extending the protection of a manufacturer's warranties to remote buyers of the product is the rationale expressed in the leading case on this point, *Henningson v. Bloomfield Motors*.<sup>153</sup> The underlying reason is that, in today's commercial world, manufacturers make products for, and market them directly to, consumers who include not only the ultimate buyer but also others who foreseeably may use or be affected by the product. Generally speaking, though not always, the consumer (1) is not as able to protect himself against the risk of product defects as is the manufacturer, and (2) has less bargaining strength to bargain over the question of liability in the event of a product-related harm occurring. Therefore, strict adherence to traditional privity limitations is often unfair to the consumer. These fairness concerns remain, though are greatly reduced, if the plaintiff is another commercial party rather than a consumer.

*Henningson*, however, found that privity should not be a bar where the claim was for personal injury due to breach of an implied warranty of merchantability. Should the result be different if the claim is one for breach of an express warranty or the warranty of fitness for a particular purpose? Should it matter whether the claim is for personal injury, property loss, economic loss, or for revocation of the contract?

Certainly, the Minnesota courts have consistently found that privity limitations should not be a bar to breach of warranty claims.<sup>154</sup> There are circumstances, however, in which observance of the privity limitation makes good sense. The relevant circumstances that affect the proper answer to this question are: (1) the type of warranty at issue; and (2) whether the claim is for personal injury, property loss, economic loss, or for revocation.

### 1. *Vertical Privity and Express Warranty*

Where the claim is for breach of an express warranty, the absence of vertical privity should not be a bar to a remote buyer's claim. An express warranty is founded upon a representation the

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153. See *supra* notes 131–36 and accompanying text.

154. See *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 358 (Minn. 1977); *Milbank Mut. Ins. Co. v. Proksch*, 309 Minn. 106, 107, 244 N.W.2d 105, 109 (1976); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 339–40, 154 N.W.2d 488, 500–01 (1967); *Beck v. Spindler*, 256 Minn. 543, 562, 99 N.W.2d 670, 683 (1959); *Schubert v. J.R. Clark Co.*, 49 Minn. 331, 340, 51 N.W. 1103, 1106 (1892).

seller makes about the product upon which the buyer relies in buying the product. If the product manufacturer makes the representation in its advertising or on its packaging, that representation is surely intended for the ultimate buyer of the product with whom the manufacturer does not contract directly.

What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.<sup>155</sup>

The vast majority of authority now holds that express warranties in a product's advertising and packaging run directly to the ultimate purchaser and that lack of privity does not bar such claims.<sup>156</sup>

Moreover, the federal Magnuson-Moss Warranty Act provides a private right of action for breach of an express warranty. Lack of vertical privity does not bar this statutory claim.<sup>157</sup> Finally, where

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155. *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 615-16 (Ohio 1958).

156. *See, e.g., Reid v. Volkswagen of Am., Inc.*, 512 F.2d 1294 (6th Cir. 1975) (car manufacturer made express representations regarding vehicle quality); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310 (S.D.N.Y. 1983) (manufacturer of diesel engines for taxicabs made representations regarding reliability of engines to cab manufacturer who relayed them to the taxicab buyer, and manufacturer could foresee that its representations would be relayed to this ultimate buyer); *Hauter v. Zogarts*, 534 P.2d 377, 381 (Cal. 1975) (manufacturer represented that golf practice aid was "completely safe"); *Hamon v. Digliani*, 174 A.2d 294, 294 (Conn. 1961) (manufacturer's advertising represented that detergent was "all-purpose" and "for all household cleaning and laundering"); *Kinlaw v. Long Mfg. N.C., Inc.*, 259 S.E.2d 552, 553 (N.C. 1979) (manufacturer represented that tractor was "free from defects in material and workmanship").

157. *See infra* Part VIII.H. Magnuson-Moss provides that such suits may be brought against the person "actually making" a written warranty. 15 U.S.C. §

the manufacturer's representations about the product upon which the buyer has relied prove to be untrue, a tort claim for misrepresentation will typically be available and the privity issue can be avoided altogether.

*2. Vertical Privity and Implied Warranty of Fitness for a Particular Purpose*

On the other hand, vertical privity should usually be a bar to a claim for breach of an implied warranty of fitness for a particular purpose by a remote buyer. Unlike the express warranty situation, this warranty is very unlikely to arise unless plaintiff and defendant were adjoining links in the product's distributive chain. An implied warranty of fitness for a particular purpose arises only if the seller has "reason to know" of the buyer's special needs or purposes and if the buyer relies on the seller's expertise in supplying a product for that special purpose. In cases where the seller does not deal directly with the buyer, it is very unlikely that such a warranty is made directly to that remote buyer. It is very unlikely that the seller knows of that buyer's particular needs or that such a buyer is relying on the seller's expertise even if the buyer actually relies somehow on the expertise of the remote seller with whom he does not contract directly. Therefore, it is very unlikely that a remote buyer could show that all of the requisite elements of this warranty have been satisfied.

In a case where someone, typically the retail seller, has made an implied warranty of fitness for a particular purpose to the plaintiff, privity should bar the plaintiff's claim against the product's manufacturer who did not make the representations upon which the plaintiff-purchaser relied. Assume, for example, that a prospective buyer of a riding lawnmower conditions his purchase on the mower's suitability for a steep hill on his property. He expresses this condition to the retail seller who inspects the buyer's property and then represents that the mower is safe for the buyer's particular need. When the mower is used on the steep hill,

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2310(f) (1975). This provision would apply in the many situations where the one actually making the representation is the product manufacturer through its advertising or packaging. Claims brought under this federal statute give rise to a federal cause of action, although the federal jurisdictional requirements are quite stringent, and allow for the recovery of all litigation expenses, including attorney's fees.

it tips over backwards and injures the buyer.<sup>158</sup> If the buyer then attempts to make a breach of implied warranty of fitness for a particular purpose claim against the manufacturer of the mower, lack of privity between the defendant-manufacturer and the injured buyer should bar the claim. The manufacturer has no reason to be aware of the buyer's particular needs, nor has it made any representations about the suitability of the product for the buyer's particular needs, nor is it likely that the buyer has in fact relied upon the manufacturer. Finally, if we assume that the manufacturer is not negligent because it cannot reasonably foresee that a retail seller will make such a representation, there is no good basis for voiding the privity barrier even though the plaintiff has suffered a personal injury.

### 3. *Vertical Privity and Implied Warranty of Merchantability*

It is very different in a case where personal injury or property loss results from a breach of an implied warranty of merchantability. If the product is not safe for the ordinary purposes for which such products are used, the manufacturer should foresee the risk of harm, not only to a remote purchaser, but also possibly to many others. The absence of vertical privity should not be a bar to the buyer's claim against the remote manufacturer, as the *Henningsen* court decided in that pre-U.C.C. case for reasons that remain sound.<sup>159</sup>

However, this privity issue should arise rarely, if ever, in Minnesota. If the plaintiff has suffered personal injury or property loss, it is completely redundant to plead breach of an implied warranty of merchantability in addition to tort theories of liability.<sup>160</sup> It is also foolish to plead it instead of the tort theories

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158. These facts are similar to those in *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421 (4th Cir. 1985) (applying Maryland law), except that the injured buyer in this example brings his claim for breach of an implied warranty of fitness for a particular purpose not against his seller, but against the manufacturer of the mower. See *supra* notes 100–01 and accompanying text.

159. See *supra* notes 131–36 and accompanying text.

160. See *Goblirsch v. W. Land Roller Co.*, 310 Minn. 471, 475, 246 N.W.2d 687, 690 (1976), in which the court concluded that the trial court did not err in refusing to instruct the jury on breach of implied warranty of merchantability, observing that “the instructions would have been mere surplusage, redundant in view of the instructions on strict liability.” The court further observed that an instruction on breach of implied warranty “in the circumstances of this case, merely would have been redundant and possibly confusing.” *Id.* at 476, 246 N.W.2d at 690.

since doing so brings into play many contract law considerations that could work to the plaintiff's detriment. The defendant may allege and be able to prove that the seller is not a merchant, that the transaction was not a "sale," that the warranty has been effectively disclaimed, or raise other impediments to relief based on a warranty theory. Furthermore, the defendant's evidence on these issues could undermine the plaintiff's independent tort claims. Therefore, even if privity is not a bar to recovery in cases of personal injury, many hurdles rooted in contract law doctrine could prevent the plaintiff's recovery on a breach of warranty theory.

In a personal injury or property damage case, if plaintiff's counsel pleads redundant theories out of a concern that he might possibly miss something unless he pleads everything he can think of, then the trial judge should insist that counsel clean up the complaint by dismissing the redundant claims. Moreover, the court must not submit the case to the jury on more than one theory of recovery where those theories are truly redundant. To do so invites an inconsistent verdict.<sup>161</sup> Assume, for example, that the case is submitted to the jury on both breach of the implied warranty of merchantability and strict liability for design defect theories. The jury finds that there is no breach of the implied warranty of merchantability but that the product was defectively designed. But a product cannot be both merchantable and defective. These inconsistent verdicts leave the court and the parties at a loss as to what the jury concluded on the critical issue of whether there is any basis upon which the defendant may be liable to the plaintiff.

#### 4. *Vertical Privity and Claims for Economic Loss*

What if the plaintiff is not injured in his person or property, but suffers only economic loss? In that case, he will be precluded from suing on most tort theories and breach of warranty may be the only available theory of liability. Minnesota's most recent version<sup>162</sup> of an economic loss statute, Minnesota Statutes section 604.101, provides that "[a] buyer may not bring a product defect

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161. *Id.*

162. Section 604.101 applies only to claims arising after August 1, 2000. See MINN. STAT. § 604.101(6) (2002).

tort claim”<sup>163</sup> unless the defective goods “caused harm to the buyer’s tangible personal property other than the goods or to the buyer’s real property.”<sup>164</sup> The statute does not apply to “claims for injury to the person.”<sup>165</sup> The statute provides in section 604.101, subd. 2(1), that economic loss claims can be brought “regardless of whether the seller and the buyer were in privity regarding the sale or lease of the goods.” Therefore, privity of contract between plaintiff and defendant is not required in claims for economic loss brought under this statute.

Section 604.101, applies only to claims arising after August 1, 2000.<sup>166</sup> A predecessor statute, Minnesota Statutes section 604.10, was first enacted in 1991 and may still apply to some economic loss claims. As time goes by, claims under this earlier statute are increasingly unlikely to arise.

The primary reason for distinguishing between economic loss and other harms is to set a boundary between contract and tort law. The economic loss doctrine acts as a screen to prevent tort theories of liability from undermining the law of sales enacted by the legislature in the U.C.C. This law is designed to reflect and enforce the understanding of contracting parties, within the limits of contract law doctrine. These limits include the doctrine of unconscionability,<sup>167</sup> the ability to disclaim warranties<sup>168</sup> and limit remedies,<sup>169</sup> and the doctrine of privity. Therefore, in economic loss cases not ruled by tort theory, whether lack of privity protects a seller against warranty claims by remote buyers is an important question. The Minnesota legislature has answered the question in its enactment of section 604.101, apparently assuming that a remote seller will always be able to limit its liability for economic loss through disclaimers and remedy limitations so that it does not need the additional protection of the privity bar.

Economic loss is often broken down into subcategories of primary economic loss and consequential economic loss. Primary

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163. Defined in Minnesota Statutes § 604.101, subd. 1(e) to mean “a common law tort claim for damages caused by a defect in the goods but does not include statutory claims. A defect in the goods includes a failure to adequately instruct or warn.” Tort claims for intentional or reckless misrepresentation may still be brought. *See* MINN. STAT. § 604.101, subd. 4.

164. MINN. STAT. § 604.101, subd. 3 (2002).

165. *Id.* § 604.101 subd. 2.

166. *See id.* § 604.101 subd. 6.

167. *See id.* § 336.2-302 (2002).

168. *See id.* § 336.2-316.

169. *See id.* § 336.2-719.

economic loss is the difference between the value of the goods accepted by the buyer and the value they would have had if they had been as warranted, frequently measured by the cost of repair or replacement.<sup>170</sup> Consequential economic loss is all other economic harm that might flow as a consequence from the primary economic loss. It may include loss of productivity, profits, goodwill, or business reputation from the failure of the goods to function as warranted.<sup>171</sup>

No matter how remote or unforeseeable the plaintiff claiming primary economic loss might be, the seller's liability is capped by the purchase price of the product. Consequently, the vertical privity barrier is not especially important to the seller who can predict her risk potential on the warranties she has made and act accordingly. There is a sharp split of authority outside of Minnesota on the issue of whether vertical privity is a bar to a remote buyer's claim for primary economic loss. The leading case allowing recovery of primary economic loss despite the absence of privity between plaintiff-buyer and defendant-seller is *Morrow v. New Moon Homes, Inc.*,<sup>172</sup> a decision of the Alaska Supreme Court. The court reasoned that:

[t]he policy considerations which dictate the abolition of privity are largely those which also warranted imposing strict tort liability on the manufacturer: the consumer's inability to protect himself adequately from defectively manufactured goods, the implied assurance of the maker when he puts his goods on the market that they are safe, and the superior risk bearing ability of the manufacturer. In addition, limiting a consumer under the Code to an implied warranty action against his immediate seller in those instances when the product defect is attributable to the manufacturer would effectively promote circularity of litigation and waste of judicial resources.<sup>173</sup>

Observing that "[c]ontemporary courts have been more reticent to discard the privity requirement and to permit recovery in warranty by a remote consumer for purely economic losses,"<sup>174</sup> the court nevertheless concluded that it was appropriate to do so.

The fear that if the implied warranty action is extended to

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170. *See id.* § 336.2-714(2).

171. *See id.* §§ 336.2-714(3), 336.2-715.

172. 548 P.2d 279 (Alaska 1976).

173. *Id.* at 289.

174. *Id.*

direct economic loss, manufacturers will be subjected to liability for damages of unknown and unlimited scope would seem unfounded. The manufacturer may possibly delimit the scope of his potential liability by use of a disclaimer . . . or by resort to the limitations [on liability under § 2-719]. These statutory rights not only preclude extending the theory of strict liability in tort . . . but also make highly appropriate this extension of the theory of implied warranties.<sup>175</sup>

Our decision today preserves the statutory rights of the manufacturer to define his potential liability to the ultimate consumer, by means of express disclaimers and limitations, while protecting the legitimate expectation of the consumer that goods distributed on a wide scale by the use of conduit retailers are fit for their intended use.<sup>176</sup>

Consequential economic losses, however, present an entirely different context for the question of whether privity should bar the claims of remote buyers. These losses will almost always be claimed by a commercial party rather than an ordinary consumer. The pickup truck that suffers catastrophic engine failure will, for most buyers, represent at most only the loss of the value of the truck itself. A commercial user who experiences that same loss, however, may well suffer, as additional consequences, the loss of business opportunities, customers, and profits. These consequential economic losses can be enormous, exposing the remote seller to the potential of open-ended damages.

Among other jurisdictions, there is again a conflict as to whether a buyer can recover consequential economic loss from a remote seller, typically the product's manufacturer.<sup>177</sup> A leading commercial law authority agrees with the courts that have refused to allow recovery of consequential economic loss by remote, non-privity buyers.

If remote sellers wish to sell at a lower price and exclude liability for consequential economic loss to sub-purchasers, why should we deny them that right? Why should we design a system that forces a seller to bear the unforeseeable consequential economic losses of remote purchasers? Indeed, by forcing the buyer to bear such losses we may save costly lawsuits and even some economic

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175. *Id.* at 291.

