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# Innovation in the Law of Warranty: The Burden of Reform

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# Innovation in the Law of Warranty: The Burden of Reform

By Timothy J. Sullivan\*

I feel apologetic about coming before you with such common-places. But . . . we must look at the present with some dismay. And one reason for this dismay is that I should find it necessary to remind you of such common places.<sup>1</sup>

The adoption of the Magnuson-Moss Warranty Act<sup>2</sup> marked an important change in the law of warranty in sales transactions. The justification for this federal intervention in a field previously viewed as principally a matter of state concern was twofold. First, Congress assumed that the consumer, as distinguished from the commercial buyer, needed special protection in the modern marketplace. Second, Congress believed that existing state law, both statutory and judicial, inadequately protected the average consumer.<sup>3</sup>

This Article proposes to examine the asserted need for federal legislation to remedy deficiencies in state warranty law. A secondary purpose is to analyze the evolution of quality terms in contract law. To achieve these ends the Article is divided into five parts: (1) an analysis of the evolution of warranty law in England and the United States to approximately the beginning of this century; (2) a review of 20th century judicial perceptions of consumer vulnerability; (3) an analysis of state statutory law (Article 2 of the Uniform Commercial Code) prior to adoption of the Magnuson-

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1. P. GAY, *Law, Order, and Enlightenment*, in *IS LAW DEAD?* 31 (E. Rostow ed. 1971).

2. 15 U.S.C. §§ 2301-2312 (1976).

3. See notes 278-307 & accompanying text *infra*.

Moss Warranty Act; (4) a brief examination of the legislative background to and substantive content of the Magnuson-Moss Act itself; and (5) some concluding observations.

This Article has chosen an historical approach to warranty law for two reasons. First, to assay the need for federal warranty legislation, a careful study of the prior law adjudged to be deficient is necessary. Second, recent literature on the consumer and quality terms neglects the importance of history in understanding the present state of warranty law.<sup>4</sup> The law of warranty is complicated and not always consistent with what seems to be logical. Although historical analysis will not eliminate that illogic, it identifies the source of much of the present confusion.

### The Quality Term In Legal History

Few areas of the law have historical origins more complex than the law of warranty. A mastery of ancient doctrine is a substantial aid in the comprehension of seeming anomalies in the modern law.<sup>5</sup> Indeed, the confused state of current warranty law is in part the result of the persistent insensitivity of many courts and lawyers to the relevance of historical context.<sup>6</sup> Resort to history is thus justified for the most practical of reasons.

Consider this example: A farmer contracts to buy a tractor.

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4. See, e.g., Pauly, *Consumerism Takes It on the Chin: Warranty Disclaimers in Oklahoma*, 10 TULSA L.J. 675 (1975); Weintraub, *Disclaimers of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60 (1974); West, *Disclaimers of Warranties—Its Curse and (Possible) Cure*, 76 COM. L.J. 253 (1971); Comment, *Uniform Commercial Code: Disclaimer of Implied Warranties from a Manufacturer's Perspective*, 80 DICK. L. REV. 566 (1976); Comment, *Sales: New Tests for "Goods" and Disclaimers of Implied Warranties Under the Uniform Commercial Code*, 23 U. FLA. L. REV. 796 (1971); Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code*, 63 VA. L. REV. 791 (1977); Note, *Restricting Disclaimer of the Warranty of Merchantability in Consumer Sales: Proposed Alternatives to the UCC*, 12 WM. & MARY L. REV. 895 (1971); Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30 (1978).

5. Professor Llewellyn lamented the absence of historical analysis in sales cases and commentary: "It is a sad commentary on our dogmatics that sales cases over a hundred and fifty years and more than fifty jurisdictions have been treated as if they floated free of time, place and person." Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 699 (1936) [hereinafter cited as Llewellyn].

6. The commentators have differed as to the reasons for the complexity of warranty law. One observer has noted that these difficulties may be traced to three causes: (1) too much theory; (2) too little theory; (3) no theory whatever. Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods*, 15 MOD. L. REV. 425 (1952).

As agreed, the farm implement dealer delivers a tractor, ostensibly to satisfy the farmer's need. Although the machine delivered is a tractor, it lacks the power to pull the attachments required for effective farming. Has the farmer legal cause for complaint? The facts are much simplified and make a forthright answer difficult. Most attorneys will agree, however, that the farmer's best hope for relief may lie not in the main body of contract law,<sup>7</sup> but rather in the law of warranty. To the farmer it is a matter of common sense: If the tractor will not do what tractors are supposed to do, relief should be available. In the end, the law may countenance that result. The careful lawyer, however, must tell the farmer client that common sense in the law of warranty is not always as simple as it seems.

## England

### *Origins of Substantive Warranty Law*

Had the farmer lived in medieval England and dealt in horses rather than tractors, he or she might have found the rule of law more congenial, or at least more forthright. In the English society of the 13th and 14th centuries,<sup>8</sup> the influence of the Church was pervasive. The sum of human activity was linked to its relationship with God; trade for profit was considered sinful. Religious duty required sellers to correct quality defects unknown to them at the time of sale.<sup>9</sup> Other institutions such as feudal authority and craft guilds reinforced the Church's teaching by imposing upon sellers rigorous quality standards in conducting their trade.<sup>10</sup>

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7. Many courts have not treated noncompliance with a warranty obligation as just another breach of contract. Historically, warranty breaches were considered a special kind of legal problem; particular rules, not always consistent with basic contract law, have been devised to deal with warranty problems. The Uniform Commercial Code attempts to integrate the remedial aspects of warranty law with the main body of sales doctrine. See generally Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262, 278-79 (1964); Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 273, 273-74 (1950). For a formal discussion of the reasons for the special treatment of warranty law outside the main body of contract law, see text accompanying notes 57-94 *infra*.

8. Implied warranties of quality may be traced to even earlier periods. Early Welsh codes contained provisions implying warranties of title and warranties against any "inward disorder" in the goods. Stone, *The Transaction of Sale in Saxon Times*, 29 LAW Q. REV. 323, 334 (1913).

9. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1137-38 (1931) [hereinafter cited as Hamilton].

10. *Id.* at 1153-54.

Slowly, a professional class of traders emerged. As early as the 12th century, special courts were established to adjust relations among traders and between traders and their customers.<sup>11</sup> By the 13th and 14th centuries, these special courts had acquired an institutional character and were convened regularly at trade fairs, and later, in market towns. From the decisions of these courts emerged the beginnings of the "law merchant." What records of their proceedings as have survived suggest that they consistently imposed strict responsibility upon sellers for the quality of their wares.<sup>12</sup> Thus, from its infancy the law merchant, insofar as it dealt with the quality of goods, was founded on "credit, not distrust."<sup>13</sup>

A variety of local courts of sometimes inconsistent and overlapping jurisdiction also existed at this time. In these local courts the fraudulent seller was called to account. The plaintiff buyer's action was sometimes labeled covenant but more often trespass or deceit. These local courts also imposed sanctions against sellers for defects in the quality of their goods. The seller who delivered defective goods not only harmed the buyer, but also violated local criminal law. The seller's wrong thus transcended the limits of the particular transaction and offended the community's sensibilities as well.<sup>14</sup>

With the decline of feudal institutions, the break with Rome, and the rise of an influential middle class tied to trade and commerce, the ordered world of medieval England, linked closely to Christian teaching in all its aspects, was in decline.<sup>15</sup> The legal fields in which the concept of caveat emptor would later flourish came under cultivation.

Most commentators trace the origins of the doctrine of caveat emptor to *Chandelor v. Lopus*.<sup>16</sup> In *Chandelor*, the plaintiff purchased what the defendant seller falsely affirmed was a bezoar

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11. *Id.* at 1158.

12. *Id.* at 1159-62.

13. T. SCRUTTON, *THE ELEMENTS OF MERCANTILE LAW* 23 (1891).

14. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 276 (1969) [hereinafter cited as MILSOM].

15. Hamilton, *supra* note 9, at 1164-70.

16. 79 Eng. Rep. 3 (Ex. 1603). The commentators have not all agreed that caveat emptor made its first appearance in *Chandelor*. Professor Simpson, for example, traces the substance of the doctrine back to *Harvey v. Young* decided a year before *Chandelor* but not reported. A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 536 (1975) [hereinafter cited as SIMPSON].

stone.<sup>17</sup> The buyer sued successfully in the King's Bench. The verdict was reversed in the Exchequer Chamber on the grounds that the plaintiff had proved neither that the defendant knew his affirmation to be false nor that he had *warranted* the stone to be a bezoar stone. The court noted that all sellers will *affirm* that their wares are good; only if the sellers *warranted* the quality of their goods, however, would a cause of action lie.<sup>18</sup>

This restrictive reading in *Chandelor* of the seller's obligation for quality had little impact for the rest of the 17th century. The reports of the period contain few cases in which the issue of responsibility for defective goods was litigated.<sup>19</sup> Nonetheless, efforts persisted to establish caveat emptor as a ruling precedent. The doctrine was advanced by the emergent philosophy of individualism and by the doctrine of laissez-faire, both of which were antithetical to the interventionist impulses and regulatory standards so characteristic of the medieval period.<sup>20</sup>

The 18th century was a battleground between the rigorous quality standards imposed on sellers by the law merchant and the developing concept of caveat emptor. In some cases the disappointed buyer was given protection.<sup>21</sup> In others, the doctrine of caveat emptor was invoked implicitly, if not explicitly by the seller.<sup>22</sup> By the closing decades of the century the struggle over the status of caveat emptor was further complicated because the fluidity of

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17. A bezoar stone is a gallstone-like object found in the intestines of goats. At the time *Chandelor* was decided, bezoar stones were considered to have a variety of salutary medicinal qualities. SIMPSON, *supra* note 16, at 536.