176. *Id.* at 292.

177. *See* CLARK & SMITH, *supra* note 65, § 10:21, at 10-54.

losses against which buyers, knowing they have the responsibility, may protect themselves. In short, we believe that a buyer should pick its seller with care and recover any economic loss from that seller and not from parties remote from the transaction. Put another way, we believe the user is often the “least cost avoider.” By placing the loss on the users or by forcing them to bargain with their immediate sellers about the loss, we may minimize the total loss to society. If manufacturers are not the least cost risk avoider, but must nevertheless bear the loss, we may cause them to spend more of society’s resources than optimal to avoid the loss and may unnecessarily increase the cost of the commodity sold.<sup>178</sup>

Despite the Minnesota legislature’s decision to the contrary in section 604.101, it makes good sense to abolish vertical privity for primary economic loss claims where the product’s price is the ceiling of potential liability but retain it for consequential economic loss claims where the liability exposure is open-ended. The manufacturer often cannot foresee how a remote purchaser will use the goods and cannot, therefore, predict her liability potential. Such unpredictability undermines the manufacturer’s loss-spreading ability through either insuring against liability or incorporating the cost of her risk into the price of the product. Remember that, in tort law, usually under the concept of direct or proximate cause, a defendant’s ability to foresee risk of harm to another is the primary factor that limits liability to that other person.

It is not clear whether, in its deliberations over the provisions of section 604.101, the legislature thought about these distinctions between primary and consequential economic loss and the different policy considerations relevant to the issue of whether privity should bar claims against remote sellers for one, or the other, or both kinds of economic loss. As noted above, there is still the argument that a remote seller can limit its liability for economic loss through disclaimers and remedy limitations so that it doesn’t need the additional protection of the privity bar. The court in *Morrow* emphasized this point.<sup>179</sup>

The commercial reality, however, is that the manufacturer may not always be able to make effective her efforts to disclaim or limit

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178. WHITE & SUMMERS, *supra* note 109, § 11-6 at 407.

179. See *supra* note 173 and accompanying text.

remedies against a remote buyer. If, for example, the manufacturer includes in the contract for sale to a distributor a written warranty disclaimer that meets the requirements of section 336.2-316,<sup>180</sup> there is no guarantee that that written documentation will get through the entire chain of transactions, including the transaction between distributor and retailer, and the transaction between retailer and ultimate buyer, so that the disclaimer gets to the ultimate buyer in a form that will make it enforceable against that buyer under the Code. A component part supplier to the manufacturer is removed even further from the ultimate purchaser making it even more difficult for such a seller to effectively disclaim warranty liability to such a purchaser. It seems particularly harsh to deprive the manufacturer of the benefit of the privity bar where it is (1) also unable to effectively disclaim warranty liability to unknown remote buyers, and (2) unable to predict its liability potential for unforeseeable and unknowable consequential losses, thus undermining its loss-spreading ability.<sup>181</sup>

Perhaps all of this discussion of privity and the distinctions between primary and consequential economic loss is merely of academic interest to Minnesota practitioners. Mindful, however, of the possibility that some economic loss claims may still arise in Minnesota under section 604.10, the predecessor to section 604.101, the question of whether vertical privity is required to succeed in such a claim could still arise. The legislature has now declared in section 604.101 that, as a matter of public policy, privity should not bar any economic loss claim arising under that statute and the statute does not distinguish between direct and consequential economic loss. Perhaps, then, the easy answer for a court presented with a privity issue in a consequential economic loss claim that arises under section 604.10 is to simply adopt the same policy. The Minnesota cases which reach the conclusion that

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180. See *infra* Part VIII.A regarding disclaimers of warranties generally.

181. See *Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.* 526 N.W.2d 305, 309 (Iowa 1995) (quoting with approval from *WHITE & SUMMERS*, *supra* note 109).

Remote buyers may use a seller's goods for unknown purposes from which enormous losses might ensue. Since the remote seller cannot predict the purposes for which the goods will be used she faces unknown liability and may not be able to insure [herself.] Insurers are hesitant to insure against risks they cannot measure. Moreover, here more than in personal injury and property damage cases, it is appropriate to recognize the traditional rights of parties to make their own contract.

*Id.* See also *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103 (Iowa 1995).

vertical privity is not a bar to recovery for consequential economic loss are based on the faulty reasoning that this question is answered by the provisions of section 336.2-318 which, as discussed above, relates only to the question of horizontal privity.<sup>182</sup> On the other hand, a court that is mindful of the ongoing debate over this issue in many other jurisdictions and is not bound by section 604.101, may sensibly decide that, in the particular case of a claim for consequential economic loss due to breach of a warranty, privity of contract should remain a requirement for recovery under the warranty. This result strikes a fair balance between the rights of aggrieved buyers and the interests of upholding freedom of contract under Article 2 of Minnesota's U.C.C.

##### 5. *Vertical Privity and Revocation of Acceptance*

Finally, is privity an issue if the buyer does not seek damages but simply wishes to revoke acceptance of the goods<sup>183</sup> and recover his purchase price?<sup>184</sup> Most cases that have considered the question have concluded that revocation of acceptance is a remedy available only against the buyer's immediate seller.<sup>185</sup> However, one Minnesota case has concluded that privity will not act as a bar to revocation against a remote seller where the immediate seller has gone out of business, because it makes no sense to force a buyer to keep a product "which is sufficiently defective so as to justify his returning it and then requiring him to sue the distributor for damages merely because the dealer is insolvent or no longer in business."<sup>186</sup>

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182. See *supra* Part VI.C.

183. MINN. STAT. § 336.2-608 (2002) (allowing a buyer to revoke acceptance of defective products only in situations where the defect "substantially impairs" the product's value, not just in any instance of breach of warranty.)

184. See MINN. STAT. § 336.2-711(1) (2002).

185. See, e.g., *Voytovich v. Bangor Punta Operations, Inc.* 494 F.2d 1208 (6th Cir. 1974) (applying Ohio law); *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210 (Ariz. 1981); *Conte v. Dwan Lincoln-Mercury, Inc.* 374 A.2d 144 (Conn. 1976); *Edelstein v. Toyota Motor Distribs.*, 422 A.2d 101 (N.J. Super. Ct. App. Div. 1980); *Wright v. O'Neal Motors, Inc.*, 291 S.E.2d 165 (N.C. Ct. App. 1982).

186. *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357 (Minn. 1977). See also *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982) (applying Arkansas law) (affirming claim against a tractor manufacturer for revocation where tractor dealer had gone out of business).

*D. Time Limits, First-Buyer Limits on Warranty Coverage*

The lack of privity generally will not protect a seller subject to Minnesota law, who has made a representation about its product that gives rise to an express warranty, from warranty claims by remote buyers or third parties adversely affected by the product. Nor will it be able to disclaim that warranty except under unusual circumstances. Similarly, section 336.2-318 would not allow the seller to limit the warranty's coverage to only the buyer or only to certain designated persons such as members of the buyer's household. According to that section of the Code, the seller's warranty "extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section." Official U.C.C. Comment 1 explains that:

The last sentence does not mean that a seller is precluded from excluding or disclaiming a warranty . . . provided such exclusion or modification is permitted by Section 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2-718 or 2-719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom *the warranties which he has made to his buyer* would extend under this section.<sup>187</sup>

In other words, so long as a warranty has been extended to the buyer, then the seller cannot limit its liability to third persons that may be adversely affected by breach. However, the seller may disclaim warranties or limit remedies as to the buyer. If the seller does so, those limitations also apply to third party beneficiaries.

Therefore, the seller may, by contract, limit the express warranty for a certain period of time or to certain persons and not run afoul of section 336.2-318. Furthermore, even if the absence of vertical privity is not a bar to a warranty-based claim by a remote buyer, that buyer's claim is limited by the terms of the warranty

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187. MINN. STAT. § 336.2-318 U.C.C. cmt. 1 (2002) (emphasis added).

itself. A good illustration of the seller's ability to contractually limit warranty coverage in this way is found in *Haas v. DaimlerChrysler Corp.*<sup>188</sup> In that case, a new car manufacturer expressly warranted certain features of a new car for a certain number of miles or months to the first buyer only. The contract also provided that the remainder of the warranty could be transferred to a subsequent buyer, but only upon payment of a fee. Specifically, the manufacturer's warranty provided that:

The Chrysler "Owner's Choice Protection Plan" Warranty is extended only to the first buyer/owner of the vehicle. If you're the second buyer/owner of the vehicle, you may transfer the warranty coverage under the "Owner's Choice Protection Plan" Warranty and the "7/100 Corrosion Warranty" \* \* \* into your name.

To transfer the warranty, you must have an authorized Chrysler Corporation Dealer process a "Transfer of Coverage Application" for you. The cost for this service is \$150. You pay this fee directly to the dealer. You must apply for a coverage transfer within 30 days from the date you buy the vehicle. As a Second Buyer/Owner, you may transfer only the remaining "Owner's Choice Protection Plan" coverage which the first buyer/owner elected, together with the remaining portion of the "7/100 Corrosion Warranty."<sup>189</sup>

Haas bought a used Chrysler from a Chrysler dealer. The dealership charged \$150 to transfer to her the remainder of the factory warranty. Haas then brought a class action lawsuit alleging that the fee violated section 2-318 of the U.C.C. and certain provisions of the Magnuson-Moss Warranty Act. On appeal of the district court's dismissal of the claim, the court of appeals discussed the section 2-318 claim as follows:

Haas contends that the statute by its terms extends the warranty to persons who would reasonably be expected to use the vehicle, including second-hand purchasers such as she. According to Haas, because Chrysler cannot "exclude or limit" the operation of this statute, it cannot charge a fee to transfer the warranty. Instead, Haas contends, the warranty transfers by operation of law.

The flaw in Haas's argument is that it confuses the first-

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188. 611 N.W.2d 382 (Minn. Ct. App. 2000).

189. *Id.* at 383-84 (emphasis in original).

party right to receive services under the warranty with the third-party statutory right to recover for damages caused by breach of the warranty. As Haas concedes and the statute's caption reflects, this provision of the U.C.C. deals with "Third Party Beneficiaries of Warranties Express or Implied." Section 2-318 provides that the "seller's warranty whether express or implied extends to any person \* \* \* *who is injured by breach of the warranty.*" Until Haas is injured by a breach of the warranty, section 2-318 grants her no third-party beneficiary rights.

The warranty in this case specifically provides that it "is extended only to the first buyer/owner of the vehicle." The warranty goes on to provide that the vehicle's second buyer can transfer any remaining warranty coverage by having the Chrysler dealer submit a "Transfer of Coverage Application" at a cost to the second purchaser of \$150.

Those contractual terms define and limit any rights Haas may have as a third-party beneficiary of the warranty. As the Minnesota Supreme Court has observed, the rights of third-party beneficiaries "depend upon, and are measured by, the terms of the contract."<sup>190</sup>

The *Haas* court also concluded that this limited warranty did not violate the provisions of the Magnuson-Moss Warranty Act because it conspicuously limited the warranty to the first buyer only.<sup>191</sup>

#### *E. Warranty Liability of Successor Corporations, Parent Corporations*

What happens if a predecessor corporation breaches a warranty attached to a product sold by that predecessor and the buyer wishes to recover from the successor corporation? Common law rules regarding the liability of a successor corporation for the debts of a predecessor determine the answer to this question. In general, those rules provide that when a successor acquires the assets of a predecessor, it is not liable for the debts of the transferor-predecessor. The successor is not the seller of a product that was put into commerce by the predecessor and is not at fault in putting the product into the buyer's hands. However, there are several exceptions to this general rule of non-liability of successor corporations. A successor may be responsible for the liabilities of

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190. *Id.* at 385 (citations omitted).

191. *Id.* at 384-85.

its predecessor if: (1) the successor assumes its predecessor's liabilities; (2) the sale of assets amounts to a consolidation or merger of the two companies; (3) the successor is a mere continuation or reincarnation under a new corporate charter of the predecessor business; or (4) the sale amounts to a fraudulent effort to avoid the predecessor's liabilities.<sup>192</sup>

In the case of parent companies of the manufacturer of the defective product, the separate identity of the parent will ordinarily shield it from warranty liability to an aggrieved buyer. Courts are very reluctant to pierce the corporate veil, recognizing that limited liability is an exceedingly important principle of corporate law, and will do so only in very limited circumstances.<sup>193</sup>

## VII. THE REQUIREMENT OF NOTICE OF BREACH

### A. *Generally*

Once a buyer has bought and accepted a product and then discovers a defect or other attribute of the product amounting to a breach of warranty, he must notify the seller of the breach within a reasonable time. Failure to do so means loss of his right to any remedy. This requirement of notice, and the "no remedy" consequences for the buyer who fails to give timely notice, is found in the language of Minnesota Statutes section 336.2-607(3) which provides:

Where a tender has been accepted

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

Failure on the part of a buyer to give timely and sufficient notice is an obvious, and can be a very effective, defense for a seller against whom a breach of warranty claim is brought. The effect of failing to give notice may have a devastating impact on the buyer. Not only is he "barred from any remedy" against the seller, but he remains liable to the seller for the price of the product. "Any

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192. See CLARK & SMITH, *supra* note 66, §10.23; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998).

193. See 1 JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, CORPORATIONS § 7.7 at 7.11 (1995 & Supp. 2000); HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 202 at 547 (3d ed. 1983).

remedy” would include not only damages but also the right to reject the goods or revoke acceptance of the goods. In a seller’s action for the price, the buyer who fails to give notice is barred from right of setoff or a counterclaim for damages. However, the cases indicate that the courts are often unwilling to apply this notice requirement with as much stringency as its language seems to suggest.

A buyer’s duty to give notice of breach is one of long standing in Minnesota law. There is a similar requirement in the U.C.C.’s predecessor, the Uniform Sales Act.<sup>194</sup> The requirement of prompt notice pursues several important goals. First, prompt notice “informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiations.”<sup>195</sup> If the seller’s first notice of an alleged breach is the buyer’s complaint, there is no opportunity to negotiate and resolve the problem prior to litigation.<sup>196</sup> Second, notice provides the seller an opportunity to quickly address the problems presented by the defect or breach. Given notice, she may be able to cure the defect and minimize the losses to the buyer and her own liability. In the case of product manufacturers, prompt notice of the defect provides an opportunity to fix any design or warning problems, thereby minimizing risk to others.<sup>197</sup> Third, given notice, a seller has the opportunity to make her own investigation of the alleged breach by, for example, examining the product. Unless afforded this opportunity, the seller may not have a fair and effective opportunity to defend herself.<sup>198</sup> Finally, the notice requirement serves a purpose similar to a statute of limitations in that it provides the seller with some sense of finality regarding her

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194. MINN. STAT. § 512.49 (1961) (*repealed by* the Uniform Commercial Code, ch. 811, art. 10, § 336.2-412 (1965)) (stating “if . . . the buyer fail[s] to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.”).

195. MINN. STAT. § 336.2-607, U.C.C. cmt 4 (2002).

196. See *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 5 (Minn. 1992), *overruled on other grounds by* *Ly v. Nystrom*, 615 N.W.302 (Minn. 2000) (“[N]otice affords the seller an opportunity to prepare for negotiation and litigation.”). See also generally WHITE & SUMMERS, *supra* note 109, § 11-10 (discussing buyer’s notice to seller).

197. *Church of the Nativity of Our Lord*, 491 N.W.2d at 5 (“notice provides the seller a chance to correct any defect”).

198. *Id.* (“notice provides the seller a safeguard against stale claims being asserted after it is too late for the manufacturer or seller to investigate them”).

sale of a product. The seller should be able to assume that her exposure for warranty liability has ended if the buyer, given a reasonable opportunity to do so, has failed to discover and give notice of a breach.<sup>199</sup>

Before looking in more detail at what constitutes a reasonable time for giving notice and the requirements for form and content of the notice, remember this: If the buyer's product defect claim is brought on a tort theory, there is no such notice requirement. This again emphasizes that a plaintiff-buyer should generally avoid warranty claims if a tort theory of recovery is available. Even if the buyer has given the seller notice of breach, the seller can, and likely will, raise questions of timeliness and sufficiency of the notice. In tort, the filing of the complaint is all the notice that the buyer need give the defendant-seller.

#### *B. Burden of Pleading Notice*

The "plaintiff in a breach of warranty case is precluded from recovery if he does not plead and prove the giving of notice within a reasonable time . . . ."<sup>200</sup> So the plaintiff must specifically plead that he provided timely notice as a condition precedent to maintaining an action for breach of warranty.

#### *C. Timeliness of the Notice*

Section 336.2-607(3)(a) requires that the buyer give notice of breach "within a reasonable time after he discovers or should have discovered any breach." Timeliness is thus always a factual issue,<sup>201</sup> to be determined case by case, though in a very clear case the court could conclude that the time that elapsed before giving notice was unreasonable as a matter of law. Both the remedy sought and the status of the buyer affect the answer to the question of whether

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199. WHITE & SUMMERS, *supra* note 108, § 11-10 (stating "[t]here is some value in allowing sellers, at some point, to close their books on goods sold in the past and to pass on to other things").

200. *Truesdale v. Friedman*, 270 Minn. 109, 125-26, 132 N.W.2d 854, 865 (1965). *Truesdale* was decided under Minnesota Statutes § 512.49 of the Uniform Sales Act, the predecessor to § 336.2-607(3)(a), which continued the requirement that the buyer must give notice of breach or be barred from recovery for breach of warranty. *Id.*

201. *See Willmar Cookie Co. v. Pippin Pecan Co.*, 357 N.W.2d 111, 115 (Minn. Ct. App. 1984) ("What constitutes a 'reasonable time' is a jury question and depends on the facts and circumstances of the case").

notice was timely. Official U.C.C. Comment 4 to this section provides:

The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

This comment makes clear that the time after discovery of the breach during which notice is timely is "extended" in the case of a consumer. The same is true, perhaps to an even greater extent, in the case of a nonbuyer third party who is injured by the breach.<sup>202</sup> The cases show that several other factors also may affect the timeliness issue.

The seller's own behavior in responding to a consumer's complaints in a way that suggests "we'll work it out" can be important in determining whether the buyer's notice was timely. For example, in *Kopet v. Klein*,<sup>203</sup> the buyer of a water softener, that failed to work properly, first complained of difficulties with the product two weeks after its purchase. For several months thereafter, the buyer cooperated with the seller's service agent to try to remedy the defects before finally, after a year, notifying the seller that he should either replace the water softener or refund the purchase price. In response to the seller's contention that the buyer's notice was untimely, the court said that the first complaint, made two weeks after purchase, served as notice of breach and any delay between that time and the time the plaintiff specifically requested a replacement or a refund "was due to the indulgence and cooperation by the plaintiff in the defendant's attempts to

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202. Section 336.2-607, Official U.C.C. Comment 5 provides:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

203. 275 Minn. 525, 148 N.W.2d 385 (1967).

remedy its defaults. This period should not be charged to the buyer as delay in notifying the seller of the defects.”<sup>204</sup>

Similarly, in *Willmar Cookie Co. v. Pippin Pecan Co.*,<sup>205</sup> a buyer purchased cases of shelled pecans for rebagging and sale to the retail market. Four days after their delivery, the buyer notified the seller that some of the pecans were moldy. The seller instructed the buyer to set aside the questionable pecans and indicated that the seller would take care of the problem. After about ten days, the buyer decided that it was not financially worthwhile to continue to sort the good pecans from the bad and began to receive complaints from customers who had purchased some of the pecans sent out for retail sale. The buyer then proceeded to pick up many of the re-bagged pecans that had been sent out for sale and issued credit memos for them. The buyer again called the seller to complain but was told that “70 days is an unreasonable amount of time to make a complaint.”<sup>206</sup> After several more unsatisfactory contacts to complain about the pecans, the buyer finally sent a formal letter of revocation of acceptance. At trial, the jury decided that the buyer’s notice of breach was timely. On appeal, the court of appeals affirmed the jury’s determination, saying that the buyer’s first contact with the seller four days after receipt of the goods “could be construed by the jury to constitute reasonable notice of breach. Even if the jury did not consider the October 5 call to be notice, it could have determined that the December 9 notice was reasonable because there was a delay before customer complaints reached Willmar Cookie, and the October 5 call had given Pippin Pecan preliminary notice of the problem.”<sup>207</sup>

To the contrary, in *Truesdale v. Friedman*, an action by a service station owner against his gasoline supplier for delivering allegedly inferior gasoline, the court concluded that “[a] delay in notification from 12 to 23 months, apparently established by the record in this case, would be unreasonable as a matter of law when the buyer is aware, or should be aware, of the defect.”<sup>208</sup> Delay in giving notice, of course, may result in loss of evidence crucial to the defense or other prejudice to the defendant.<sup>209</sup>

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204. *Id.* at 531, 148 N.W.2d at 390.

205. 357 N.W.2d 111 (Minn. Ct. App. 1984).

206. *Id.* at 113.

207. *Id.* at 115–16.

208. *Truesdale v. Friedman*, 270 Minn. 109, 121, 132 N.W.2d 854, 862 (1965).

209. *See, e.g.,* *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444 (1st Cir. 1997) (three years elapsed after accident before notice of breach given); *Hebron*

These and similar cases<sup>210</sup> are a reflection of the policies which underlie the notice requirement of section 336.2-607(3)(a). The timeliness of the notice should be evaluated in light of the policies that encourage the buyer and seller to work together to try to first address the defect and then negotiate and resolve any problems presented by the defect before resorting to litigation.<sup>211</sup>

As noted above, the Official Comments to the U.C.C. indicate that the nature of the party claiming breach is a relevant consideration in determining the timeliness of the breach. In general, commercial buyers are expected to be more prompt in giving notice than are ordinary consumers<sup>212</sup> or bystanders.<sup>213</sup> The nature of the harm suffered is also very relevant in determining whether notice of breach is timely given. In cases of personal injury, the availability of tort theories of liability, unencumbered by a notice requirement, make the question of timely notice under the U.C.C. largely irrelevant. Indeed, at least in cases of personal injury to a bystander, it seems clear that Minnesota courts will not allow the absence of notice to stand in the way of a breach of warranty claim.

In *McCormack v. Hanksraft Co.*,<sup>214</sup> the case adopting strict liability for product defects, the defendant argued that the plaintiff, who was not a purchaser but an injured third party, was barred from recovery for breach of warranty because of failure to give notice of breach within a reasonable time. The supreme court responded to this argument as follows:

We cannot agree. This argument, not unlike the defendant's suggestion that the absence of privity of contract between defendant and plaintiff should likewise bar recovery, does not appeal to our sense of justice. It can be disposed of by adopting the rule of some jurisdictions that in personal injury actions alleging breach of warranty no such notice need be given because, as here, the plaintiff is not a "buyer" within the contemplation of the statute. But such disposition, and

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v. Am. Isuzu Motors, Inc., 60 F.3d 1095 (4th Cir. 1995) (two years elapsed after accident before notice of breach given).

210. See, e.g., *N. States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405 (8th Cir. 1985) (applying Minnesota law).

211. See *supra* notes 192-96 and accompanying text.

212. MINN. STAT. § 336.2-607 U.C.C. cmt. 4 (2002).

213. *Id.* § 336.2-607 U.C.C. cmt 5.

214. 278 Minn. 322, 154 N.W.2d 488 (1967).

similarly the elimination of privity, is only a transparent device to reach a desired result by eliminating bars to recovery imposed by the law of sales.

[W]e hold that neither notice nor privity need be alleged or proved in cases like the one before us. We do so simply to eliminate these contractual limitations upon a claim for personal injury against a manufacturer based upon a breach of an express warranty (as was done long ago with respect to implied warranties) but, more importantly, to declare our agreement with the principles underlying the rule of strict tort liability and to record our intention of applying that rule in this type of case.<sup>215</sup>

This is all part of the court's discussion of the policy reasons for adopting strict tort liability for product defects and depends, in part, on an assumption that the plaintiff would be denied recovery if the notice requirement were enforced:

If traditional commercial contractual limitations, such as the requirement of notice or the doctrine of privity, were applied to this case, defendant's liability upon the ground of breach of an express warranty could not be upheld. Plaintiff would be denied recovery despite adequate proof that the vaporizer was "in a defective condition unreasonably dangerous to the user"; that the plaintiff was injured thereby; and that defendant represented the vaporizer as "safe" and did everything by advertising and otherwise to induce that belief while creating the risk and reaping the profit from its sales.<sup>216</sup>

Perhaps the court unnecessarily merged its thinking about warranty law and tort law in this opinion. Perhaps that is not surprising since it was only first recognizing the doctrine of strict products liability and may have been a bit hazy about some of the details of that doctrine and its relationship to other theories of liability. Even if the plaintiff's breach of warranty claim in *McCormack* had been barred by failure to give notice, the court's adoption of strict tort liability provided another, wholly independent, basis for imposing liability on the manufacturer and the plaintiff would not have been "denied recovery."

The court does seem to recognize that the language of the applicable statute specifically refers only to the "buyer" of a

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215. *Id.* at 339–40, 154 N.W.2d at 499–501.

216. *Id.* at 338–39, 154 N.W.2d at 500.

product,<sup>217</sup> so the court's conclusion is perhaps limited only to cases like *McCormack* where the plaintiff is not the buyer, but an injured bystander. Read closely, *McCormack* abolishes the notice requirement in breach of warranty cases only where the plaintiff is a bystander who has suffered a personal injury, but not where the plaintiff is a buyer of the product who alleges a personal injury. In the cases of product buyers who have suffered personal injury, it would be wrong for the court to rewrite the statute and cavalierly ignore a statutory requirement of notice adopted by the legislature.<sup>218</sup> The availability of tort theories of liability argues in favor of requiring a buyer who chooses to sue in warranty for whatever reason to meet the Code's requirement of notice.<sup>219</sup> Nevertheless, it is fair to assume that, even in cases of personal injury to a buyer, a court will go out of its way to find that the notice requirement of section 336.2-607(3)(a) has been satisfied. Again, it bears remembering that this whole question is avoided if the personal injury claim is brought exclusively on a tort theory and the wholly redundant warranty theory is not added to the plaintiff's complaint.

Thus, the most likely sort of case in which the timeliness or sufficiency of notice may cause problems for a plaintiff is one in which a commercial buyer is claiming economic loss. In these cases, the policies of giving a seller the opportunity to address the defect in the product and the opportunity to resolve the resulting breach of warranty before the buyer feels the need to resort to litigation<sup>220</sup> strongly favor requiring commercial buyers to promptly satisfy the notice of breach requirement.

Comment 4 states that in these cases section 2-607 defeats "commercial bad faith," and if the court senses that merchant

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217. MINN. STAT. § 512.49 (1961) (the predecessor Uniform Sales Act). The language of U.C.C. § 2-607(3)(a) also specifically refers only to "the buyer."

218. For a case baldly holding that the requirement of notice is inapplicable because the plaintiff claiming breach of warranty is a consumer buyer, see *Fischer v. Mead Johnson Labs.*, 341 N.Y.S.2d 257 (N.Y. App. Div. 1973).

219. In *Parrillo v. Giroux Co.*, 426 A.2d 1313, 1317 (R.I. 1981), the court recognizes the virtues of keeping tort and warranty theories analytically separate:

[S]trict liability and implied warranty are parallel theories of recovery, one in contract and the other in tort, with each having its separate analytical elements and procedural conditions precedent. If litigants seek to prevail by relying on alternate theories of recovery, they may; but in so doing, they must touch all the bases as they present each theory (reference omitted).

220. See *supra* notes 192-96 and accompanying text.

buyers are lying in the grass with the thought of increasing their damages, it will not hesitate a moment to cut them off. A case in point is *A. C. Carpenter, Inc. v. Boyer Potato Chips*.<sup>221</sup> In that case the buyer sent a “breach” letter to the seller eight days after receiving the nonconforming potatoes. The seller received the letter four days after it was sent. The hearing officer held that the notice was not timely; twelve days was too long for the parties dealing in perishables. The hearing officer might have suspected that the buyer was not acting in good faith, for the buyer did not call the seller although he knew the seller’s address and the telephone number. In *G. & D. Poultry Farms, Inc. v. Long Island Butter & Egg Co.*,<sup>222</sup> the court found a delay unreasonably long because, in part, the buyer had ordered and paid for additional goods without notifying the seller that the initial goods were in any way unsatisfactory. In short, a merchant buyer who receives defective goods and who expects to reject, revoke acceptance, or sue under sections 2-714 and 2-715, should act fast.<sup>223</sup>

*D. Sufficiency of the Notice*

“The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer’s rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer’s rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach . . . .”<sup>224</sup> The drafters of the U.C.C. “[q]uite clearly . . . intended a loose test; a scribbled note on a bit of toilet paper will do . . . .”<sup>225</sup>

Interpreting the predecessor Uniform Sales Act notice requirement, the Minnesota courts concluded that “a mere complaint as to quality of goods sold is not sufficient notice of the

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221. 1969 WL 10993 (U.S. Dept. Agri. 1969) (discussed in WHITE & SUMMERS, *supra* note 109 at 419).

222. 306 N.Y.S.2d 243 (N.Y. App. Div. 1969).

223. WHITE & SUMMERS, *supra* note 108, § 11-10 (footnotes omitted).

224. MINN. STAT. § 336.2-607, U.C.C. Comment 4 (2002).

225. WHITE & SUMMERS, *supra* note 109, § 11-10 at 419.

breach of warranty” and that the notice “must apprise the seller that the buyer intends to claim damages for a breach of warranty.”<sup>226</sup> However, under the U.C.C. “[n]otification need not take a specific form;” even oral notice is good enough.<sup>227</sup> This current view that there is no magic form which the notice must take seems eminently justified in light of the U.C.C. drafter’s comments.

Finally, the fact that the seller is already aware of defects in the product does not dispense with the notice of breach requirement. In *Christian v. Sony Corp. of Am.*,<sup>228</sup> the buyer failed to give notice in accordance with section 336.2-607(3)(a) to either the defendant manufacturer or to the retailer but argued, in resisting a motion for summary judgment on the breach of warranty claims, that he might, after discovery, be able to produce evidence that the manufacturer was aware of the product’s defects either because they were made aware by other litigation or because of hearing complaints from other customers. In granting the manufacturer’s motion for summary judgment, the federal district court, applying Minnesota law, concluded that:

Plaintiff’s argument misses the mark. In discussing the provision of the now-defunct Uniform Sales Act which corresponds to U.C.C. section 2-607, Judge Learned Hand made the following observation:

The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice “of the breach” required is not of the facts, which the seller presumable [sic] knows quite as well as, if not better than, the buyer, but of buyer’s claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

Indeed, the Minnesota Supreme Court has identified

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226. *Truesdale v. Friedman*, 270 Minn. 109, 123, 132 N.W.2d 854, 863 (1965).