18. Professor McMurtrie contends that the plaintiff in *Chandelor* lost because of a defect in his declaration, not on any substantive grounds. McMurtrie, *Chandelor v. Lopus*, 1 HARV. L. REV. 191 (1887). Professor Ames, on the other hand, contends that the result did not turn on a point of pleading. Ames, *The History of Assumpsit* (pt. 1), 2 HARV. L. REV. 1, 9-10 (1888) [hereinafter cited as Ames]. Professor Hamilton believes that there was a second action between the parties involving the same facts, the results of which were reported in *Southern v. How*, 79 Eng. Rep. 400 (K.B. 1618). Hamilton, *supra* note 9, at 1166-67. Professor Simpson rejects the notion that there were two actions. SIMPSON, *supra* note 16, at 536 n.2.

19. There were some actions in which the courts did treat the problem of seller's responsibility for quality. These cases had no factual similarity; however, they often concerned transactions far removed from the everyday buying and selling of chattels. See, e.g., *Ekins v. Tresham*, 83 Eng. Rep. 318 (K.B. 1663); *Tracy v. Veal*, 79 Eng. Rep. 194 (K.B. 1608); *Roswel v. Vaughan*, 79 Eng. Rep. 171 (Ex. 1606).

20. Kessler, *The Protection of the Consumer Under Modern Sales Law* (pt. 1) 74 YALE L.J. 262, 266 (1964).

21. See, e.g., *Stuart v. Wilkins*, 99 Eng. Rep. 15 (K.B. 1778).

22. See, e.g., *Jendwine v. Slade*, 170 Eng. Rep. 459 (K.B. 1797).

mercantile custom was not easily assimilated into the formalism of the common law.<sup>23</sup>

The 19th century was marked, for a time, by the clear ascendancy of caveat emptor.<sup>24</sup> Many cases may be cited in which the doctrine was invoked to cut back the seller's liability for quality.<sup>25</sup> For example, In *Chanter v. Hopkins*<sup>26</sup> the defendant buyer operated a brewery. He ordered from the plaintiff seller a patented furnace which the seller had advertised as a "Smoke-consuming Furnace." After installation, the defendant complained that there was as much smoke as before and that brewing took more time than before installation. The defendant refused to pay and the plaintiff brought suit. The defendant did not assert or attempt to prove fraud, but based his defense on the broad principle: "If a man sells an article, he thereby warrants that it is merchantable—that it is fit for some purpose."<sup>27</sup> The court, in affirming the verdict for the plaintiff, rejected the defendant's "broad principle":

What is the [buyer's] order? It is an order for one of those engines of which the plaintiff was known to be the patentee; he was not obliged to know the object or use to which the defendant meant to apply it; and it is admitted there is no fraud. . . . It appears to me that this is the ordinary case of a man who has the misfortune to order a particular chattel, on the supposition that it will answer a particular purpose, but who finds it will not. I think there is no ground at all, therefore, to disturb the verdict.<sup>28</sup>

Even after the general acceptance of caveat emptor, there were two means by which the buyer could impose liability on the seller for defective goods. First, the seller was still accountable for express representations known to be false. Second, if the seller ex-

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23. See Hamilton, *supra* note 9, at 1172.

24. The evolution of legal doctrine is rarely tidy. The rigid requirement that the writer compress unruly history into neat paragraphs sometimes leads to oversimplification. In retrospect, it appears that by the beginning of the 19th century caveat emptor was an emerging doctrine, although some cases support a different conclusion. The problem was further complicated because well into the middle of the 19th century each branch of the English judicial system—King's Bench, Exchequer, and Common Pleas—was rendering decisions inconsistent with decisions on similar facts by the other two branches. "It is amazing to think that any lawyer could have thought all three were announcing and applying a single body of law." Llewellyn, *supra* note 5, at 720.

25. See, e.g., *Burnby v. Bollett*, 153 Eng. Rep. 1348 (Ex. 1847); *Parkinson v. Lee*, 102 Eng. Rep. 389 (K.B. 1802).

26. 150 Eng. Rep. 1484 (Ex. 1838).

27. *Id.* at 1486.

28. *Id.* at 1487.

pressly warranted the goods, the seller would be strictly liable for any defect inconsistent with the warranty.<sup>29</sup>

An express warranty was a matter of some formality; mere affirmations or general expressions of quality would not suffice.<sup>30</sup> Because of the general acceptance of caveat emptor the buyer could gain protection only by insisting upon a separate or special warranty of quality. This had the effect of separating warranty law from the developing rules of bargain and sale.<sup>31</sup>

Concurrent with the general ascendancy of caveat emptor were counterpressures to expand the seller's responsibility for quality. These contradictory tendencies created a period of impasse. On the one hand, the early common law judges readily found the seller liable for fraud or breach of express warranty, however narrowly defined. On the other hand, caveat emptor was invoked to protect against extending the seller's liability beyond fraud or breach of warranty, in the limited sense then accepted.<sup>32</sup> The impasse could not and would not be long lived. The tendency of the common law over time has been to broaden the scope of the seller's responsibility for quality.<sup>33</sup>

In retrospect, the inadequacy of early English warranty law appears to be based on an overly narrow definition of fraud.<sup>34</sup> There could be liability for fraudulent misstatement only if a seller's statements were knowingly false. Absent technical words of express warranty, there was no liability for negligent or careless misrepresentations. This meant that "the ingenious rascal went free."<sup>35</sup> However, the potential for expanding the liability of sellers for the quality of their goods was imminent in the doctrine of express warranty because the sellers who expressly warranted their goods were held strictly liable for any breach.<sup>36</sup> Thus, from an

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29. 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 69-70 (1926) [hereinafter cited as HOLDSWORTH].

30. The reports are not precise about what formalities were required to create an express warranty. See SIMPSON, *supra* note 16, at 245.

31. Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods*, 15 MOD. L. REV. 425, 431-32 (1952).

32. 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 378-79 (1906) [hereinafter cited as STREET].

33. Kessler, *The Protection of the Consumer Under the Modern Sales Law* (pt. 1), 74 YALE L.J. 262, 263-64 (1964).

34. 8 HOLDSWORTH, *supra* note 29, at 69.

35. STREET, *supra* note 32, at 380.

36. See note 29 *supra*.



early date, the notion of liability without fraud or guilty knowledge had already been incorporated into the law in a limited sense by the recognition of express warranty.<sup>37</sup>

Lord Holt began the process of expanding the seller's liability for quality by striking directly at two of the principles that had served to restrain the expansion of seller's liability: (1) the requirement that special words be used to raise a warranty and (2) the standard that no liability would attach to false statements made in connection with the sale of goods unless the seller knew of their falsity. In two decisions,<sup>38</sup> Lord Holt held that an express warranty could be found even though no special words of warranty were used: "[T]he bare affirming it to be his amounts to warranty."<sup>39</sup>

Lord Holt's decisions did more than merely weaken existing requirements that technical words be used to create a warranty or that actual knowledge of false representations be established before liability for fraud would attach. In a sense, his work anticipated the concept of implied warranty. Prior to Lord Holt's decisions, words of art were necessary to establish any warranty; the impact of his reasoning was that warranty could be implied from words which an ordinary person would assume amounted to a representation of good title.<sup>40</sup> This contribution freed the development of warranty law from the formalism that had retarded its expansion.

The development of implied warranties into a form resembling modern implied warranties took little more than fifty years.<sup>41</sup> In

37. 8 HOLDSWORTH, *supra* note 29, at 70.

38. *Medina v. Stoughton*, 91 Eng. Rep. 188 (K.B. 1700); *Cross v. Gardner*, 89 Eng. Rep. 453 (K.B. 1689).

39. *Medina v. Stoughton*, 91 Eng. Rep. 188, 188 (K.B. 1700).

40. Not all scholars are of the opinion that Lord Holt's warranty of title decisions notably advanced warranty law. See, e.g., STREET, *supra* note 32, at 383-84; Williston, *What Constitutes an Express Warranty in the Law of Sales*, 21 HARV. L. REV. 555, 556 (1908). Lord Holt's innovative impulse was exercised in the area of title to chattels. Presumably, legal minds of that era, steeped in the centrality of property in the legal system, could more easily countenance advances that seemed to protect expectations of title as distinguished from the qualitative aspect of goods.