227. *Church of the Nativity of Our Lord v. WatPro Inc.*, 491 N.W.2d 1, 5 (Minn. 1992); *see also State v. Patten*, 416 N.W.2d 168 (Minn. Ct. App. 1987); *Alafoss v. Premium Corp. of Am., Inc.*, 599 F.2d 232, 235 n.5 (8th Cir. 1979) (applying Minnesota law) (“The type of notification required to preserve PCA’s right to a remedy for Alafoss’ breach need not be an explicit statement of all its objections to the goods. The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched.” (internal citations omitted)).

228. 152 F. Supp. 2d 1184 (D. Minn. 2001).

three purposes behind the notice provision found in Minn. Stat. section 336.2-607: (1) to provide the seller with an opportunity to correct the defect (a particularly compelling purpose where, as here, the sales contract limits the buyer's remedy to repair or replacement); (2) to provide the seller with an opportunity to prepare for negotiation and litigation; and (3) to provide the seller with an opportunity to investigate the claims independently while the merchandise remains in a relatively pristine state. While general knowledge of problems with a product may serve the last two of these purposes, the first purpose may only really be served if the seller is aware of a defect in the product and that a particular seller [sic] wishes to have that defect addressed.<sup>229</sup>

*E. Notice to Whom?*

One question that is not clearly answered by the language of section 336.2-607(3)(a), which requires that the buyer "notify the seller," is whether the aggrieved buyer must give notice of breach to more than one party in the chain of sale of the product. Does this language require only that the buyer give notice to his immediate seller or also to remote sellers against whom the buyer wishes to bring a breach of warranty claim?

If the immediate seller is an agent of the manufacturer, then "notice given by the buyer to the identified agent of a remote manufacturer is sufficient."<sup>230</sup> In many instances, however, there will be no agency relationship between the immediate seller and the remote manufacturer. What, then, must the buyer do? If he chooses to sue the remote manufacturer directly or join the manufacturer with the immediate seller in his breach of warranty action, must the buyer give notice under section 336.2-607(3)(a) to the remote manufacturer? There is no Minnesota law that bears directly on this issue.

A leading authority on U.C.C. warranties sees the matter this way:

If the retail buyer is given the right to pursue a non-privity seller on a warranty theory, he ought to retain the duty of giving notice to that seller. Moreover, the duty should not

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229. *Id.* at 1187–88 (citations omitted).

230. *Church of the Nativity of Our Lord*, 491 N.W.2d at 6.

be deemed satisfied by giving notice to the immediate seller only and then pursuing a warranty action against the remote manufacturer.

Some courts suggest that notice to the dealer will preclude the manufacturer from raising § 2-607(3)(a) as a defense, but the better approach is to read the words “the seller” to mean “any seller who is sued in the warranty action.” Why should the remote manufacturer not be given the protection of notice? Although the duty should be satisfied if the buyer gives notice to the immediate seller, who in turn notifies the manufacturer in a timely manner, the manufacturer should be off the hook if notice is not communicated upstream to it. Otherwise the result would be the anomalous situation of the retail buyer being able to sue the manufacturer directly in a case where the immediate seller would probably be precluded on any indemnity claim because of failure to pass the notice upstream.<sup>231</sup>

If the buyer has given notice to his immediate seller who then passes that notice on up the chain to the remote manufacturer, then there should be no argument about whether notice was given to the manufacturer. In such instances, the manufacturer has actual notice though, of course, there may still be a question of timeliness. However, the fact that she did not receive the notice directly from the buyer is not important.

The case law in other jurisdictions generally shows that, if the buyer has notified his immediate seller, then he will be excused from giving notice to the remote manufacturer especially in the case of personal injury.<sup>232</sup> Where the buyer has suffered personal injury as a result of the breach, courts are strongly averse to barring his claim against a remote seller because of lack of notice just as they are for lack of privity.

If, however, the buyer has suffered only economic loss, his failure to give notice to the remote manufacturer may very well bar his breach of warranty claim<sup>233</sup> even where the manufacturer is in fact generally aware of a defect in the product’s design.<sup>234</sup> Even in

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231. CLARK & SMITH, *supra* note 65, § 9:15.

232. *See, e.g.*, Snell v. G.D. Searle & Co., 595 F. Supp. 654 (N.D. Ala. 1984); Owens v. Glendale Optical Co., 590 F. Supp. 32 (S.D. Ill. 1984); Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984).

233. *See, e.g.*, Wilcox v. Hillcrest Mem’l Park of Dallas, 696 S.W.2d 423 (Tex. App. 1985).

234. *See* Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J.

economic loss cases, some courts are willing to overlook the lack of notice to the remote manufacturer when the buyer has given notice to his immediate seller, even if that notice was not passed along to the manufacturer.<sup>235</sup>

### VIII. DISCLAIMERS AND LIMITATIONS OF REMEDIES

#### A. *Generally*

One of the most important goals of commercial law is to preserve the ability of parties to freely bargain and contract with one another, setting the price and other terms of a sale according to their mutual agreement. If the buyer and seller of a product were always equally well-informed of the product's qualities and risks, and if they always had equal bargaining strength, there would be little need for the law to constrain the terms of their agreement. However, the commercial reality is that the buyer of a product is typically not as well informed about risks associated with the product as is the seller, and one party often has greater bargaining power than the other. The law, therefore, also seeks to control these imbalances in the interest of fairness to both parties.

The law allows buyers and sellers to agree to limit, or entirely eliminate, warranty terms from their agreement and also to limit the buyer's remedies for breach of warranty but imposes some constraints on doing so. The U.C.C. provides, in section 2-316, that sellers may disclaim warranties in whole or in part so that the product is sold without any warranties at all or so that the warranties are limited. Such disclaimers may mean that no warranty associated with the product ever arises. Or, a seller may limit the duration of the warranty to a certain period of time, for example twelve months, or limit her warranty to only certain parts of the product, like the engine and drivetrain of a car. Through a disclaimer, the parties effectively agree to shift the risk of some or all product defects to the buyer.

To the extent that a warranty does exist, sections 2-718 and 2-719 of the Code also allow sellers to prescribe and limit the type of remedy or amount of damages for breach of a warranty. A seller

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1985).

235. See, e.g., *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736 (Colo. 1991); *Ragland Mills, Inc. v. Gen. Motors Corp.*, 763 S.W.2d 357 (Mo. Ct. App. 1989).

might, for example, provide an express warranty against defects in material or workmanship and limit the remedy for breach to repair or replacement of the product.

The U.C.C. requires that a seller who wishes to disclaim warranties or limit remedies for breach must do so clearly and conspicuously so that the buyer is not unfairly surprised or misled.<sup>236</sup>

In addition, anti-disclaimer legislation designed specifically to provide greater protection to consumers against unfair seller practices substantially restricts a seller's ability to disclaim warranty liability in consumer sales. These laws, most notably the Magnuson-Moss Federal Warranty Act<sup>237</sup> and the Minnesota Consumer Protection Act,<sup>238</sup> tip the law's balance in favor of protecting consumer warranty rights by sharply limiting, or altogether prohibiting, a product seller's ability to disclaim implied warranties in consumer transactions.

Finally, the Revised Article 2 of the Uniform Commercial Code, which will likely soon become law in Minnesota, imposes some more explicit requirements for effective warranty disclaimers.<sup>239</sup>

Because warranty disclaimers and remedy limitations are part of the contract between buyer and seller, these terms may constrain the buyer who sues in contract. If an aggrieved buyer sues on a tort theory, however, such contractual terms will be ineffective in protecting the seller from liability.<sup>240</sup> This distinction again emphasizes that plaintiffs who have tort theories of recovery available to them should usually avoid pleading breach of warranty. Defendants who are faced with a breach of warranty claim may find rich ground to plow in the disclaimer and limitation of remedy

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236. MINN. STAT. § 336.2-316, U.C.C. cmt. 1 (2002) (explaining the basic purpose of the section:

This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.)

237. 15 U.S.C. §§ 2301-2312. *See infra* Part VIII.G[1].

238. MINN. STAT. §§ 325G.17-325G.20 (2002).

239. *See infra* Part X.

240. *See* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. m (1965); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (1997).

terms of the contract before they ever turn to questions of privity or notice of breach.

*B. Disclaimers of Express Warranties*

“A ‘disclaimer’ of an express warranty may seem an oxymoron.”<sup>241</sup> It makes no sense for a seller to make an express representation about the product in one part of the contract and then disclaim that same promise in another. On the other hand, sellers may certainly limit their express warranties to certain parts of the product, certain aspects of its performance, to a fixed period of time, or in other ways. Indeed, it is common for a sales contract to speak of an “express warranty” and then limit that warranty in some way. A manufacturer of a new car may limit its warranty to a certain number of years or number of miles. The same manufacturer will further limit its warranty so that normal maintenance and normal wear and tear are not covered.

How are words in a sales agreement that extend a warranty and other words that limit or altogether disclaim a warranty to be read together? Minnesota Statutes section 336.2-316(1) provides that:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 336.2-202) negation or limitation is inoperative to the extent such construction is unreasonable.

A disclaimer that contradicts the essential promise of the warranty is unreasonable and therefore invalid. For example, a term of the agreement that provides that “this product is expressly warranted to be free of all defects in materials and workmanship” is essentially inconsistent with a term that provides that “this product is sold ‘as is’ without any warranties express or implied.” Either the product is promised to be free of all defects in materials and workmanship or it is not. Under section 336.2-316(1), it would be unreasonable to allow the latter term to disclaim the express promise of the former term. Thus, the disclaimer language would be invalid. However, there is nothing inconsistent in language that warrants the product to be “free of all defects in materials and workmanship” and the language “for a period of 12 months.” Such

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241. WHITE & SUMMERS, *supra* note 109, § 12-2.

a time limitation is not inconsistent with the essential promise of the warranty. It is simply part of the seller's express promise and would be a valid limitation on the duration of the express warranty. Since the seller need not make such a promise at all, she should be able to circumscribe the promise by limiting its duration.

Not surprisingly, courts disfavor outright disclaimers of express warranties and ambiguities are generally construed in favor of warranty coverage. Some specific examples help to illustrate. In *Northern States Power Co. v. ITT Meyer Industries*,<sup>242</sup> the buyer sued for breach of warranty when screw anchors intended to anchor towers for an electric transmission line failed and the towers collapsed. In the course of negotiations for the purchase of the anchors, the buyer provided detailed performance specifications to which the seller agreed, specifying that "the material we propose to supply meets the design requirements as specified."<sup>243</sup> This agreement was expressly incorporated into the contract. The contract also contained terms that provided as follows:

Meyer warrants for one (1) year that all Products (a) are designed in accordance with generally accepted engineering practice, (b) will withstand destruction test loads to the extent of the calculated loads of yield stress the Products are designed to withstand, (c) will be fabricated in accordance with drawings furnished by Meyer and approved by the Buyer, and (d) are free from defects in materials and workmanship.

Meyer's liability for any breach of this warranty shall be limited solely to job site replacement or repair, at the sole option of Meyer, of any defective part or parts, during a period of one (1) year from the date of shipment, providing the Product is properly installed and is being used as originally intended.

IT IS EXPRESSLY AGREED THAT THIS SHALL BE THE SOLE AND EXCLUSIVE REMEDY OF THE BUYER. UNDER NO CIRCUMSTANCES SHALL MEYER BE LIABLE FOR ANY COSTS, LOSS, EXPENSE, DAMAGES, SPECIAL DAMAGES, INCIDENTAL DAMAGES, OR CONSEQUENTIAL DAMAGES ARISING DIRECTLY OR INDIRECTLY FROM THE USE OF THE PRODUCTS, WHETHER BASED UPON WARRANTY, CONTRACT,

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242. 777 F.2d 405 (8th Cir. 1985) (applying Minnesota law).

243. *Id.* at 411.

## NEGLIGENCE OR STRICT LIABILITY.

THE WARRANTY AND LIMITS OF LIABILITY CONTAINED HEREIN ARE IN LIEU OF ALL OTHER WARRANTIES EXPRESS OR IMPLIED. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED BY MEYER AND EXCLUDED FROM THIS WARRANTY. FURTHER MEYER DOES NOT WARRANT THAT THIS PRODUCT COMPLIES WITH LOCAL, MUNICIPAL, STATE OR FEDERAL CODES, IF ANY. THE BUYER ALONE IS RESPONSIBLE FOR KNOWLEDGE OF AND COMPLIANCE WITH ANY SUCH CODES.<sup>244</sup>

At trial, the jury found that Meyer made an express warranty that the anchors would perform in accordance with the buyer's technical specifications. The trial court found that the disclaimers quoted above were in conflict with that warranty, that the specifications were an important element in the anchor design, that the buyer had relied upon those specifications being incorporated into the finished anchors, and that the specifications were thus a crucial part of the contract. The court of appeals affirmed the results at trial saying that: "We agree that the . . . disclaimer of all warranties directly and unavoidably conflicts with the specifications warranty."<sup>245</sup>

Similarly, in *Hydra-Mac v. Onan Corp.*,<sup>246</sup> the seller of engines made express representations about the reliability, durability and general suitability of their engines for the needs of the buyer, a manufacturer of skidloaders. On the back of the sales invoice, the seller purported to disclaim both express and implied warranties. The court concluded that the seller had made express warranties that were inconsistent with the disclaimer and that, therefore, the disclaimer was ineffective.<sup>247</sup>

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244. *Id.* at 411 n.6.

245. *Id.* at 412.

246. 450 N.W.2d 913 (Minn. 1990).

247. *Id.* at 917. *See also* Minn. Mining & Mfg. Co. v. Nishika Ltd., 885 S.W.2d 603 (Tex. App. 1994) (applying Minnesota law), *question certified*, 955 S.W.2d 853 (Tex. 1996), *certified question answered*, 565 N.W.2d 16 (Minn. 1997), *modified*, 953 S.W.2d 733 (Tex. 1997) (holding as incompatible an express warranty and attempted disclaimer thereof); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 384 (Minn. 1978) (noting that the seller had "attempted both to warrant his product and to disclaim any warranties" and concluding that the "warranty and disclaimer cannot be reasonably reconciled . . . and thus the language of the express warranty

C. *Disclaimers of Oral Express Warranties*

The same general principles regarding disclaimers, discussed above in Part VIII.A., also apply to an express warranty that arises out of oral representations made about the product. If a warranty arises out of oral representations, any attempted disclaimer that is inconsistent with the warranty is inoperable. However, section 336.2-316's rule that language inconsistencies must be resolved in favor of the warranty is "subject to the provisions . . . on parole or extrinsic evidence (section 336.2-202)."<sup>248</sup> If the only evidence of the existence of a warranty is an oral representation made prior to or contemporaneously with a written contract, that evidence may be precluded by the operation of the parole evidence rule. Thus, the buyer may not be able to prove the existence of the warranty.

Section 336.2-202 provides that contract terms which are "set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." The key question, then, is whether the product was sold under written terms that amount to the "final expression" of the parties' agreement with respect to a warranty. If so, the buyer will be precluded from introducing evidence of an oral express warranty and the seller gets the same result as she would from an effective disclaimer of express warranties.