41. Implied warranties in the sale of food and drink had been recognized in England since the Middle Ages. The source of such implied warranties apparently rested in statutory enactments of some kind, because a breach was an offense against the commonwealth. See *Roswel v. Vaughn*, 79 Eng. Rep. 171, 172 (Ex. 1608) (Tanfield, C.B.). The entire subject is fully discussed in *Burnby v. Bollett*, 153 Eng. Rep. 1348 (Ex. 1847). There is no evidence that the long tradition of fixing liability for breach of implied warranties on the sellers of food and drink influenced the later and broader development of the doctrine.

two decisions, one involving the sale of beer to a tavern keeper<sup>42</sup> and the other a contract to deliver "waste silk,"<sup>43</sup> Lord Ellenborough<sup>44</sup> declared that where the buyer has no opportunity to inspect the goods, the maxim of caveat emptor does not apply: "Without any particular warranty [merchantable quality] is an implied term in every such contract. . . . [The buyer] cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them."<sup>45</sup> In neither case was fraud on the part of the seller alleged or proved. In both cases Lord Ellenborough succeeded in imposing liability on sellers for failure to meet a quality standard never specifically warranted. The court's task thus became one of divining the parties' presumed but unspoken intent. Although the court carefully restricted its holding to cases in which the buyer had no opportunity to inspect the purchased goods, the foundation was laid for a significant expansion of seller's liability for quality defects.

Lord Ellenborough's opinions were so brief that they reveal little of their theoretical foundations. On the other hand, Chief Justice Best's opinion in *Jones v. Bright*,<sup>46</sup> which built upon Lord Ellenborough's work, is significant because the dialogue between counsel and the court provides a striking insight into the great theoretical changes that were then occurring in warranty law. In *Bright*, the plaintiff had purchased copper sheathing for his ship from the defendant manufacturer, who was aware of the purposes for which the plaintiff wished to use the copper. The defendant assured the plaintiff, "I will supply you well."<sup>47</sup> In fact, the copper became greatly worn and pocked after only four months use. The evidence established that ordinary marine copper could be expected to last four years. The plaintiff sued and recovered judgment in the trial court.

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42. *Holcombe v. Hewson*, 170 Eng. Rep. 1194 (K.B. 1810).

43. *Gardiner v. Gray*, 171 Eng. Rep. 46 (K.B. 1815).

44. Lord Ellenborough's role as an innovator in warranty law is somewhat curious. One of his biographers wrote: "[A]ll of his tendencies were strongly towards the support of government, and the resistance of innovations." E. Foss, 8 JUDGES OF ENGLAND 321 (1864). He was, however, considered to be a learned and able judge, eloquent, inflexibly just, but possessed of a wit touched too much by sarcasm and ridicule. *Id.* at 322-23.

45. *Gardiner v. Gray*, 171 Eng. Rep. 46, 47 (K.B.1815).

46. 130 Eng. Rep. 1167 (C.P. 1829).

47. *Id.* at 1167.

On appeal, the defendant argued that there could be no recovery unless the seller used words of express warranty or knew that the copper sold was defective.<sup>48</sup> They attempted to distinguish *Gardiner v. Gray*<sup>49</sup> on the grounds that the seller in that case had been held liable not because of any implied warranty, but for failure to deliver goods of the description expressly warranted.<sup>50</sup> The seller also argued that economic disaster would attend the approval of this new idea of implied warranty: "If such a doctrine can be maintained, every dealer or manufacturer,—however skillful in the exercise of his art; however careful in the selection of his materials; and however cautious in the language of his contracts,—may be ruined in a moment by the unexpected failure of his commodity."<sup>51</sup>

Despite the seller's able counsel, the verdict for the plaintiff buyer was affirmed on appeal. The court rejected the defendant's reliance on "old cases." *Chandelor*, the court said, simply established the proposition that a seller would be liable for breach of warranty or false representation. It did not hold that the warranty must be express; an implied warranty was within the *Chandelor* holding. One judge declined to quibble about "ancient learning," stating that the case should be put on the broad principle that if a person sells an article, it is thereby warranted to be merchantable.<sup>52</sup> Although there was some doubt whether the warranty was express or implied, the judges were unanimous in their support for the concept of implied warranties. Finally, they addressed the defendant's economic argument: "[This] case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold."<sup>53</sup>

The parameters of warranty law even as articulated in a document as current as the Uniform Commercial Code have been largely drawn from the decision in *Bright*. Although other English decisions in the first sixty years of the 19th century gave warranty

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48. *Id.* at 1170.

49. 171 Eng. Rep. 46 (K.B. 1815).

50. 130 Eng. Rep. at 1171.

51. *Id.* at 1170-71.

52. *Id.* at 1172.

53. *Id.* at 1173.

law a more comprehensive character,<sup>54</sup> the three most important developments were the erosion of the requirement that prescribed formalities be observed in order to create express warranties; the development of implied warranties; and the imposition of strict liability for misrepresentations about quality.<sup>55</sup>

*The Evolution of Liability For Breach of Warranty In a Procedural Context*

Suits for breach of warranty were first brought in tort as actions on the case for deceit.<sup>56</sup> During early stages in its evolution, breach of warranty was considered wholly delictual because the pleadings rarely asserted the existence of consideration. In the few cases that did allege consideration, it was dismissed as irrelevant.<sup>57</sup>

The principal actions by which the royal courts regulated the sale of goods were debt and detinue.<sup>58</sup> By the 15th century lawyers recognized the affinity of certain actions on the case to contractual matters.<sup>59</sup> Yet the incorporation of warranty actions into the body of assumpsit was delayed until the close of the 18th century.<sup>60</sup> The delay is explained by the fact that warranty actions had originated in local, nonroyal courts which treated breaches of warranty as an offense against society rather than as a matter concerning only the interests of private litigants.<sup>61</sup> Only gradually, after warranty actions began to be brought in the royal courts, did the impact of their delictual origin begin to fade. Once this occurred, it became obvious that false representations of quality could furnish the basis

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54. See generally *Jones v. Just*, L.R., 3 Q.B. 197 (1868); *Bridge v. Wain*, 171 Eng. Rep. 543 (K.B. 1816); *Josling v. Kingsford*, 143 Eng. Rep. 177 (C.P. 1863).

55. English warranty law is doctrinally more complex than warranty law in the United States. This is surprising because the Sale of Goods Act, which has governed warranty law in England since 1893, was the model for Professor Williston's Uniform Sales Act. The whole of English warranty law is ably analyzed in Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods*, 15 MOD. L. REV. 425 (1952).

56. SIMPSON, *supra* note 16, at 240. Apparently even to lawyers schooled in the writ system, the warranty action on the case in deceit posed problems. It was brought in the *ostenturus quare* form which had the characteristics of a catchall writ devoid of any organizing principle. *Id.* at 241.

57. Ames, *supra* note 18, at 8. Indeed, in the earliest reported action for breach of warranty in common form, the defendant objected that the action sounded in covenant. The court rejected his argument. See MILSOM, *supra* note 14, at 276-77.

58. SIMPSON, *supra* note 16, at 242.

59. MILSOM, *supra* note 14, at 277.

60. 8 HOLDSWORTH, *supra* note 29, at 70.

61. MILSOM, *supra* note 14, at 276.

for an action in deceit as well as in assumpsit for broken promises.<sup>62</sup>

The reclassification of warranty actions from tort to contract<sup>63</sup> after many of the principles of the law of contract had assumed certain fixed characteristics is of more than antiquarian concern. Its effects are still felt in the application of modern warranty law. Had warranties been developed initially as a part of the law of contract, there might never have been a body of warranty rules outside the mainstream of contract doctrine. The doctrine of consideration, for example, had become well established prior to the time warranty actions were treated in a contractual context. If the example of the farmer who purchased a defective tractor were viewed solely from the perspective of classic contract doctrine, the exchange of the tractor for the agreed price was supported by adequate consideration within the meaning of technical contract rules. Only when contract law began to assimilate rules which took account of the quality of the goods delivered could the farmer hope for relief.<sup>64</sup> Because the law of warranty was merged into the law of contract at the time contractual principles had evolved into a well-developed body of formal rules,<sup>65</sup> the influence of its own historical origin in tort were never fully assimilated.

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62. The case that most clearly marks the transition of breach of warranty from tort to contract is *Stuart v. Wilkins*, 99 Eng. Rep. 15 (K.B. 1778). The case is also notable for an uncharacteristically equivocal opinion by Lord Mansfield.

63. Legal categories such as tort and contract are of great importance in rationalizing modern legal principles. Early common law lawyers, however, were barely cognizant of such categories. For them, the writ system was what mattered. In the writ system, tort and contract, as the terms are now understood, had no meaning. For convenience, the terms tort and contract will be used throughout this discussion, although they are of dubious historical accuracy.

64. Professor McClain contends that the first attempts to enforce implied warranties were made in deceit actions rather than in actions for breach of warranty. These early efforts were only partially successful because *scienter* was required in deceit actions. The real growth of implied warranties did not occur until warranties became a recognized part of the law of assumpsit. See McClain, *Implied Warranties in Sales*, 7 HARV. L. REV. 213, 219 (1893). Assumpsit itself developed as a part of the action of trespass on the case as an alternative to covenant and debt as a means of enforcing promises. See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 644-45 (5th ed. 1956). The courts yielded to the need for this alternative in *Slade's Case*, 76 Eng. Rep. 1074 (K.B. 1602), which eliminated the requirement that the plaintiff prove that the promisor made two promises. But see Ames, *supra* note 18, at 16. In *Moses v. Macferlan*, 97 Eng. Rep. 676 (K.B. 1760), Lord Mansfield allowed a promisee who could not show an express promise of any kind to recover. The significance of Lord Mansfield's opinion was to allow a recovery founded upon the implication of a promise rather than on an expression of promise.

65. See SIMPSON, *supra* note 16, at 243.

## The United States

Express warranties were routinely enforced in the United States.<sup>66</sup> The recognition of implied warranties, however, was slow and tortuous. The state of American law at this time was well expressed by William Wetmore Story who wrote: "The general rule of law, applicable to all sales, is, that the buyer buys at his own risk; *caveat emptor*."<sup>67</sup> More contemporary scholars, aided by the perspective of time, agreed that *caveat emptor* was the dominant American doctrine for the greater part of the 19th century.<sup>68</sup> Yet the rejection of the concept of implied warranties was not uniform,<sup>69</sup> and even in jurisdictions which purported to adhere faithfully to *caveat emptor*, there were occasional lapses.<sup>70</sup> There can be no doubt, however, that American courts gave ground grudgingly to the advance of implied warranties.

*Seixas v. Wood*<sup>71</sup> is perhaps the earliest American case in which the doctrine of *caveat emptor* was fully discussed and approved. In *Seixas* the plaintiff had purchased what the defendant seller specifically described as *brazilleto*, a commodity of considerable value. Unknown to either party, the wood proved to be not *brazilleto* but *peachum*, having hardly any value. The defendant contended that there had been no express warranty, only a mere

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66. See, e.g., *Hawkins v. Berry*, 10 Ill. (5 Gilm.) 36 (1848); *Hillman v. Wilcox*, 30 Me. 170 (1849); *Kinley v. Fitzpatrick*, 5 Miss. (4 Howard) 59 (1839); *Beals v. Olmstead*, 24 Vt. 119 (1852).

67. W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 329 (1844).

68. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 180 (1977); Hamilton, *supra* note 9, at 1178.

69. In the 18th century, reported cases in both North and South Carolina rejected the unfettered application of *caveat emptor*. In *Galdbraith v. Whyte*, 2 N.C. (1 Hayw.) 601 (1797), the North Carolina Superior Court stated: "Every man is bound to be honest—he ought to discover to the vendee all such properties as if known might probably dispose him not to purchase." See also *Timrod v. Shoolbread*, 1 S.C.L. (1 Bay) 324 (1793). By the 19th century this resistance to *caveat emptor* declined in North Carolina but continued in full force in South Carolina. See *Missroon v. Waldo*, 11 S.C.L. (2 Nott & McC.) 76 (1819); *Barnard v. Yates*, 10 S.C.L. (1 Nott & McC.) 142 (1818). In *Barnard*, Justice Gantt minced no words in expressing his hostility to the notion of *caveat emptor*: "On our part we have exchanged it [*caveat emptor*] for that of *caveat venditor*, and in behalf of honesty and fair dealing, I would say *esto perpetua* . . . I think it has been truly observed, that it is a disgrace to the law that such a maxim, as that of '*caveat emptor*,' should ever have been adopted." 10 S.C.L. (1 Nott & McC.) at 147.

70. In the 19th century, New York was considered a bastion of *caveat emptor*. But see *Howard v. Hoey*, 23 Wend. 350 (N.Y. 1840); *Gallagher v. Waring*, 9 Wend. 20 (N.Y. 1832).

71. 2 Cai. R. 48 (N.Y. 1804).

representation.<sup>72</sup>

On the facts presented, Justice Thompson could not find an express warranty. He then raised, *sua sponte*, the question of whether a warranty might be implied. He answered in the negative and declared the superiority of the principle of caveat emptor. Not only did he see no injustice in the rule's application, but he believed the rule was "best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts."<sup>73</sup> Justice Kent agreed, resting his conclusion heavily on English precedent.<sup>74</sup>

The opinions of both Justices Thompson and Kent are marked by an attitude that caveat emptor is not a rule that compliments either human nature or the law. Justice Thompson cited Professor Wooddeson's Vinerian lectures in which caveat emptor was criticized as retrograde.<sup>75</sup> Justice Kent noted approvingly the civil law tradition that imposed a broad responsibility upon sellers for latent defects. He even suggested that were the matter open, he would have preferred the civilian view.<sup>76</sup> Yet both Justices, in the end found for the seller based on English precedent and perhaps also because of their conception of the needs and expectations of business.

Justices Thompson and Kent thus approved the doctrine of caveat emptor in a somewhat equivocal fashion in *Seixas*, which was decided in 1804. As the century progressed, the rejection of implied warranties and the approval of caveat emptor was expressed with less uncertainty in most American jurisdictions. Justice Davis, writing for the Supreme Court in the case of *Barnard v. Kellogg*,<sup>77</sup> betrayed no doubts about the virtues of caveat emptor:<sup>78</sup>

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72. *Id.* at 49.

73. *Id.* at 54.

74. *Id.* at 54-55.

75. *Id.* at 52-53.

76. Chancellor Kent remained an uncertain advocate of caveat emptor. Writing thirty-six years after his opinion in *Seixas* he still regretted that the common law could not adopt rules of conduct in conformity with higher notions of morality. He believed the rule of caveat emptor to be justified because it imposed upon buyers the reasonable duty to protect their own interests. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 477-79, 490-91 (4th ed. 1840).

77. 77 U.S. (10 Wall.) 383 (1870).

78. It is ironic that Justice Davis wrote with such unstinting enthusiasm in support of caveat emptor at a time when, for a variety of reasons, many state courts had begun to abandon it. See M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 198-200 (1977).

No principle of the common law has been better established, or more often affirmed, both in this country and in England, than . . . the maxim of *caveat emptor* . . . Such a rule, requiring the purchaser to take care of his own interests, has been found best adopted to the wants of trade in the business transactions of life . . . Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception, (South Carolina), sanction it.<sup>79</sup>

In *Seixas* and in *Barnard*, *caveat emptor* was defended on the grounds that precedent, both English and American, justified the doctrine. However, the courts in both cases decided to sustain *caveat emptor* for reasons more fundamental than devotion to *stare decisis*. Chief Justice Gibson stated that alternatives to *caveat emptor* were impractical and that commerce depended upon legal rules that allowed as few reclamations as possible: "The relation of buyer and seller . . . is not a confidential one; and if the buyer, instead of exacting an explicit warranty, chooses to rely on the bare opinion of one who knows no more about the matter than he does himself, he has himself to blame for it."<sup>80</sup> Justice Richardson, sharing Chief Justice Gibson's fear of constant judicial intervention in commercial dealings, summoned an unhappy vision in which courts were given "a species of eminent domain to model, make or break contracts."<sup>81</sup> Justice Paige believed that *caveat emptor* was admirably adopted to the dawning age of manufacturing. He stated the rule "encourages trade by preventing actions against all in turn through whose hands the article of commerce has passed in a course of dealings. . . . [To] apply to these persons the principle of *caveat venditor* would lead to endless litigation. . . ."<sup>82</sup>

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79. 77 U.S. (10 Wall.) at 388-89.

80. *McFarland v. Newman*, 9 Watts 55, 57 (Pa. 1839). Professor Llewellyn expressed mild surprise that Chief Justice Gibson, the vigorous advocate of *caveat emptor*, was a Jacksonian Democrat. See Llewellyn, *supra* note 5, at 733. Had Professor Llewellyn enjoyed the full benefit of revisionist historical study of the Jacksonian era, he might not have been as surprised. In the view of many historians, a principal tenet of the Jacksonian faith was a belief in economic development and the right of a new class of entrepreneurs to contend equally with established persons of wealth. See generally R. REMINI, *THE REVOLUTIONARY AGE OF ANDREW JACKSON* 9-25 (1976). See also M. MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* (1957).

81. *Harrington v. Commissioners*, 13 S.C.L. (2 McCord) 400, 408 (1823).