The most interesting problem of contract interpretation arises when an oral express warranty is alleged and there is also a written agreement containing disclaimer language. In *Minnesota Forest Products, Inc. v. Ligna Machinery, Inc.*,<sup>249</sup> a lumber company which had purchased sawmill equipment sued the seller and manufacturer of the equipment for breach of warranty, claiming that the seller had "made specific representations . . . that their sawmill design and equipment would meet certain specifications and would perform at certain rates."<sup>250</sup> The seller alleged that those representations gave rise to an express warranty. The court concluded that the written contract did not contain an integration clause stating that the writing was the final expression of the parties' agreement, so the parole evidence rule did not preclude the

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must prevail.").

248. MINN. STAT. § 336.2-316(1) (2002).

249. 17 F. Supp. 2d 892 (D. Minn. 1998).

250. *Id.* at 917.

evidence which might prove this oral representation. The court therefore denied the seller's motion for summary judgment on the buyer's express warranty claim, concluding that the seller "did not validly disclaim any express warranties . . . ." <sup>251</sup>

In *Minnesota Forest Products*, however, the contract did contain a limited warranty on materials and workmanship and provided that this warranty "is exclusive and in lieu of all other express and implied warranties . . . ." Why should this language not be regarded as the "final expression" of the parties' agreement regarding an express warranty that could not, according to section 336.2-202, be "contradicted" by the evidence of the seller's oral representations? The court does not explain except to say that there was no "integration clause" in the contract. This result obviously suggests that even a clearly-drafted disclaimer of express warranties will not necessarily work as an integration clause. Sellers must, therefore, include a specific integration clause in a written contract such as: "The seller makes no other warranty beyond that contained in this writing," or "This writing supersedes all prior oral or written agreements or representations and excludes all warranties not set forth herein," in order to make clear that the written disclaimer language is the "final expression" of the parties' agreement regarding an express warranty.

*D. Disclaimers of Implied Warranties—U.C.C. Section 2-316*

The implied warranties of merchantability and fitness for a particular purpose may generally be disclaimed so long as the seller: (1) fully complies with the provisions of section 336.2-316; and (2) is not prohibited from doing so by consumer protection, anti-disclaimer statutes. <sup>252</sup> Attempts to disclaim the implied warranties are viewed with disfavor. Therefore, the courts tend to read and apply the Code's provisions for such disclaimers strictly. Furthermore, the typical inability of consumers to bargain over the content of product warranties has led to both federal and state legislation prohibiting, or severely restricting, product manufacturers and other sellers from disclaiming implied warranties or from limiting damages for breach of warranty in sales of consumer products. <sup>253</sup>

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251. *Id.* at 918.

252. *See infra* Part VIII.G.

253. *Id.*

1. *The Safe Harbor of Subsection (2)*

Section 336.2-316(2) provides as follows:

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

Thus, subject to the provisions of subsection (3), disclaimers which strictly comply with the provisions of subsection (2) will, except in extraordinary circumstances, be effective. The implied warranty of merchantability, the basic warranty of product quality and safety, may be disclaimed only by explicitly mentioning the magic word "merchantability."<sup>254</sup> Furthermore, if the disclaimer is in writing, it must be conspicuous.<sup>255</sup> This requirement is meant to put the buyer on notice that the product is being sold without any implied warranties of quality or performance. Under the U.C.C., a contract term or clause is conspicuous "when it is so written that against whom it is to operate ought to have noticed it."<sup>256</sup> Thus, a

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254. See, e.g., *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 n.13 (8th Cir. 1977) (applying Minnesota law) ("the need for contractual certainty dictates against abandoning the requirement for a disclaimer to mention the word 'merchantability'"); *S-C Indus. v. Am. Hydroponics Sys., Inc.*, 468 F.2d 852 (5th Cir. 1982) (express warranty superseded "all other warranties . . . express or implied"); *Curtis v. Murphy Elevator Co.*, 407 F. Supp. 940 (E.D. Tenn. 1976) (the language "all warranties, express, implied and statutory, shall terminate upon final acceptance of the work covered by this contract" did not effectively disclaim the implied warranty of merchantability since it did not mention "merchantability"); *Pearson v. Franklin Labs., Inc.*, 254 N.W.2d 133 (S.D. 1977) (seller stated that he had no responsibility for results from use of cattle vaccine but did not mention merchantability); *Disc. Drug Corp. v. Honeywell Prot. Servs., Div. of Honeywell, Inc.*, 450 A.2d 49 (Pa. 1982). But see *Sterner Aero AB v. Page Airmotive, Inc.*, 499 F.2d 709 (10th Cir. 1974) and *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962) (both cases upholding disclaimers that did not mention the word "merchantability").

255. See *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 885 S.W.2d 603 (Tex. App. 1994) (applying Minnesota law), *question certified*, 955 S.W.2d 853 (Tex. 1996), *certified question answered*, 565 N.W.2d 16 (Minn. 1997), *modified*, 953 S.W.2d 733 (Tex. 1997) (seller's attempted disclaimers were in small type on form invoice, were not capitalized or of contrasting typeface or color, and were thus not conspicuous).

256. MINN. STAT. § 336.1-201(10) (2002).

disclaimer of an implied warranty must be made to stand out from the rest of the contract by means of bold type or a different typeface, by placing the disclaimer in a box of text that separates it from the remainder of the contract, by a heading such as **DISCLAIMER OF IMPLIED WARRANTIES**, or by some other means calculated to assure that the product's buyer will be protected from surprise. There is no magic formula or language for making a disclaimer conspicuous, but courts expect a significant effort on the part of the seller to make the language stand out in a way that calls the disclaimer to the buyer's attention.<sup>257</sup>

A disclaimer of an implied warranty of fitness for a particular purpose must be conspicuous *and* it must be in writing. No particular language is required to disclaim this warranty, but the Code provides that the language "is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

## 2. *The Exceptions of Subsection (3)*

The requirements for a valid warranty disclaimer in section 336.2-316(2) are "[s]ubject to subsection (3)" of that same Code section. Subsection (3) provides as follows:

Notwithstanding subsection (2)

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

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

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

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257. See, e.g., *Dorman v. Int'l Harvester Co.*, 120 Cal. Rptr. 516 (Cal. Ct. App. 1975); *Koellmer v. Chrysler Motors Corp.*, 276 A.2d 807 (Conn. Cir. Ct. 1970); *Cate v. Dover Corp.*, 790 S.W.2d 559 (Tex. 1990).

of trade.

These three exceptions to the disclaimer requirement of subsection (2) “are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer’s attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.”<sup>258</sup>

Subsection 3(a) provides that a seller may disclaim implied warranties by using “as is” or similar language and is not required to specifically mention “merchantability” or fitness “unless the circumstances indicate otherwise.” In circumstances where the use of “as is” or similar language makes clear to the buyer that he takes the risk that the product may contain latent safety or quality defects, then use of such language will effectively disclaim implied warranties. But not all sales transactions occur under such circumstances. Such language is more likely to be a valid disclaimer in a commercial transaction in which the buyer is a knowledgeable business party, or in transactions involving the sale of used goods. For example, in *St. Croix Printing Equipment, Inc. v. Rockwell Intern. Corp.*,<sup>259</sup> the buyer, whose business was the purchase and resale of used printing equipment, purchased a used printing press from the seller. The printing press was located in Florida and the buyer did not inspect the press before agreeing to its purchase. The contract for sale contained “AS IS – WHERE IS” language in describing the product being sold. When the buyer subsequently found the press to be unsatisfactory, it sued for breach of warranty. In upholding the trial court’s grant of summary judgment for the defendant-seller, the court of appeals made the following observations:

Here we have a contract between “merchants.” There is no unequal bargaining power. *Both* St. Croix and Rockwell are in the business of buying and selling used printing equipment. *Both* St. Croix and Rockwell use “as is” language in their own agreements with their respective clients and were aware of the consequences of the language. *Both* parties were aware of the location of the press. While St. Croix could have inspected the press prior to “sealing” the agreement, [it] declined any opportunity to inspect the press. At minimum, [St. Croix]

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258. MINN. STAT. § 336.2-316, U.C.C. cmt. 6 (2002).

259. 428 N.W.2d 877 (Minn. Ct. App. 1988).

was fully aware of the danger in foregoing personal inspection and should have foreseen the possibility that the printer would not be in the same condition as was alleged, especially since such equipment is disassembled prior to shipping.

While a different outcome might present itself if this dispute concerned an unequal bargaining situation, the knowledge, skill and expertise concerning printing equipment in this case is comparable. Both parties stood on an equal footing.<sup>260</sup>

In consumer sales, where the buyer is not a sophisticated purchaser, a court may be more reluctant to treat “as is” language as a valid disclaimer of warranties.<sup>261</sup> The same reluctance may be encountered where the sale is of a new, not a used, product.<sup>262</sup> A careful product seller ordinarily should not depend upon these subsection (3) exceptions to the more explicit requirements of subsection (2) of section 336.2-316. In order to be certain that any implied warranties are disclaimed, the magic words “merchantability” and “fitness for a particular purpose” should be used in a written and conspicuous disclaimer.

According to subsection 3(b) of section 336.2-316, the buyer’s prior inspection, or the seller’s demand that the buyer inspect the product prior to sale,<sup>263</sup> will effectively disclaim implied warranties so long as the defect is obvious. The buyer’s inspection does not disclaim warranty liability for latent defects that cannot reasonably be discovered by an inspection. Generally speaking, a consumer will be expected to discover only quite obvious defects.<sup>264</sup> On the

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260. *Id.* at 880–81 (citations omitted). *See also* Buettner v. R.W. Martin & Sons, 47 F.3d 1086 (4th Cir. 1995) (“as is” disclaimer valid because purchaser was sophisticated business buyer); Buettner v. Super Laundry Mach., 857 F. Supp. 471 (E.D. Va. 1994), *aff’d*, 47 F.3d 116 (4th Cir. 1995).

261. *See, e.g.*, Knipp v. Weinbaum, 351 So.2d 1081 (Fla. Dist. Ct. App. 1977).

262. *See, e.g.*, Gindy Mfg. Corp. v. Cardinale Trucking Corp., 286 A.2d 345 (N.J. 1970) (disapproved of in *Ramirez v. Autosport*, 440 A.2d 1345 (N.J. 1982)).

263. *See* MINN. STAT. § 336.2-316, U.C.C. cmt. 8 (2002) (“In order to bring the scope of ‘refused to examine’ in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal.”).

264. *See id.* (“A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.”)

other hand, a sophisticated buyer is expected to bring more expertise to the process and to know what to look for.<sup>265</sup> Even a sophisticated buyer, however, cannot reasonably be expected to discover latent defects. Furthermore, the inspection, or the seller's demand that the buyer inspect, must be *prior* to the agreement to purchase. A subsequent inspection will not change the warranty terms of the contract.

The remaining alternative way in which a disclaimer may arise is "by course of dealing or course of performance or usage of trade."<sup>266</sup> This language represents a hidden danger for buyers and an opportunity for sellers to argue that past dealings between the parties, or the general practices of the seller's trade, have effectively disclaimed or limited any warranties. Section 336.1-205(1) of the Code defines "course of dealing as a "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Under section 336.2-208, a "course of performance" arises whenever "the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other." Thus, both a "course of dealing" and "a course of performance" arise from the relationship between buyer and seller and the established pattern of dealing between them.

Section 336.1-205(2) of the Code defines "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." This provision is rooted in a common understanding held by both buyers and sellers, as a class, in a particular trade or business.

Even where there is no explicit disclaimer, or the disclaimer fails to use the magic word "merchantability" or is not "conspicuous," the prior dealings between the parties or trade usage may effect a disclaimer. These subsection (3)(c) disclaimers are most likely to arise in commercial transactions where the parties have a history of dealings with one another, and not in consumer transactions where, typically, the buyers and seller conclude only one or a very few transactions.

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265. *Id.*

266. § 336.2-316(3)(c).

Therefore, a buyer's pattern of accepting a price-adjustment formula for goods below a certain quality would effectively disclaim the implied warranty of merchantability.<sup>267</sup> A long period of dealing between buyer and seller during which the buyer knew that any purchase of the product from the seller was contingent upon the exclusion of both Code implied warranties would effectively disclaim those warranties.<sup>268</sup>

Dealers in a certain product may, as a matter of trade usage, buy and sell from one another with the understanding that they are *not* doing so on a "caveat emptor" basis.<sup>269</sup>

Where there is a course of dealing or performance between the parties, the seller in particular should look carefully at their past practices. She may find, for example, that she can show that past transactions included disclaimers, or that the buyer understood prior disclaimers even though they were inconspicuous and failed to mention "merchantability." Of course, past practices could also work in favor of the buyer where, for example, he can show that, despite disclaimers, the seller had repaired or replaced defective products. In order to show a "usage of trade," expert testimony may be required. At a minimum, testimony from others in the same trade or business who have the experience to know the usages of the trade would be crucial.

Finally, neither past practices between the parties nor trade usage will be effective to disclaim an express warranty. A seller who makes an express representation upon which the buyer relies, and then subsequently seeks to disclaim that promise by showing that it runs counter to a prior course of dealing or trade usage, will run afoul of the provisions of section 336.2-316(1) which provides that:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 336.2-202) negation or limitation is inoperative to the extent such construction is unreasonable.

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267. See *J. D. Pavlak, Ltd. v. William Davies Co.*, 351 N.E.2d 243 (Ill. App. Ct. 1976) (sale of meat products).

268. See *Std. Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164 (D. Conn. 1984) (a 62-year course of dealing in the sale of structural steel).

269. See *Robert Miller Gallery, Inc. v. Shepard Gallery Assocs., Inc.*, 6 U.C.C. Rptr. Serv. 1076 (N.Y. 1988) (the trade usage among fine art dealers).

*E. Unconscionability*

Product manufacturers and sellers are well aware that they cannot contract out of liability in tort for defective products. However, in an effort to limit risk as much as possible, they typically seek to limit the scope of their warranty liability by carefully defining the remedies available for breach of warranty and by disclaiming as much liability as possible for implied warranties.

An important question, therefore, is whether an otherwise valid under section 336.2-316 disclaimer of implied warranties may ever be invalid because it is unconscionable. This is a question of statutory interpretation.

Two provisions of the U.C.C. appear to be relevant to this issue, section 336.2-302, the general provision of the Code that deals with unconscionability, and section 336.2-719(3) the provision that deals specifically with unconscionable limitations on consequential damages for breach of warranty.<sup>270</sup> Minnesota Statutes section 336.2-302(1) provides as follows:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The U.C.C. does not define “unconscionable.” U.C.C. Comment 1 to section 336.2-302 says that “[t]he principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.” The precise meaning of “unconscionable” has escaped numerous attempts by courts and commentators to define the term. It is, therefore, not surprising that different courts strike the balance at different places along the continuum between rigorously enforcing the parties’ bargain, on the one hand, and exercising the chancellor’s power to prevent inequities on the other.<sup>271</sup>

Whatever unconscionable may mean in other contexts, a prior question in the case of a warranty disclaimer is whether such a

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270. See *infra* Part VIII.F for a general discussion of limitations of remedies for breach of warranty.

271. For a good general discussion of the debate among courts and commentators over the applicability of U.C.C. § 2-302’s applicability to otherwise-valid warranty disclaimers, see CLARK & SMITH, *supra* note 66, § 8:12.

disclaimer that is otherwise valid under section 336.2-316 can ever be invalidated as unconscionable. The better answer is that section 336.2-316 strikes a balance among the contracting parties' interests that is independent of other provisions of the Code, contains its own provisions for guaranteeing fairness and avoiding unfair surprise, and is the sole measure of the validity of warranty disclaimers. Therefore, if the disclaimer is valid under section 336.2-316, it is *not* additionally subject to section 336.2-302's unconscionability limitation.