82. *Hargous v. Stone*, 5 N.Y. 73, 89 (1851). It would be simplistic to suggest that the 19th century American cases that rejected the concept of implied warranties were but crude



The rules developed to sustain the doctrine of caveat emptor presupposed a classical exchange transaction in which there was face to face dealing, relatively equal commercial experience on both sides, and a fair opportunity to examine the goods.<sup>83</sup> So long as these factors existed in a majority of contracts, warranties for the buyer's benefit were generally unnecessary. By the 19th century, however, the classical commercial world had begun to change. Mass production and contracts of sale for the future delivery of standard goods between distant parties became the norm.<sup>84</sup> Goods became more specialized and diverse, and the assumption that every party to a contract had equal bargaining power could no longer be made. Transcontinental bargains became routine and the buyer's presale opportunity to inspect—the foundation of caveat emptor—was rendered increasingly suspect.<sup>85</sup> The law responded to these changes by a gradual recession of the doctrine of caveat emptor and expansion of implied quality warranties.<sup>86</sup>

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reflections of an economic bias in favor of the rising manufacturing and commercial class. See Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 348-49 (1937). Professor Horwitz supports Professor Llewellyn's general thesis that changes in commercial life and the growth of a national market economy helped explain the decline of caveat emptor. Professor Horwitz, however, may not share Professor Llewellyn's view that no class bias or exploitation was involved. See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 173-201 (1977). Professor Horwitz's treatment of the transformation of contract law in the 19th century was subjected to a searching critique in Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). Moreover, in many cases decided in jurisdictions that faithfully invoked the doctrine of caveat emptor, sensible results were reached. See, e.g., *Muller v. Eno*, 14 N.Y. 597 (1856); *Hargous v. Stone*, 5 N.Y. 73 (1851); *Port Carbon Iron Co. v. Groves*, 68 Pa. 149 (1871).

83. The pervasive use of factors in the 19th century may also have had some impact on the persistence of caveat emptor. Sellers who used factors to select goods that the seller had contracted to buy generally had no more specific knowledge of the goods than the buyer. See generally Steffen & Danziger, *The Rebirth of the Commercial Factor*, 36 COLUM. L. REV. 745 (1936).

84. Professor Llewellyn describes market conditions in which caveat emptor flourished as "primitive mercantile." Llewellyn, *supra* note 5, at 739. Market conditions that led to the erosion of caveat emptor he describes as "mature mercantile." Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 342-45 (1937).

85. In many of the cases which based their holdings on the principle of caveat emptor, the courts emphasized that the buyer has the right of inspection and thus had the means to protect himself or herself. See, e.g., *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 388 (1870); *Seixas v. Wood*, 2 Cai. R. 48, 55 (N.Y. 1804); *McFarland v. Newman*, 9 Watts 55, 57 (Pa. 1839). Sometimes the right of inspection was of more theoretical than practical benefit to the buyer. If the goods were in existence and defined at the time of sale, the fact that there was no opportunity to inspect did not justify the implication of a warranty of merchantability. See *Hargous v. Stone*, 5 N.Y. 73, 86 (1851).

86. See W. STORY, *A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* 333 (1844). Professor Williston, in the second edition of his treatise on sales, noted the tendency of both

The American law of warranty in the late 19th and early 20th centuries was stunningly complex. The existence of an implied warranty could depend upon a considerable array of factors such as whether the agreement was a sale of present goods or an executory agreement for the sale of future goods,<sup>87</sup> whether the seller was a manufacturer or a mere dealer,<sup>88</sup> and whether there was a sale by sample or by description.<sup>89</sup> These complexities need not be explained in depth: it is enough to recognize that they provided fertile soil for the germination of doctrines which encouraged the expansion of seller's implied obligations for quality. Chief among the devices used to expand a seller's liability for quality was the manipulation of numerous exceptions to the general rule of caveat emptor.<sup>90</sup>

Two Massachusetts cases with contrasting results on similar facts vividly illustrate the process by which the reach of caveat emptor was restricted. In *Gossler v. Eagle Sugar Refinery*,<sup>91</sup> the

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express and implied warranties to impose expanded liability upon the seller. S. WILLISTON, *WILLISTON ON SALES* 368-72, 440-43 (2d ed. 1924).

87. See *Deming v. Foster*, 42 N.H. 165 (1860). "In the case of executory contracts . . . the law implies a contract that the articles to be made and furnished shall be reasonably fit and proper for the use for which they are ordered. . . . But there is no implied warranty as to the quality of an article sold . . . where there is a present sale of a particular existing article . . . ." *Id.* at 173-74.

88. Where the seller was a manufacturer many courts held that an implied warranty existed when the buyer had no opportunity to inspect. See *National Cotton Oil Co. v. Young*, 74 Ark. 144, 85 S.W. 92 (1905); *Glasgow Milling Co. v. Burgher*, 122 Mo. App. 14, 97 S.W. 950 (1906); *Hooven & Allison Co. v. Wirtz*, 15 N.D. 477, 107 N.W. 1078 (1906). Where the seller was a dealer most American courts found no implied warranty. *McCaa v. Elam Drug Co.*, 114 Ala. 74, 21 So. 479 (1897); *Ehrsam v. Brown*, 76 Kan. 206, 91 P. 179 (1907); *Hernan v. Crook, Horner & Co.*, 100 Md. 210, 59 A. 753 (1905).

89. A sale by description occurred when the seller's description of the goods was a fundamental factor inducing the sale. Although the courts were frequently imprecise in their definition of sales by description, most courts agreed that when a sale by description occurred an implied warranty that the goods conformed to the description arose. See, e.g., *Munford v. Kevil*, 109 Ky. 246, 58 S.W. 703 (1900); *Lenz v. Blake-McFall Co.*, 44 Or. 569, 76 P. 356 (1904). Sales by sample gave rise to an implied warranty that the bulk of the article sold would be equivalent to the sample. See, e.g., *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 A. 422 (1901); *Dayton v. Hooglund*, 39 Ohio St. 671 (1884); *Hume v. Sherman Oil & Cotton Co.*, 27 Tex. Civ. App. 366, 65 S.W. 390 (1901).

90. Early in the 19th century, courts freely discussed expanding exceptions to caveat emptor in particular cases. In *Rodgers & Co. v. Niles & Co.*, 11 Ohio St. 48 (1860), Judge Scott observed: "The general rule of the common law undoubtedly is, that . . . the vendor will not be held liable for any defects in the quality of the articles sold, in the absence of fraud, or express warranty . . . . But to this general rule the requirements of manifest justice have introduced sundry exceptions, of which some are as well settled as the rule itself, while as to others, the authorities cannot be easily reconciled." *Id.* at 53 (emphasis added).

91. 103 Mass. 331 (1869).

plaintiff had sold defendant a quantity of "Manila Sugar," as described in the sale note. The defendant buyers refused to pay for the sugar when delivered because it contained four percent sand. The buyers argued that the seller had impliedly agreed to deliver goods that would not only satisfy the bare description of Manila sugar but would also not exceed in percentage of impurity "normal Manila sugar"; thus advocating that the sale of goods which were specifically described implied a warranty that the goods described would be merchantable. The court was not prepared to accept so radical a notion. In rejecting the defendant's contention, it stated simply: "If [the buyers] had doubts about the goodness of the article, or did not choose to run the risk of latent defects, they should have refused to purchase without a warranty upon these points."<sup>92</sup>

Twenty-two years later, the judicial atmosphere in Massachusetts had changed. In *Murchie v. Cornell*,<sup>93</sup> the plaintiffs had sold the defendants a quantity of ice. Though the ice technically satisfied the contract description, it was not merchantable. The trial judge had instructed the jury that the ice was ice if what was delivered to the defendant was cold and hard. As a result, a verdict was rendered for the defendant. Justice Holmes, speaking for the state supreme judicial court, reversed the trial court's judgment, summing in a single sentence twenty years of difficult judicial progress toward extending a seller's liability for quality: "If a very vague, generic word is used, like 'ice,' which, taken literally, may be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name."<sup>94</sup>

### **The Consumer and Quality Terms: Privity and Disclaimers**

The consumer-commercial buyer distinction was given little explicit recognition until the 20th century. Rather, judicial energies had been focused on accommodating the traditional notion of caveat emptor to the emerging realities of modern commerce. Only after the most extreme features of caveat emptor were pruned

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92. *Id.* at 334.

93. 155 Mass. 60, 29 N.E. 207 (1891).

94. *Id.* at 60, 29 N.E. at 207.

away,<sup>95</sup> did there appear the first glimmerings of the consumer-commercial buyer distinction now judicially accepted.

This Article traces the evolution of the consumer into a figure deserving special judicial solicitude in two ways. First, it examines the erosion of privity as a bar to recovery for breach of warranty. Second, it briefly surveys the judicial treatment of seller's disclaimers and restriction of warranty. In conjunction, these two inquiries should permit conclusions on the extent to which state courts recognized the need of consumers for special warranty protection prior to the enactment of the Magnuson-Moss Act.

This Article defines "consumer" with reference to the buyer's capacity to bargain effectively and intelligently over warranty terms.<sup>96</sup> Neither the occupational status of the buyer nor the use to which the buyer intends to put the goods should matter. Thus the small businessperson who buys a delivery van from General Motors or the modest farmer who purchases a tractor from Allis-Chalmers is as fully deserving of consumer status as the householder who buys a step ladder from the local hardware store.