The arguments in favor of this conclusion include:

1) Section 336.2-316 makes no mention of unconscionability or section 336.2-302 anywhere in its language or in its comments. It sets forth in some detail the requirements for a valid disclaimer and explicitly refers to course of dealing, course of performance and trade usage— general commercial concepts defined in the Code—but does not refer to unconscionability. Thus, there is a strong negative implication that the general unconscionability provision of the Code is inapplicable to warranty disclaimers.<sup>272</sup>

2) Section 336.2-719(3), the section of the Code that deals with limitations of remedies, provides, by way of contrast, that “[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.” Again, the implication is that section 336.2-316, which deals with the related matter of limitation or exclusion of warranties but which does *not* mention unconscionability, is not subject to an unconscionability limitation.<sup>273</sup>

3) Furthermore, U.C.C. Comment 2 to section 336.2-302 provides:

This Article treats the limitations or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty.

The comment says, in other words, that if there is no breach, there can be no consequential damages; if there is no warranty, there can be no breach; and there can be no warranty if the seller

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272. See Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. PA. L. REV. 485, 516–28 (1967) (noting the classic argument against applying the Code's unconscionability limitations to warranty disclaimers.)

273. *Id.*

has disclaimed in accordance with the provisions of section 336.2-302. This message is fortified by U.C.C. Comment 3 to section 336.2-719(3):

Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

In other words, a seller is constrained by unconscionability concerns in limiting remedies but “in all cases is free” of such constraints in disclaiming warranties altogether.

4) Subjecting warranty disclaimers to the uncertain effects of an ill-defined unconscionability limitation undermines commercial certainty and subjects the validity of warranty disclaimers to case-by-case judicial analysis. The requirements of section 336.2-316 clearly and precisely balance the interests of buyer and seller and provide explicit tests for valid disclaimers. These provisions are designed to provide the certainty that is such an important policy goal of commercial transactions.<sup>274</sup>

A majority of courts that have spoken to the point favor the view that a disclaimer valid under section 2-316 of the U.C.C. cannot be invalidated because it is unconscionable under section 2-302.<sup>275</sup> This view of both courts and commentators is strengthened by subsequent legislative developments that further police contracts, especially in regard to warranty disclaimers in sales or leases to consumers.<sup>276</sup> These statutes impose explicit limits on warranty disclaimers and are designed to assure fairness and avoid overreaching while still maintaining freedom of contract. They suggest that explicit requirements for and limitations on warranty disclaimers<sup>277</sup> are favored over the general and ultimately somewhat vague notion of unconscionability.

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274. *Id.*

275. *See, e.g.,* Moulton v. Ford Motor Co., 511 S.W.2d 690 (1974), *cert. denied* 419 U.S. 870 (U.S. Oct. 15, 1974) (No. 74-91); Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1974) (commercial case); Rio Grande Jewelers Supply, Inc. v. Data Gen. Corp., 689 P.2d 1269 (N.M. 1984) (commercial case); Marshall v. Murray Oldsmobile Co., 154 S.E.2d 140 (Va. 1967) (consumer sale); Avery v. Aladdin Prod. Div., Nat. Serv. Indus., Inc., 196 S.E.2d 357 (Ga. Ct. App. 1973).

276. *See infra* Part VIII.G.

277. Including the requirements of U.C.C. § 2-316.

There is, naturally, another view regarding this issue. The opposite view argues (1) that the language of section 2-302 is very broad, referring to “any clause of the contract,” and that it should be broadly applied, and (2) that most of the illustrative examples found in the comments to section 2-302 are of cases involving unconscionable warranty disclaimers.<sup>278</sup> Some courts have suggested in dicta that an otherwise valid disclaimer may be unconscionable<sup>279</sup> but, “it is hard to find a single decision to date that squarely holds that a properly drafted section 2-316 warranty disclaimer is unconscionable per se.”<sup>280</sup>

There are no cases in Minnesota decided under the U.C.C. that deal squarely with this issue.<sup>281</sup> Especially where consumer buyers are concerned, the courts will presumably continue to interpret contract language strictly against the seller and may even strain the interpretation of contract language to avoid a warranty disclaimer thus making it unnecessary to face the question of whether an otherwise-valid disclaimer of warranties, may be invalid because it is unconscionable under Minnesota Statutes section 336.2-302. One pre-Code case illustrates the “strained interpretation” approach to preserving for the buyer a warranty that the seller thought had been disclaimed. In *Bekkevold v. Potts*,<sup>282</sup> the seller included in the contract for sale of a tractor and some other equipment the following provision: “No warranties have been made in reference to said motor vehicle by the seller to the buyer unless expressly written hereon at the date of purchase.” None were written thereon. The seller knew, however, the particular

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278. See M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969) (noting the classic argument in favor of applying the Code’s unconscionability limitations to warranty disclaimers). See also Russell J. Weintraub, *Disclaimer of Warranties and Limitations of Damages for Breach of Warranty Under the U.C.C.*, 53 TEX. L. REV. 60, 75–83 (1974).

279. These cases typically invalidate the disclaimer on some other ground or provide a strained interpretation of the contract in order to find the existence of a warranty. See, e.g., *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195 (N.J. Super. Ct. Law Div. 1968) (attempted disclaimer did not meet requirements of § 2-316); *Jefferson Credit Corp. v. Marcano*, 302 N.Y.S.2d 390 (N.Y. Civ. Ct. 1969) (Spanish buyer could not read disclaimer written in English); *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (pre-Code case finding disclaimers to be contrary to public policy).

280. CLARK & SMITH, *supra* note 66, § 8:12.

281. *But cf.* *Holt v. First Nat. Bank of Minneapolis*, 297 Minn. 457, 214 N.W.2d 698 (1973) (waiver of defenses against third-party assignees in installment sales agreement not unconscionable).

282. 173 Minn. 87, 216 N.W. 790 (1927).

purpose for which the equipment was to be used and knew that the buyer was relying on the seller's judgment to provide suitable equipment. The court, observing that an implied warranty "is a child of the law"<sup>283</sup> that "arises independently and outside of the contract,"<sup>284</sup> concluded that the disclaimer applied only to warranties "made . . . by the seller," not those arising by operation of law. Consequently, the implied warranty of fitness that had arisen as a matter of law out of the circumstances of the sale was not disclaimed by the language in the contract!

*F. Limitations of Remedies*

In many product sales, the seller does not attempt to nullify warranties altogether through an outright disclaimer, but instead attempts to modify or limit the remedies available to the seller for breach. A typical example is a warranty against all defects for sixty days which limits the buyer's remedy to repair or replacement of the defective product. In this example, there is an express warranty, but the warranty is limited in duration and the remedies for breach of the warranty are limited.

Even though the parties are free to shape their agreement, including the remedies available for breach, to suit their particular interests and requirements, Minnesota Statutes section 336.2-719 controls their ability to do so in the interests of fairness and informed dealing. Section 336.2-719 provides as follows:

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
  - (a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts, and
  - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited

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283. *Id.* at 89, 216 N.W. at 791.

284. *Id.*

remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

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

The remedies “provided in this article” (Article 2) are described in sections 336.2-714 and 336.2-715, and include damages for the loss of value of the goods as well as consequential damages including injuries to persons or other property. In the event of breach, these are the remedies available to the buyer unless the parties have agreed to modify or limit the remedies.

U.C.C. Comment 1 to section 336.2-719 explains:

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

Subsection (1) subjects any limitation on remedies for breach of warranty to the requirement that the contract make express and clear that the limited remedy is the “exclusive” remedy. If this is not made very clear, then the remedy provided by the terms of the contract will be treated as a supplement to, rather than as a displacement of, the usual array of Code remedies for breach.<sup>285</sup> The case law suggests that the seller must be crystal clear in drafting limitations of remedies language, especially in consumer

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285. See MINN. STAT. § 336.2-719, U.C.C. cmt. 2 (2002) (Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed).

sales. An illustrative example is *Ford Motor Co. v. Reid*, in which the contract provided that an express warranty with a remedy of repair or replacement was “in lieu of any other express or implied warranty . . . and of any other obligation on the part of [the seller].”<sup>286</sup> The court concluded that the limiting language referred to warranties and obligations and not to remedies, and allowed the buyer to utilize other Code remedies for breach of express warranty.<sup>287</sup> To be as certain as can be, a seller wishing to limit remedies for breach of warranty should use express language saying that the parties agree that the remedy provided by the contract is the “exclusive remedy for breach of warranty.”

Subsection (2) of section 336.2-719 will invalidate a remedies limitation where the remedy provided in the contract has failed of its essential purpose. If the breach effectively deprives the buyer of the essential value of the product and cannot be remedied within a reasonable period of time, then the buyer has no effective remedy. The classic example of an exclusive remedy that has failed of its essential purpose is the repair-or-replace remedy applied to a car which is a true lemon. If the car has recurring defects which result in the vehicle spending an inordinate amount of time under repair and unavailable for use by the buyer, a repair-or-replace remedy has failed of its essential purpose, which is to provide a serviceable car within a reasonable time. If the remedy limitation fails this test, the buyer then has access to the full range of remedies provided in Article 2 of the U.C.C. even if the seller is making her best efforts to repair or replace defective parts and get the car back on the road.<sup>288</sup> In the case of motor vehicles, virtually every state now also has a “lemon law” that supplements the U.C.C. “fail of its essential purpose” language. Minnesota’s motor vehicle lemon law is found in Minnesota Statutes section 325F.665.

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286. 465 S.W.2d 80, 82 (Ark. 1971).

287. *Id.* See also *Stream v. Sportscar Salon, Ltd.*, 397 N.Y.S.2d 677 (N.Y. Civ. Ct. 1977); *Herbstman v. Eastman Kodak Co.*, 330 A.2d 384 (N.J. Super. Ct. App. Div. 1974).

288. See, e.g., *Jacobs v. Rosemount Dodge-Winnebago S.*, 310 N.W.2d 71 (Minn. 1981) (failure to repair defects in motor home brought in several times for repairs); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977) (defective car that dealer could not or would not put car in reasonably good operating condition). Cases involving products other than motor vehicles include: *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. 1977) (railroad cars); *Minn. Forest Prods., Inc. v. Ligna Mach., Inc.*, 17 F. Supp. 2d 892 (D. Minn. 1982) (fact questions precluded summary judgment on issue of whether repair-or-replace remedy in contract for sawmill equipment failed of its essential purpose).

Subdivision (3) of section 336.2-719 provides that remedy limitations may be unconscionable. This contrasts clearly with the provisions of section 336.2-316 which, by its own terms, does not subject warranty disclaimers to an unconscionability test.<sup>289</sup> Furthermore, subdivision (3) provides that any limitation in the contract on damages for personal injuries is *prima facie* unconscionable. This language suggests that there could be circumstances in which the seller can overcome the “prima facie” language but it is difficult to imagine a contractual exclusion of personal injury damages that would overcome this presumption of unconscionability. However, while limitations on consequential damages that amount to some form of property loss such as business interruption losses or other economic loss *may* be shown to be unconscionable in a particular instance, they nevertheless are not *prima facie* unconscionable. In *Transport Corp. of America v. International Business Machines Corp.*,<sup>290</sup> a computer reseller, Innovative Computing Corporation (ICC), sold a computer system to a commercial trucking business which used the system for various business functions and for the storage of certain business records. A disk drive failure led to certain business interruption losses for which the buyer sued claiming breach of warranty. The contract disclaimed all implied warranties and provided an exclusive repair-or-replace warranty which specifically provided that: “IN NO EVENT SHALL ICC BE LIABLE FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES SUCH AS LOSSES OF ANTICIPATED PROFIT OR OTHER ECONOMIC LOSS IN CONNECTION WITH . . . THIS AGREEMENT.”<sup>291</sup>

The buyer argued that this limitation of remedies was unconscionable. In concluding that the limitation was valid, the court said that “[a]n exclusion of consequential damages set forth in advance in a commercial agreement between experienced business parties represents a bargained-for allocation of risk that is conscionable as a matter of law.”<sup>292</sup>

It is not surprising that limitation of remedies terms are most likely to be upheld in commercial transactions involving experienced business parties. For example, in *Kleven v. Geigy*

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289. *See supra* Part VIII.E.

290. 30 F.3d 953 (8th Cir. 1984).

291. *Id.* at 960.

292. *Id.* *See also* *Nelson Distrib., Inc. v. Stewart-Warner Indus. Balancers*, 808 F. Supp. 684 (D. Minn. 1992).

*Agricultural Chemicals*,<sup>293</sup> a farmer-buyer of herbicide brought a breach of warranty claim against the product manufacturer. While the court concluded that the seller's warranty was breached, it rejected the buyer's claim that the seller's exclusion of consequential damages was unconscionable. The court points out that "[i]t is general knowledge in the buyer's rural area that the eventual yield of a farm crop, such as corn, is affected by many factors such as soil, weather, seed, weeds, and other conditions," implying that the buyer was a sophisticated commercial party who knew the risks associated with purchase of the seller's product.<sup>294</sup> However, even where the transaction is clearly a consumer transaction, courts in several other jurisdictions have found circumstances in which limitations and exclusions of consequential property damages are not unconscionable.<sup>295</sup>

Since there is rarely, if ever, good reason under Minnesota law to bring a claim for personal injury on a breach of warranty theory instead of in tort, the question of the unconscionability of such a contract limitation should very rarely arise.<sup>296</sup>

In addition to these requirements in section 336.2-719, other law, particularly law aimed specifically at protecting consumers in sale or lease transactions, may constrain a seller's ability to limit remedies for breach of warranty.<sup>297</sup>

### G. *Anti-Disclaimer Law*

To the average consumer, the term "warranty" suggests a promise that a product will be free of defects and, if defective, that the seller will bear the loss. But in fact many warranties are mainly disclaimers designed by the seller to substantially limit the seller's potential warranty liability. While this may not represent a problem to sophisticated commercial buyers, many consumers are thus effectively misled as to who really bears the risk of loss if the product is defective. Despite the supposed protections built into the U.C.C.'s provisions regarding warranty disclaimers and remedy

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293. 303 Minn. 320, 227 N.W.2d 566 (1975).

294. *Id.* at 329, 227 N.W.2d at 572.

295. *See, e.g.,* NEC Techs., Inc. v. Nelson, 478 S.E.2d 769 (Ga. 1996) (television set); Lobianco v. Prop. Protect., Inc., 437 A.2d 417 (Pa. Super. Ct. 1981) (home burglar alarm); Gladden v. Cadillac Motor Car Div., Gen. Motors Corp., 416 A.2d 394 (N.J. 1980) (automobile tire).

296. *See supra* Part V.

297. *See infra* Part VIII.G.

limitations, both the federal Congress and many state legislatures have concluded that the U.C.C. fails to adequately protect consumer interests against unfair seller practices. The result has been the enactment of legislation designed specifically to tip the law's balance in favor of protecting consumer warranty rights by sharply limiting, or altogether prohibiting, a product seller's ability to disclaim implied warranties in consumer transactions.