### Privity, the Consumer, and the "Death of Contract"

The decline of privity as an effective bar to recovery for breach of warranty can be traced to a gradual judicial awakening to changes in the American economy. So long as buyer and seller dealt face to face, tort and contract rules as they had evolved by the early years of this century gave the buyer a reasonable measure of protection. As the production and distribution process became

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95. At the turn of the 20th century, the courts were divided between the old caveat emptor rules and the new attitude which encouraged restriction of the doctrine. Typical of the judicial dilemma was *Gage v. Carpenter*, 107 F. 886 (1st Cir. 1901), where the court stated: "We do not understand that the civil law maxim caveat venditor, which is based upon the idea that a sound or full price raises a warranty that the goods are sound, had been fully adopted in common-law jurisdictions, although the harsh caveat emptor rule has been qualified somewhat, so that the warranty of the vendor as to quality exists where he sells property about which he assumes to have knowledge, or about which he alone has the means of knowledge, or under such circumstances as it is the policy of the law to charge him with knowledge . . ." *Id.* at 889.

96. Justice Peters, in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), stated: "I would find that plaintiff was an ordinary consumer insofar as the purchase involved here was concerned, even though he bought the truck for use in his business. Plaintiff was an owner-driver of a single truck he used for hauling and not a fleet owner. . . . He was the final link in the marketing chain, having no more bargaining power than does the usual individual who purchases a motor vehicle on the retail level." *Id.* at 27-28, 403 P.2d at 157-58, 45 Cal. Rptr. at 29-30 (Peters, J., concurring and dissenting).

more complex, however, and as more parties intervened between manufacturer and ultimate consumer, the rules which had served well to adjust relations between the immediate buyer and seller no longer seemed to work. Traditional doctrine had to be reexamined and reshaped.

This reworking of traditional doctrine was not the result of conscious judicial policymaking. Rather, it reflected the inadequacy of existing doctrine to resolve buyer-seller disputes in an unfamiliar setting.<sup>97</sup> Efforts to adapt then prevailing notions of tort and contract doctrine to changed economic conditions ultimately dealt a fatal blow to privity as a means of restricting a remote seller's liability and produced the modern law of "products liability."<sup>98</sup>

The first efforts to break the barrier of privity and to extend the manufacturer's liability to the ultimate consumer were in the area of contract-warranty principles. Early reliance was placed upon contract theory because doctrinal obstacles to nonprivity recovery in tort seemed insurmountable. Courts had great difficulty in accepting the notion that parties to a contract owed a duty of care to nonparties. Thus, tort law imposed a strict privity requirement as a condition of recovery.<sup>99</sup> Moreover, the disposition to insist upon privity was reinforced by a strong philosophical and economic conviction that the burden of imposing tort liability upon nonparties would present undue hardship to the manufacturing enterprise.<sup>100</sup> Finally, even after the decision in *MacPherson v. Buick Motors*,<sup>101</sup> a plaintiff not in privity of contract was required to

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97. See Kessler, *Products Liability*, 76 YALE L.J. 887, 887-95 (1967) (demonstrating that products liability law has presented similar problems to the courts and legislatures of many industrial societies).

98. The literature on products liability is vast. See, e.g., Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185 (1976); Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973). This Article will examine only those cases in this field in which the courts have created a special status for the consumer in products liability law.

99. Bohlen, *Fifty Years of Torts* (pt. 2), 50 HARV. L. REV. 1225, 1232-34 (1937).

100. See *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 867 (8th Cir. 1903); *Ketterer v. Armour & Co.*, 200 F. 322 (2d Cir. 1912); *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842).

101. 217 N.Y. 382, 111 N.E. 1050 (1916).

establish negligence as a precondition to recovery in tort.<sup>102</sup> A suit in contract for breach of warranty, on the other hand, could succeed without establishing fault,<sup>103</sup> although privity generally remained a requirement for recovery.<sup>104</sup>

Perhaps ironically, the effort to escape the restrictive effects of privity gained its first success in contract-warranty actions. Judicial resolve to retain the requirement of privity may have begun to weaken when the strict application of the privity doctrine produced results which seemed, at best, bizarre. In *Gearing v. Berkson*,<sup>105</sup> for example, a husband and wife sued a retail butcher for false warranty after both became ill from eating infected pork chops. Both plaintiffs recovered in the trial court. The appellate court affirmed the judgment for the husband; judgment for the wife, however, was reversed. The court concluded that although the wife had purchased the pork chops, she had done so in her capacity as the agent of her husband. Thus she, as an agent, was not in privity with the butcher, while her husband, as principal, was in privity.<sup>106</sup>

The most persistent early efforts to create a recognized exception to the privity requirement in warranty actions occurred in cases involving the sale of food. Resistance to relaxing the privity barrier was considerable even here.<sup>107</sup> A few courts, however, began to allow the individual food purchaser to recover against the remote manufacturer notwithstanding a lack of privity.<sup>108</sup> Moreover, at least one court made no effort to hide its impatience with the injustice resulting from too rigid an insistence on privity.<sup>109</sup>

102. *Id.* at 384, 111 N.E. at 1053.

103. *See, e.g.,* *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

104. *See* *Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Welshausen v. Charles Parker Co.*, 83 Conn. 231, 76 A. 271 (1910); *Pelletier v. Dupont*, 124 Me. 269, 128 A. 186 (1925); *State v. Consolidated Gas Co.*, 146 Md. 390, 126 A. 105 (1924); *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1923).

105. 223 Mass. 257, 111 N.E. 785 (1916).

106. *Id.* at 258, 111 N.E. at 786.

107. *See, e.g.,* *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S.W. 288 (1905).

108. Curiously, three of the cases in which privity was rejected as a bar to recovery involved the same defendant: *Ketterer v. Armour & Co.*, 200 F. 322 (S.D.N.Y. 1912); *Tomlinson v. Armour & Co.*, 75 N.J.L. 748, 70 A. 314 (1908); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913). On rare occasions an early court would find the means to dispense with privity in a nonfood case. *See, e.g.,* *Richardson Mach. Co. v. Brown*, 95 Kan. 685, 149 P. 434 (1915) (farm machinery sale).

109. In *Ketterer v. Armour & Co.*, 200 F. 322 (S.D.N.Y. 1912), Judge Noyes stated: "The remedies of injured consumers ought not to be made to depend upon the intricacies of

The Supreme Court of Iowa in *Davis v. Van Camp Packing Co.*<sup>110</sup> provided one of the most candid explanations for eliminating the bar of privity to recovery in warranty in food cases. In *Davis*, the plaintiff's mother had purchased from a local retailer a can of beans manufactured by the defendant. The beans were adulterated and the plaintiff suffered serious illness after eating them. The supreme court reversed a judgment for the defendant. The court initially offered a variety of plausible but ultimately unsatisfying explanations for its decision: "[The] implied warranty . . . runs with the sale, and to the public, for the benefit of the consumer . . . . Or it may be treated as a representation or a warranty that, because of the sacredness of human life, food products so put out are wholesome."<sup>111</sup> The court's most significant comments, however, addressed the changed economic climate in which the average citizen made purchases: "In the earlier cases . . . when a person went to market with a market basket on his arm, and could examine the food, the doctrine [caveat emptor] was held to apply . . . . But the business of canning food products of almost every kind has increased enormously in recent years. The purchaser has no opportunity of examination . . . ."<sup>112</sup>

The particular significance of *Davis* and of other similar decisions was not that contracts involving food were considered to be unique.<sup>113</sup> Rather, *Davis* and cases like it reflected an awareness that mass production had profoundly changed the way in which goods were bought and sold in the United States.<sup>114</sup> The typical buyer at the end of the distributive chain now commonly pur-

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the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon 'the demands of social justice.'" *Id.* at 323.

110. 189 Iowa 775, 176 N.W. 382 (1920).

111. *Id.* at 801, 176 N.W. at 392. The plaintiff in *Davis* was in no sense a "buyer" from anyone as he was four times removed from the defendant manufacturer. The local grocer from whom plaintiff's mother had purchased the beans had himself acquired them from a local jobber. The jobber had purchased them from the defendant.

112. *Id.* at 802, 176 N.W. at 392.

113. At least one court prior to *Davis* could not see any basis for treating the problems of privity and implied warranty in food cases in a manner different from general sales law. See *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481 (1908). See also Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 404 (1937).

114. One ironic result of the reasoning in decisions allowing a buyer to recover against a remote seller because of changed manufacturing and distribution systems was that it was used to deny recovery against the retailer with whom the buyer was in privity. See, e.g., *Scruggins v. Jones*, 207 Ky. 636, 269 S.W. 743 (1925). *Contra*, *Ward v. Great Atl. & Pac. Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918).

chased packaged goods of uncertain origin and of unobservable quality.

The courts used considerable imagination in developing explanations for the new rule that was applied in food cases.<sup>115</sup> The consumer was said to be a third-party beneficiary of the retailer's contract with the manufacturer.<sup>116</sup> Some courts simply refused to apply the privity requirement in food cases.<sup>117</sup> There was some support for the view that applying a privity requirement in food contracts was contrary to public policy.<sup>118</sup> The California Supreme Court discovered provisions in the Uniform Sales Act which, in the court's opinion, abolished the strict privity requirement.<sup>119</sup> None of these explanations, however, explicitly addressed the fundamental reason for the change in the privity requirements: an altered economic system that had created a radically different buyer-seller relationship.

Predictably, plaintiffs soon began to argue that relaxation of the privity bar should not be restricted to food cases. In *Baxter v. Ford Motor Co.*,<sup>120</sup> the plaintiff lost an eye when a pebble shattered the windshield of his Ford automobile. Ford had expressly represented by a sticker affixed to the windshield that it was shatterproof. The court rejected Ford's defense of lack of privity for two reasons. First, the buyer, an "ordinary person," had no reason to know that the glass was other than what Ford represented it to be. Second, the court stated:

Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to ultimate consumers. It would be unjust to recognize a rule that would permit a manufacturer of goods to create a demand for their products by

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115. For a comprehensive listing of "exemptions" to the privity doctrine, see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-57 (1958).

116. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928).

117. *See, e.g., Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924).

118. *See Williams v. Campbell Soup Co.*, 80 F. Supp. 865 (W.D. Mo. 1948).

119. *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939). In fact, the Uniform Sales Act does not refer to privity. Sections 12 through 16 (the warranty provisions), when read with the definitions of buyer and seller in § 76-1, make it difficult to conclude that remote parties were intended to be included.

120. 168 Wash. 456, 12 P.2d 409, *aff'd per curiam on rehearing*, 15 P.2d 1118 (1932), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934).



representing that they possess qualities which they . . . do not possess and then, because there is no privity of contract . . . deny the consumer the right to recover.<sup>121</sup>

The court in *Baxter*, held Ford liable because it believed modern marketing conditions compelled that result.<sup>122</sup> Although *Baxter* was not the only decision based on the manufacturer's advertising,<sup>123</sup> it was perhaps the most forthright. Warranty was perceived principally as a contract doctrine, and consequently many courts had difficulty in accepting the extension of warranty liability to remote parties. The courts needed a broadly based legal theory that would permit imposing liability on remote sellers outside the confining context of contract law. This theory was found in the rediscovery of warranty's origin in tort.

The courts had never really forgotten that the history of the law of warranty was not purely contractual.<sup>124</sup> References to the doctrine's hybrid origins, however, seemed more often intended as demonstrations of judicial erudition than as citations to relevant law. The significance of warranty's dual character was, for a long time, not really understood in the context of the battle over privity. At least one court frankly admitted that the cases were confused.<sup>125</sup>

A decision was needed which recognized a connection between the modern economic reality and warranty's ancient foundations in

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121. 168 Wash. at 462-63, 12 P.2d at 412.

122. *Baxter's* impact was considerable. Dean Prosser believed that the court in *Baxter* relied upon tort rather than contract as a basis for abolishing the privity requirement. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1137 n.224 (1960) [hereinafter cited as Prosser]. Although there is dicta, particularly in the court's opinion in the second appeal, which justifies the Prosser view, other language suggests that the court did not really intend to abandon contract-warranty analysis in order to avoid problems of privity. See *Baxter v. Ford Motor Co.*, 179 Wash. 123, 125, 35 P.2d 1090, 1091 (1934). The Supreme Court of Michigan held for the plaintiff in *Bahlan v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939), on facts remarkably similar to those in *Baxter*. The Michigan court rejected the suggestion that contributory negligence was a defense. The court, after citing *Baxter*, held that allowing the use of a tort defense would be inconsistent with the rationale of the *Baxter* holding. *Id.* at 691-92, 288 N.W. at 311. The *Baxter* decision was not universally followed. See *Rachlin v. Libby-Owens-Ford Glass Co.*, 96 F.2d 597 (2d Cir. 1938); *Chanin v. Chevrolet Motor Co.*, 89 F.2d 889 (7th Cir. 1937).

123. See *Maecherlein v. Sealy Mattress Co.*, 145 Cal. App. 2d 275, 302 P.2d 331 (1956); *Roberts v. Anheuser-Busch Brewing Ass'n*, 211 Mass. 449, 98 N.E. 95 (1912); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

124. See *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155 (1924); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

125. See *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. Ct. 515, 156 A. 537 (1931).

tort. This recognition was supplied in *Decker & Sons Inc. v. Capps*.<sup>126</sup> In *Decker* the plaintiff's mother had purchased from a local retailer meat processed by the defendant. The plaintiffs ate the meat and became ill. In a suit for breach of implied warranty, the judgment for the plaintiffs was affirmed despite the defendant's argument that privity was indispensable to recovery. The court first noted that the ultimate consumers in the modern market cannot protect themselves.<sup>127</sup> The court then went on to state that although the action was in warranty, the warranty involved "is not the more modern contractual warranty but is an obligation imposed by law to protect public health."<sup>128</sup> Quoting Professor Williston in stating that warranty was originally a tort action, the court insisted that only in the more recently developed *contractual* action of warranty, derived from special assumpsit, was privity required. "Here the liability of the manufacturer and vendor is imposed by operation of law as a matter of public policy for the protection of the public, and is not dependent on any provision of the contract, either express or implied."<sup>129</sup>

Despite the undeniable appeal of the argument in *Decker*, it did not immediately sweep away all that came before it.<sup>130</sup> Those courts which rejected attempts to bleach warranty of its contractual coloration recognized the stakes involved. As long as warranty was treated as an aspect of contract law, the requirement of privity had some rational foundation. At the very least, the relationship between contract and warranty allowed courts to consider privity requirements on a case by case basis. The characterization of warranty as tort, however, removed privity as a condition of recovery.

Courts that did not accept the new tort-warranty notion accused jurisdictions that did of "strain[ing] for a beneficial re-

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126. 139 Tex. 609, 164 S.W.2d 828 (1942).

127. *Id.* at 612, 164 S.W.2d at 829.

128. *Id.* at 616, 164 S.W.2d at 831.

129. *Id.* at 617, 164 S.W.2d at 831-32.

130. Courts continued to render decisions requiring privity without acknowledging that warranty originated in tort. *See, e.g.,* *Hermanson v. Hermanson*, 19 Conn. Supp. 479, 117 A.2d 840 (1954); *Duncan v. Juman*, 25 N.J. Super. 330, 96 A.2d 415 (1953). Even in Texas the courts refused to extend the *Decker* rationale beyond the context of food. *See* *Brown v. Howard*, 285 S.W.2d 752 (Tex. Civ. App. 1955). Other jurisdictions, however, adopted the theory that warranty's origins in tort justified eliminating the privity requirement. *See, e.g.,* *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313 (1944); *Worley v. Procter & Gamble Mfg. Co.*, 253 S.W.2d 532 (Mo. App. 1952).

sult"<sup>131</sup> or of assuming a right to recovery "without obviating the limitations inherent in rights arising from contract relations."<sup>132</sup> These objections had little impact despite the fact that no English or early American case supported the contention that there could be recovery in warranty absent a contractual relation.<sup>133</sup> Indeed, there is evidence that a distinct, noncontractual theory of warranty was without any consistent foundation in the cases prior to 1963.<sup>134</sup>

The California Supreme Court in *Greenman v. Yuba Power Products, Inc.*<sup>135</sup> struck the decisive blow restricting the contract theory and establishing a tort basis for recovery against a remote seller. In this well known case, the plaintiff's wife purchased from a local retailer a combination power tool manufactured by the defendant. While using the tool, the plaintiff suffered serious physical injury caused by a design defect. The manufacturer argued that the California version of the Uniform Sales Act required prompt notice of product failure as a condition to recovery in warranty. Chief Justice Traynor, writing for the court, distinguished warranties that are created by contract from those that arise independently of contract.<sup>136</sup> He stated that a manufacturer is liable in tort to a remote purchaser for injuries caused by a defective product on grounds wholly independent of warranty. This strict tort liability is justified, he said, because the cost of the injury is better borne by the manufacturer than by injured persons unable to protect themselves.<sup>137</sup> Chief Justice Traynor acknowledged that prior California

131. *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 57, 112 A.2d 701, 704 (1955).

132. *Borucki v. MacKenzie Bros. Co.*, 125 Conn. 92, 98, 3 A.2d 224, 226 (1938).

133. See Prosser, *supra* note 122, at 1127-28.

134. See Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 718-50 (1970).

135. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

136. *Id.* at 61, 377 P.2d at 899, 27 Cal. Rptr. at 699.

137. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. Chief Justice Traynor made a similar argument in an earlier California case: "Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection." *Escola v. Coca-*

cases<sup>138</sup> had relied on statutory standards to determine a defendant's liability for breach of warranty, but he contended that such references to statutory authority were appropriately adopted under the circumstances of the particular case.<sup>139</sup> These earlier decisions emphasized warranty's tort origins to avoid entangling contract principles. The *Greenman* case went beyond these earlier decisions and articulated a new grounds for imposing liability on remote sellers: a theory of strict responsibility independent of warranty. The justification for this new doctrine was frankly based on policy grounds.