*1. Magnuson-Moss Warranty Act*

Congress enacted the Magnuson-Moss Warranty Act<sup>298</sup> in order to strengthen and clarify consumer product warranties. The Act is designed to protect consumers from deceptive warranty practices. It does not apply to transactions involving only commercial parties or warranties for services.<sup>299</sup> It authorizes the Federal Trade Commission (FTC) to make regulations implementing the Act's protections<sup>300</sup> and creates a federal cause of action for violations of the act.<sup>301</sup>

The most important provision of the Act prohibits disclaimers of implied warranties in the sale of consumer products costing more than ten dollars.<sup>302</sup> This provision effectively preempts state law, such as the provisions of Minnesota Statutes section 336.2-316, which authorizes such disclaimers in consumer transactions.<sup>303</sup> Although a seller offering either a "full" or a "limited" written warranty may not altogether disclaim implied warranties, she may limit the *duration* of implied warranties if offering only a "limited" written warranty. This is true so long as this limitation is reasonable, conscionable, and clearly communicated on the face of the warranty.<sup>304</sup> Warranty limitations that do not meet these criteria are void.<sup>305</sup>

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298. 15 U.S.C. §§ 2301–2312 (2000). For an excellent, in-depth discussion of the intricacies of Magnuson-Moss, see CLARK AND SMITH, *supra* note 66, at Part 2, chs. 14–21.

299. 16 C.F.R. § 700.1(h) (1986).

300. 15 U.S.C. § 2302. The FTC rules authorized by the Magnuson-Moss Act are found in 16 C.F.R. §§ 700–703.

301. 15 U.S.C. § 2310.

302. *Id.* § 2308.

303. MINN. STAT. § 336.2-316 (2002). See also *supra* Part VIII.D.

304. 15 U.S.C. § 2308(b) (providing that "[f]or purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration."). Section 2304(a)(2) provides that the duration of implied warranties may not be limited in the case of "full" warranties.

305. *Id.* § 2308(c).

Magnuson-Moss does not require a product seller to provide a warranty. However, if a written warranty<sup>306</sup> is offered to a consumer on a consumer product,<sup>307</sup> then the provisions of the Act are triggered.

Any written warranty within the scope of the Act must meet several basic requirements. First, the warrantor must disclose its terms “fully and conspicuously.”<sup>308</sup> This disclosure obligation applies to warranties on consumer products that cost more than five dollars.<sup>309</sup> The full disclosure requirement ensures that consumers have clear and fair notice if the warranty is unenforceable by a subsequent purchaser,<sup>310</sup> if the warranty is limited to only certain parts of the consumer product,<sup>311</sup> if the duration of the warranty is limited to a specific time or number of uses,<sup>312</sup> if the warrantor is limiting its performance obligations,<sup>313</sup> if the consumer must follow any procedures for performance of the warranty,<sup>314</sup> if the warrantor has created an informal dispute resolution mechanism,<sup>315</sup> if the written warranty restricts the duration of an implied warranty,<sup>316</sup> and if a consumer must return a registration card before the warranty will be effective.<sup>317</sup> In addition, compliance with the Act requires the warrantor to inform consumers that, “[t]his warranty gives you specific legal rights, and you may also have other rights which vary from State to State.”<sup>318</sup>

Under the Act, the warrantor must also ensure that the terms of the warranty are available for review by the consumer prior to sale.<sup>319</sup> The FTC has established rules describing what constitutes

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306. *Id.* § 2302.

307. *Id.* § 2301(1) (defining “consumer product” as “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes”).

308. 15 U.S.C. § 2302(a).

309. § 2302(e). The full disclosure rules established by the FTC are primarily found in 16 C.F.R. § 701. These disclosure requirements only apply to consumer products which cost more than fifteen dollars. 16 C.F.R. §701.2 (1986).

310. 16 C.F.R. § 701.3(a)(1).

311. *Id.* § 701.3(a)(2).

312. *Id.* § 701.3(a)(4).

313. *Id.* § 701.3(a)(3).

314. *Id.* § 701.3(a)(5).

315. *Id.* § 701.3(a)(6).

316. *Id.* § 701.3(a)(7). The FTC rule also requires disclosure of the fact that “[s]ome States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.” *Id.*

317. *Id.* § 701.4.

318. *Id.* § 701.3(a)(9).

319. *Id.* § 702.3. Congress required the FTC to prescribe rules governing the

adequate pre-sale disclosure by sellers,<sup>320</sup> warrantors,<sup>321</sup> catalog or mail-order sellers,<sup>322</sup> and door-to-door sellers.<sup>323</sup> Although this section of the Act applies to warranties on products sold for more than five dollars, the scope of the FTC regulations are limited to products worth more than fifteen dollars.<sup>324</sup>

Finally, the warrantor must label a written warranty as either “full” or “limited.”<sup>325</sup> This last major requirement applies to products costing consumers more than ten dollars.<sup>326</sup> A warranty will qualify as a full warranty only if it meets the federal minimum standards for such warranties set out in the Act.<sup>327</sup> The minimum standards require that (1) the warranty promises to remedy defects within a reasonable time and for no charge,<sup>328</sup> (2) the warranty does not limit the duration of any implied warranty,<sup>329</sup> (3) if the warranty limits consequential damages, it must do so conspicuously,<sup>330</sup> (4) the warranty must allow the consumer to choose a refund or replacement of the product after a reasonable number of attempts by the seller to remedy the defect,<sup>331</sup> (5) the consumer has no duty to the warrantor beyond notification of the defect,<sup>332</sup> and (6) the warranty applies to any subsequent owners of the product during the warranty’s duration.<sup>333</sup> A consumer product warranty that does not meet these minimum standards must be conspicuously titled as a limited warranty.<sup>334</sup> This designation requirement is met if it “appear[s] clearly and conspicuously as a caption, or prominent title, clearly separated from the text of the warranty.”<sup>335</sup>

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pre-sale availability of warranties. 15 U.S.C. § 2302(b) (2000).

320. *Id.* § 702.3(a).

321. *Id.* § 702.3(b).

322. *Id.* § 702.3(c).

323. *Id.* § 702.3(d).

324. *Id.* § 702.3.

325. 15 U.S.C. § 2303(a) (2000).

326. *Id.* § 2303(d).

327. *Id.* § 2303(a)(1). The minimum standards are established in § 2304.

328. *Id.* § 2304(a)(1).

329. *Id.* § 2304(a)(2).

330. *Id.* § 2304(a)(3).

331. *Id.* § 2304(a)(4).

332. *Id.* § 2304(b)(1).

333. *Id.* § 2304(b)(4). A “consumer” under the Act includes “any person to whom such product is transferred during the duration of an implied or written warranty.” 15 U.S.C. § 2301(3).

334. 15 U.S.C. § 2303(a)(2).

335. 16 C.F.R. § 700.6(a) (1986).

At first blush, the Magnuson-Moss Act appears to make any breach of a warranty under state law a violation of the Act which would thus give rise to federal jurisdiction and the possibility of recovery of attorney's fees. Section 2310(d)(1) provides that "a consumer who is damaged by the failure of a supplier . . . to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit" in state court or in federal court so long as the amount in controversy is \$50,000 or more.<sup>336</sup> If the consumer prevails, he may also recover reasonable attorney's fees.<sup>337</sup> Read in isolation, this section of the Act appears to provide that a breach of warranty under the provisions of Minnesota Statutes sections 336.2-313, 336.2-314, or 336.2-315 (the provisions relating to express warranties, implied warranties of merchantability, and implied warranties of fitness for a particular purpose) becomes a violation of Magnuson-Moss which may give rise to federal jurisdiction and effectively "federalize" products liability claims, including claims for personal injury, so long as they are brought on a warranty theory. However, section 2311(b)(2) of the Act provides:

Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

Read together, these provisions of the Act appear to permit personal injury claims under the Act only when an important substantive provision of the Act has been violated, such as section 2308's prohibition of disclaimers of implied warranties or section 2304(a)'s prohibition of limiting the duration of full warranties. This is the conclusion reached by a number of courts that have considered the matter.<sup>338</sup>

## 2. *Minnesota Consumer Protection Law*

Along with the federal warranty provisions created by the Magnuson-Moss Warranty Act, the Minnesota legislature has passed

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336. 15 U.S.C. § 2310(d)(3).

337. *Id.* 2310(d)(2).

338. *See, e.g.,* Boelens v. Redman Homes, Inc., 748 F.2d 1058, 1060, 1071 (5th Cir. 1984); Voelkel v. Gen. Motors Corp., 846 F. Supp. 1468, 1474 (D. Kan. 1994); Santarelli v. BP Am., 913 F. Supp. 324, 333 (M.D. Pa. 1996).

several statutes to further protect consumers from confusing or surprising warranty disclaimers or limitations. Although the general freedom to contract is still available, consumers are protected by these laws which require that warrantors state the warranty terms in language that can be easily understood by the buyer prior to creation of the contract.

These Minnesota laws apply to warranty disclaimers on sales of “[goods] purchased primarily for personal, family, or household purposes, and not for agricultural or business purposes.”<sup>339</sup> A warrantor’s failure to follow the provisions in sections 325G.17-20 is treated as consumer fraud<sup>340</sup> and is enjoined.<sup>341</sup>

Consumer sales of new goods in Minnesota have a statutory implied warranty of merchantability and, where the buyer makes known that the goods are required for a particular purpose and that he is relying on the seller’s skill and judgment, an implied warranty of fitness for a particular purpose.<sup>342</sup> These implied warranties can be disclaimed on an “as is” or “with all faults” basis only in a conspicuous writing that clearly and concisely informs the consumer that the goods are being sold on that basis and that “[t]he entire risk as to the quality and performance of the goods is with the buyer.”<sup>343</sup>

Express warranties are also regulated in the interests of consumer protection. A manufacturer, distributor or retailer who makes an express warranty in a consumer purchase of a new good cannot disclaim the implied warranties of merchantability or fitness for a particular purpose.<sup>344</sup> The statute establishes the duties of retailers, manufacturers, and distributors based on express warranties made by any of those parties.<sup>345</sup> Express warranties are created when a “retailer, distributor, or manufacturer undertakes (1) to preserve or maintain the utility or performance of the goods or provide compensation or replacement if there is a failure in utility or performance; or (2) declares that in the event of any sample or model, that the whole of the goods conforms to the sample or model.”<sup>346</sup> It is not necessary for the retailer, distributor,

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339. MINN. STAT. §325G.17, subd. 2 (2002).

340. *Id.* § 325G.20.

341. *Id.* § 325F.70 (2002).

342. *Id.* § 325G.18, subd. 1.

343. *Id.* § 325G.18, subd. 2.

344. *Id.* § 325G.19, subd. 1.

345. *Id.* § 325G.19, subd. 2; § 325G.17, subd. 5.

346. *Id.* § 325G.17, subd. 5.

or manufacturer to use the words “warranty” or “guarantee” or even to have specific intent to create an express warranty, but statements of the value or commendations of goods will not be enough to create an express warranty.<sup>347</sup> An advertisement may create an express warranty, but only if it makes specific claims or promises for the product’s performance.<sup>348</sup>

Purchasers of new and used cars are given specific warranty protection by other provisions of the law. Purchasers of new vehicles are protected by Minnesota’s “lemon law”<sup>349</sup> which establishes a manufacturer’s duty to repair,<sup>350</sup> replace or refund the full purchase price of a defective vehicle.<sup>351</sup> Provisions for informal dispute resolution procedures are also outlined by the statute.<sup>352</sup> A seller of used cars must also provide certain warranty protections<sup>353</sup> but the statute provides some exclusions including cars sold for less than \$3,000.00,<sup>354</sup> custom built vehicles,<sup>355</sup> cars with 75,000 miles or more,<sup>356</sup> and cars more than eight years old.<sup>357</sup>

#### *H. Effect of Disclaimers or Limitations on Third Party Beneficiaries*

As earlier discussed, Minnesota Statute section 336.2-318 extends to non-buyers—parties who are not in horizontal privity with the immediate seller of the product but who may reasonably be expected to use or be affected by the product—the same warranty protections extended to the immediate buyer of the product who is in privity with his seller.<sup>358</sup>

Because such a third party’s warranty protection derives from the warranty extended to the immediate buyer, a third party logically has no greater warranty protection than has the immediate buyer. Disclaimers or limitations affecting the warranty terms extended to the immediate buyer apply with equal force to third-party beneficiaries. This means, for example, that if a buyer’s

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347. *Id.*

348. *Masepohl v. Am. Tobacco Co.*, 974 F. Supp. 1245, 1253 (D. Minn. 1997).

349. MINN. STAT. § 325F.665 (2002).

350. *Id.* § 325F.665, subd. 2.

351. *Id.* § 325F.665, subd. 3.

352. *Id.* § 325F.665, subd. 6.

353. *Id.* § 325F.662. Warranty provisions are found in subdivision (2).

354. *Id.* § 325F.662, subd. 3(1).

355. *Id.* § 325F.662, subd. 3(4).

356. *Id.* § 325F.662, subd. 3(7).

357. *Id.* § 325F.662, subd. 3(5).

358. *See supra* Part VI.B.

warranty is limited in duration to twelve months, then that same twelve-month limit applies to third parties. It also means that if all warranties are effectively disclaimed by the seller so that the buyer receives no warranties, then there is no warranty protection for third parties either.

A good illustration of this principle is found in *Hydra-Mac, Inc. v. Onan Corp.*<sup>359</sup> Onan sold engines to Hydra-Mac, a small manufacturer that produced skid loaders for International Harvester Company. When the engines failed to perform as expected, Hydra-Mac and International Harvester sued Onan for breach of warranty. Onan defended by asserting that it had effectively disclaimed all warranties in its sales invoices delivered to Hydra-Mac and that that disclaimer defeated International Harvester's claim that it could recover damages from Onan as a third party beneficiary of product warranties made to Hydra-Mac. The supreme court concluded that "International Harvester, as purchaser of the skid loader containing the Onan engine, was a third party beneficiary of any warranties running to Hydra-Mac . . . [b]ut, as beneficiary of those warranties, International Harvester is equally subject to any disclaimers of warranty which would have been effective to bar any of Hydra-Mac's claims."<sup>360</sup>

While a third party has no more warranty protection than that afforded the immediate buyer, the language of Minnesota Statutes section 336.2-318 assures that he also has no less protection:

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.

The last sentence of this section precludes, for example, a seller limiting his warranties to the buyer only and cutting off those same warranty rights for third parties not in horizontal privity with the seller. As Official Comment 1 to this section explains: "What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section." Those persons are the "third parties" to whom this section of the Code refers—those who are

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359. 450 N.W.2d 913 (Minn. 1990).

360. *Id.* at 916. *See also* *Transp. Corp. of Am. v. Int'l Bus. Machs. Corp.*, 30 F.3d 953, 958-59 (8th Cir. 1994) (applying Minnesota law); *SCM Corp. v. Deltak Corp.*, 702 F. Supp. 1428, 1432-35 (D. Minn. 1988) (applying Minnesota law).

not in horizontal privity with the seller but who may reasonably be expected to use or be affected by the product.

However, as earlier discussed, this last sentence does not preclude a seller from contractually limiting her extension of a warranty to the first buyer of the product only and not extending the warranty to subsequent owners of the product who are not in vertical privity with the seller.<sup>361</sup>

#### IX. INDEMNIFICATION

A seller, such as a retail dealer, who is an intermediary in the chain of a product's distribution and who is made liable to the ultimate buyer for breach of an implied warranty of merchantability<sup>362</sup> may be able to seek indemnification from her own seller. Although intermediate parties such as distributors and retailers are liable to their buyers for losses caused by unmerchantable goods, they are typically mere conduits through whom the unmerchantable good passes. In most instances, they have not caused the product to be defective and they are typically not negligent for failing to discover the defect. In such cases, the intermediate sellers should be able to pass their liability upstream so that the ultimate loss falls on the party, often the manufacturer, who created the defect in the product.

This right to indemnification is implicit in the relationship between the intermediaries in the product's distributional chain. This is a contractual right, not one based in tort. An example is *Jacobs v. Rosemount Dodge-Winnebago South*,<sup>363</sup> in which a motor home dealer and motorhome manufacturer were sued for breach of warranty after the buyer of the vehicle discovered many defects and after the dealer made several unsuccessful attempts to repair the defects. The court concluded that "[t]he defects in this case were attributable to the faulty design of the motorhome, for which [the

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361. See *supra* Part VI.D.

362. A seller is liable for breach of an express warranty or an implied warranty of fitness for a particular purpose when the product fails to match a representation made by that seller to the buyer about some attribute of the product. There is no one else to turn to for indemnification because no one else made the same promise about the product. No one other than the warrantor has caused a promise or representation about the product to be made to the buyer. By way of contrast, everyone in the chain of manufacture and distribution of a product to the ultimate buyer impliedly warrants that the product is of merchantable quality.

363. 310 N.W.2d 71 (Minn. 1981).

manufacturer] alone was responsible. The manufacturing defects caused the inability of Rosemount Dodge to make the repairs required by the warranty. Rosemount Dodge was, in effect, a mere conduit in the chain of distribution and should be allowed indemnification.”<sup>364</sup>

The measure of damages in such an indemnity action includes the loss to the indemnitee resulting from her warranty-based liability to the ultimate consumer. The damages should also include reasonable attorneys fees incurred as a result of the claims brought by a third party (the product buyer or user) against which she is indemnified.<sup>365</sup>

The parties may, of course, *expressly* agree to indemnification or to limit the right to indemnification or limit the losses to be indemnified.

## X. NEW U.C.C. PROVISIONS

### A. *Generally*

Article 2 of the Uniform Commercial Code, including the provisions relating to warranties, was substantially revised by the American Law Institute and those revisions were approved by the National Conference of Commissioners on Uniform State Laws in 2003.<sup>366</sup> The amendments to Article 2 are yet to be adopted by the Minnesota Legislature, but it seems very likely that chapter 336 of the Minnesota Statutes, Minnesota’s version of the U.C.C., will be amended to reflect these changes in the uniform act. Some changes in the Code language appear to be significant; but other differences in the language do not appear to signal intent to change the law. It will take several years of experience with and judicial interpretation of this law, if and when it is adopted in Minnesota, to fully evaluate its impact. The changes in the revised U.C.C. most relevant to products liability law are summarized

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364. *Id.* at 80.

365. *See, e.g.*, *Natco, Ltd. P’ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1194 (11th Cir. 2001); *Burlington N. R.R. Co. v. Farmers Union Oil Co.*, 207 F.3d 526, 534 (8th Cir. 2000); *Peter Fabrics, Inc. v. S.S. “Hermes,”* 765 F.2d 306, 315 (2nd Cir. 1985); *United States Fid. & Guar. Co. v. Love*, 538 S.W.2d 558, 559 (Ark. 1976). However, the fees and expenses incurred in establishing the right to indemnification are not recoverable against the indemnitor since they fall within the general rule requiring a party to bear her own costs of litigation.

366. *See* U.C.C. REVISED ARTICLE 2 (2003).

below.

*B. Express Warranty*

Revised Article 2 divides the provisions regarding express warranties, now found in section 2-313, into three separate sections numbered sections 2-313, 2-313A and 2-313B. Section 2-313 deals with express warranties extended by a seller to an “immediate buyer,” one who has contracted directly with the seller.<sup>367</sup> Section 2-313A address the seller’s obligations to a remote purchaser<sup>368</sup> arising out of representations contained in the product’s packaging or accompanying the product, typically in the form of a writing<sup>369</sup> that describes the obligations that the manufacturer is willing to undertake in favor of the final party in the distributive chain. This section is meant to codify the extensive case law that has developed regarding pass-through warranties to parties not in privity with the product manufacturer. Section 2-313B addresses obligations to remote purchasers created by the product’s advertising. This section deals with obligations analogous to an express warranty that a seller has to a remote purchaser. This obligation is created, typically, by a manufacturer’s advertising campaign which makes representations which, if made to an immediate buyer, would amount to an express warranty. However, the product is not sold to the recipient of the advertising, but to some intermediary who then resells or leases the product to the recipient who is not in vertical privity<sup>370</sup> with the manufacturer.

Sections 2-313A and 2-313B address obligations to a remote purchaser, meaning one who “buys or leases goods” from someone “in the normal chain of distribution.” In a typical distributional chain of a product, there is a manufacturer, one or more wholesalers or distributors, and a retailer. A buyer or lessee from the retailer fits within this definition of “remote purchaser,” but others who may be harmed by the product’s defects are not.

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367. An immediate buyer “means a buyer that enters into a contract with the seller.” U.C.C. REVISED ARTICLE 2, § 2-313(1)(a).

368. A remote purchaser “means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.” U.C.C. REVISED ARTICLE 2, §§ 2-313A(1)(b), 2-313B(1)(b).

369. The revised Code language uses the term “record” which includes, but is broader than, a writing. U.C.C. REVISED ARTICLE 2 § 2-103(1)(m) defines record to mean “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”

370. See *supra* Part VI.C.

Whether someone other than the remote purchaser can enforce an obligation under either of these sections depends upon the law governing third-party beneficiaries, including section 2-318.

Taken together, these three new sections leave essentially intact the existing criteria for establishing an express warranty or analogous obligation. If the seller makes a representation of fact regarding the product, offers a description of the product, or provides a sample or model, any of which becomes part of the basis of the bargain, it creates an express warranty that the product shall conform to the representation, description or sample. Mere puffing, i.e., “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods”<sup>371</sup> does not, as it does not under existing law, form the basis for a warranty.

Finally, these new sections do not conflict with existing Minnesota consumer protection laws which define an “express warranty” arising out of a consumer sale<sup>372</sup> and address the matter of who is responsible for honoring an express warranty arising out of such sales.<sup>373</sup> Nor do these new sections conflict with Minnesota case law which has allowed subpurchasers to recover as third-party beneficiaries for breach of an express warranty in situations comparable to those addressed by these sections, i.e., remote purchasers to whom the seller has made a representation about the product in or on its packaging or in the product’s advertising.<sup>374</sup>

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371. U.C.C. REVISED ARTICLE 2, § 2-313(4).

372. MINN. STAT. § 325G.17(5) (2002) (“Express warranty’ means a written statement arising out of a consumer sale pursuant to which the manufacturer, distributor, or retailer undertakes: (1) to preserve or maintain the utility or performance of the goods or provide compensation or replacement if there is a failure in utility or performance; or (2) declares that in the event of any sample or model, that the whole of the goods conforms to the sample or model. It is not necessary to the creation of an express warranty that formal words such as “warranty” or “guarantee” be used or that a specific intention to make a warranty be present, but an affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.”). Under the U.C.C., an express warranty may arise from an oral representation as well as from a written statement.

373. MINN. STAT. § 325G.19, subd. 2 (2002) (“The maker of an express warranty arising out of a consumer sale in this state shall honor the terms of the express warranty. In a consumer sale, the manufacturer shall honor an express warranty made by the manufacturer; the distributor shall honor an express warranty made by the distributor; and the retailer shall honor an express warranty made by the retailer.”).

374. See *supra* Part VI.

C. *Implied Warranty of Merchantability*

Revised section 2-314 would make a few style changes to the language of the existing Minnesota Statutes section 336.2-314, but the substance of the Code's provisions regarding the implied warranty of merchantability would remain unchanged.

An interesting addition is found in the comments to revised section 2-314 which address a topic that has been the subject of considerable discussion over time. The comments note that there is

disagreement over whether the concept of defect in tort and the concept of merchantability in Article 2 are coextensive where personal injuries are involved, *i.e.*, if goods are merchantable under warranty law, can they still be defective under tort law, and if goods are not defective under tort law, can they be unmerchantable under warranty law? The answer to both questions should be no, and the tension between merchantability in warranty and defect in tort where personal injury or property damage is involved should be resolved as follows: When recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law.<sup>375</sup>

This comment describes the current state of Minnesota law.

D. *Implied Warranty of Fitness for a Particular Purpose*

There is no revision to either the language of section 2-315 regarding the implied warranty of fitness for a particular purpose nor any change in the Official Comment to this section.

E. *Privity*

Revised section 2-318 includes, as did the earlier Official Text of this section,<sup>376</sup> three alternative versions of subsection (2) intended to accommodate the differences in various states' law regarding the extent to which warranty protection extends to persons other than the buyer of the product. Revised sections 2-313A and 2-313B make clear the circumstances under which *express* warranties, which these two sections call "obligations," are

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375. U.C.C. REVISED ARTICLE 2, § 2-314, cmt 7. *See also supra* Part III.A.

376. *See supra* Part VI.B.

extended to remote purchasers, thus eliminating any possible argument by a remote seller that her express warranty obligations do not extend beyond her immediate buyer and that the absence of vertical privity bars any such claims by remote purchasers. Revised section 2-318 makes clear that a seller's warranty, whether express or implied, extends to third parties not in horizontal privity with the seller. Alternative C to subsection (2), which provides the broadest description of these third parties, extends warranty protection to "any person that may reasonably be expected to use, consume, or be affected by the goods and that is injured by breach of the warranty, remedial promise, or obligation."

This parallels the existing language in Minnesota Statutes section 336.2-318 and would not result in a change in Minnesota law. As under existing law, however, this section purports to address only the question of *horizontal* privity. As under existing law, there are circumstances under which the lack of *vertical* privity should bar certain warranty claims.<sup>377</sup>

#### F. Notice of Breach

Revised section 2-607 leaves largely unchanged the law regarding a buyer's obligations to give timely and sufficient notice of breach of warranty to the seller. A product buyer who fails to give such notice risks being barred from a remedy for breach. One important difference in the language of this revised section compared to the current law is found in subsection (3). Under Minnesota Statutes section 336.2-607(3), a buyer who fails to give timely and adequate notice of breach is "barred from any remedy."<sup>378</sup> Under revised section 2-607(3), failure to notify "bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure." An example of circumstances in which a buyer's failure to give timely and adequate notice may prejudice a seller would include a case in which delay in giving notice precluded the seller from discovering and developing evidence relevant to the claim of breach.

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377. See *supra* Part VI.C for a full discussion of this question.

378. This includes not only a damages remedy but also the right to reject the goods or revoke acceptance of the goods.

G. *Disclaimers and Limitations of Remedies*

Much existing law with respect to warranty disclaimers and limitations of remedies would be unaffected by the new Code. First, the provisions relating to disclaimers of express warranties are virtually unchanged.<sup>379</sup> Second, as under current law, revised section 2-316(3) provides that all implied warranties are disclaimed by expressions like “as is,” “with all faults” or other language that is commonly understood by buyers to exclude warranties.<sup>380</sup> Third, as under current law, subdivision (3) also provides that (1) there is no implied warranty as to defects that an examination of the product should have revealed where the buyer examines the goods prior to sale or refuses to examine them after a demand by the seller to do so,<sup>381</sup> and (2) implied warranties may be excluded by course of performance or usage of trade.<sup>382</sup> Finally, revised Article 2 makes no change whatsoever to the language of section 2-719 which governs a seller’s right to limit the remedies for breach of warranty.

However, revised section 2-316 would make some important changes to the disclaimer provisions of Minnesota Statutes section 336.2-316. These changes would impose additional requirements on a seller who wishes to disclaim warranties *in transactions with consumers*. Any implied warranty in a consumer sale that is disclaimed using “as is” or similar language must be set forth conspicuously in a record. Furthermore, unless an implied warranty is disclaimed in one of the ways described in revised section 2-316(3), revised section 2-316(2) provides that in order to exclude or modify the implied warranty of merchantability in a consumer sale, “the language must be in a record, be conspicuous, and state ‘[t]he seller undertakes no responsibility for the quality of the goods, except as otherwise provided in this contract . . . .’”<sup>383</sup> This new language fortifies the present tendency of courts to favor consumer interests in interpreting attempts to disclaim warranty liability.

Revised section 2-316(2) also provides that in order to exclude

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379. U.C.C. REVISED ARTICLE 2, § 2-316(1).

380. *Id.* § 2-316(3) (a).

381. *Id.* § 2-316(3) (b).

382. *Id.* § 2-316(3) (c).

383. *Id.* § 2-316(2).

or modify the implied warranty of fitness for a particular purpose in a consumer sale, the exclusion must be in a record, be conspicuous, and must state “[t]he seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract.”

#### *H. Unconscionability*

Revised section 2-302, the general unconscionability provision, contains only a few minor style changes compared to the language of Minnesota Statutes section 336.2-302. Taken all together, the lack of any substantive change in this section, combined with (1) the lack of any change at all in section 2-719(3)’s explicit provision that limitations on consequential damages for breach may be unconscionable, (2) the additional protection in revised section 2-316 for consumers against disclaimers of implied warranties, and (3) the anti-disclaimer protections given to consumers in the federal Magnuson-Moss Warranty Act and Minnesota consumer protection law, make a persuasive argument that an otherwise-valid disclaimer of warranty liability, one not barred by these several explicit limitations on warranty disclaimers, would not be unconscionable under the provisions of Revised Article 2.<sup>384</sup>

### XI. CONCLUSION

Though warranty law is an important supplement to tort law principles governing liability for defective products, those tort law principles provide the primary law for resolving such claims. Generally, plaintiffs should limit themselves to pleading their tort claims and not add a claim for breach of the implied warranty of merchantability. However, there are circumstances in which products liability claims must be brought on a breach of warranty theory. Where the plaintiff’s claim is for economic loss, the claim cannot be brought in tort and must proceed on a breach of warranty basis. The most likely claim will be breach of the implied warranty of merchantability, the warranty law equivalent of a claim in tort that the product is defective. Even where the product is not defective in tort law terms, a claim for breach of express warranty or for breach of the implied warranty of fitness for a particular

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384. See *supra* Part VIII.F.

purpose is appropriate where the seller has made a representation about some feature of the product or about its suitability for the buyer's particular need and where the buyer has relied upon that representation.

All of these claims carry with them the baggage of contract law doctrine. Defendants should look carefully for several issues that may limit a product buyer's warranty claims—limits that do not arise if the claims are plead in tort—such as whether notice of breach was timely given, whether the warranty has been disclaimed, or whether the buyer's remedies for breach have been limited.

In the case of consumer sales, both state and federal law provide additional warranty protections to buyers, especially by limiting the right of the seller to disclaim warranties.

Finally, a revised Article 2 of the Uniform Commercial Code, including the provisions relating to warranties, has recently been approved by the National Conference of Commissioners on Uniform State Laws. The Minnesota Legislature is likely to adopt these changes as part of Minnesota's U.C.C. If Minnesota law is amended to reflect these changes in the uniform act, they will not represent a significant change in Minnesota warranty law. However, some of the changes would be important, especially those that strengthen a consumer's protection against warranty disclaimers. It will take several years of experience with and judicial interpretation of this law, if and when it is adopted in Minnesota, to fully evaluate its impact.