The impact of Chief Justice Traynor's opinion in *Greenman* was immediate and widespread. Dean Prosser cited *Greenman* in support of section 402A in the Restatement (Second) of Torts, the strict liability provision involving defective products.<sup>140</sup> Judicial enthusiasm to embrace the *Greenman* rationale<sup>141</sup> reached such heights that some commentators implied that it was unseemly.<sup>142</sup>

One cause of the development and rapid acceptance of the strict liability theory was a burgeoning sensitivity to the ultimate consumer's particular needs. Chief Justice Traynor described the

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Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). Justice Traynor's risk spreading theory is a fundamental justification for the development of much of products liability law. The logic of Justice Traynor's view seems unassailable. The economic implications of the risk spreading argument, however, are far from clear. See Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

138. See *Dana v. Sutton Motor Sales*, 56 Cal. 2d 284, 363 P.2d 881, 14 Cal. Rptr. 649 (1961); *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P.2d 777 (1943).

139. 59 Cal. 2d at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

140. 41 ALI PROCEEDINGS 354 (1964). It is not inaccurate to link the *Greenman* opinion with § 402A of the Restatement (Second) of Torts. Chief Justice Traynor was a member of the Board of Advisors for the Restatement. Dean Prosser was the Reporter. Chief Justice Traynor's opinion in *Greenman* contains multiple citations to Dean Prosser's work. Dean Prosser, in turn, was responsible for drafting succeeding versions of § 402A, the first of which he introduced in 1961. See 38 ALI PROCEEDINGS 50-56 (1961). So closely did Dean Prosser observe the progress of strict liability in the courts that in 1964 he requested that the 1962 version of § 402A (which applied only to food and products for intimate bodily use) be withdrawn in light of rapid developments in the courts. 41 ALI PROCEEDINGS 349 (1964).

141. See, e.g., *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Garthwait v. Burgio*, 153 Conn. 284, 216 A.2d 189 (1965); *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967).

142. See generally Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 998-1004 (1966) [hereinafter cited as Franklin]; Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 715-18 (1970).

average consumer as "powerless" to protect himself or herself from the costs of physical injuries caused by defective products.<sup>143</sup> The comments to section 402A offer justification in terms of the needs of the consumer for the innovations introduced by that section.<sup>144</sup>

In response to these developments, sellers seeking protection from liability for defective products increasingly insisted on a contract based theory of warranty with its allied requirement of privity. The impatience of some courts when confronted with the contract theory was evident.<sup>145</sup> Many responded by embracing the strict tort theory of seller's liability.<sup>146</sup> When confronted with tort defenses, some courts responded by returning to a contract centered analysis.<sup>147</sup> Ultimately some jurisdictions avoided this vacillation between tort and contract principles by treating consumers as a class specially protected by warranty rules.<sup>148</sup>

Not every judge warmly embraced the brave new world in which the remote seller was made liable to the ultimate consumer on the theory that best served the purpose of the moment. Some judicial discontent reflected an attachment to categories of liability long since discarded,<sup>149</sup> but other judges expressed fears having a firmer basis than nostalgia. In *Goldberg v. Kollsman Instrument Corp.*,<sup>150</sup> the majority affirmed a judgment for strict liability in favor of an injured airplane passenger against the manufacturer of the plane and a supplier of component parts. Judge Burke, dissenting, stated that the facts of cases such as *Goldberg* placed them outside the purpose of sales law and that "the warranty rationale is at best a useful fiction."<sup>151</sup> He went on to state that if strict or enterprise liability was to be the basis for a new line of decisions then "this court cannot escape the responsibility of justifying it."<sup>152</sup> Judge Burke's dissent was conservative in the best

143. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

144. RESTATEMENT (SECOND) OF TORTS § 402A, Comment (1965).

145. See, e.g., *Lindroth v. Walgreen Co.*, 329 Ill. App. 105, 67 N.E.2d 595 (1946).

146. See note 141 *supra*.

147. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 484-85 (3d Cir. 1965).

148. See, e.g., *Bernstein v. Lily-Tulip Cup Corp.*, 177 So. 2d 362 (Fla. App. 1965), *aff'd*, 181 So. 2d 641 (Fla. 1966); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

149. See *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 250-56, 147 N.E.2d 612, 616-20 (1958) (Taft, J., concurring in part).

150. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

151. *Id.* at 439-40, 191 N.E.2d at 85, 240 N.Y.S.2d at 597 (Burke, J., dissenting).

152. *Id.* at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597.

sense. His argument with the majority was that legal doctrine founded so completely upon a social vision of the vulnerable consumer must be carefully qualified and tightly reasoned; cases in which such innovations are introduced can create an impenetrable fog of complexity that ends by defeating the aspirations of the reformers.<sup>153</sup>

Developments in the case law made Judge Burke a prophet sooner than perhaps even he had hoped, or feared. Ironically, it was Chief Justice Traynor who was principally responsible for blunting the edge of the strict liability doctrine he had proposed in *Greenman*. In *Seely v. White Motor Co.*,<sup>154</sup> the plaintiff had purchased from a dealer a truck manufactured by the defendant. The plaintiff brought suit against the manufacturer seeking repair costs, recovery of the portion of the purchase price paid, and lost profits. The plaintiff contended that the truck had been defective and that its frequent breakdowns had caused significant business loss. The trial court held there was no strict liability because it could find no causal link between the asserted defect in the truck and the accident. The trial court, however, awarded plaintiff recovery for all his losses except repair costs on the theory of express warranty. The California Supreme Court affirmed, holding that in cases of express warranty, privity was not required.

Chief Justice Traynor, in dicta, stated that strict liability in tort had not superseded warranty theory in cases involving defective products. He reasoned that strict liability had developed to afford recovery for personal injuries. Rules of warranty, he wrote, continue to serve well in a commercial setting. By this he meant that contract based concepts such as disclaimer, privity, and the requirement that notice of defects be promptly given remained viable doctrines in cases of nonphysical injury. Chief Justice Traynor agreed that property damage would ordinarily be recoverable in strict liability, but that the plaintiff had failed to show that the defect caused the accident.

The court's opinion specifically declined to limit the application of warranty law to cases where the parties stood in equal bargaining positions. The rationale of *Greenman*, Chief Justice Traynor wrote, "does not rest on the analysis of the financial strength

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153. *Id.*

154. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

or bargaining power of the parties to the particular action."<sup>155</sup> In so concluding, Chief Justice Traynor rejected the reasoning of recently decided New Jersey cases which held that the relevance of privity and other contract related notions depended upon the status of the buyer as a consumer or a commercial buyer.<sup>156</sup>

Justice Peters, in a dissenting opinion, felt that the *Seely* majority misapprehended and misapplied legal history. Justice Peters conceded that cases involving personal injury were among the first in which strict liability had been invoked. He stated, however, that the nature of the plaintiffs' injury in those early cases was the occasion but not the reason for the application of strict liability theory:

The majority recognize that the rules governing warranties were developed to meet the needs of "commercial transactions." If this is so, then why not look to the *transaction* between the buyer and the seller and see if it was a "commercial" transaction rather than a sale to an ordinary consumer at the end of the marketing chain? . . . Any line which determines whether damages should be covered by warranty law or the strict liability doctrine should be drawn at the time the sale is made.<sup>157</sup>

The *Seely* opinion has been persuasive in leading many courts to refuse recovery, in the absence of privity, to consumers whose loss is merely economic.<sup>158</sup> Yet Chief Justice Traynor's rationale for the dichotomy *Seely* creates between personal injury and eco-

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155. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

156. See *Santor v. A & M Karagheunsian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Henningens v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Chief Justice Traynor's opinion in *Seely* approved the result in *Santor* (seller liable to consumer absent privity on strict liability theory for economic loss) but would have based the decision on express warranty. 63 Cal. 2d at 17-18, 403 P.2d at 151, 45 Cal. Rptr. at 23. The court in *Santor* made no reference to express warranty.

157. 63 Cal. 2d at 26, 403 P.2d at 156, 45 Cal. Rptr. at 28 (Peters, J., dissenting).

158. The meaning of the term economic loss has become complicated. Professor Franklin has identified five distinct types of losses recognized by the courts in products liability litigation: (1) personal injury; (2) physical property damage; (3) repair loss (damage to the defective product); (4) expectation loss (losses caused by the product's failure to perform); (5) nondefective product loss (measured by the difference between the product's actual value and the value it would have had had it not been defective). See Franklin, *supra* note 142, at 981-82. Professor Edmeades has identified three categories of damage: (1) personal injury; (2) direct damage (what Professor Franklin would term "nondefective product loss"), and (3) property damage. Professor Edmeades defines direct damage as economic loss although conceding that the distinction between property damage and economic loss is sometimes hard to draw. Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 650-52 (1977). See generally Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

conomic loss when bared to its premises, is unconvincing. In *Seely*, he stated that warranty theory is appropriate for dealing with commercial loss.<sup>159</sup> Then in a law review article subsequent to *Seely*, he asserted that consumers who suffer economic loss are, by definition, operating in a commercial setting.<sup>160</sup> Chief Justice Traynor, however, never explained how the character of the injury suffered determines whether the transaction is of commercial or consumer character.<sup>161</sup> Absent such an explanation, the distinction is a nebulous concept.

The distinction between physical injury and economic loss has been invoked with curious results in California,<sup>162</sup> and with confusion elsewhere, as is vividly illustrated by the Alaska Supreme Court's opinion in *Morrow v. New Moon Homes Inc.*<sup>163</sup> The court's opinion merits detailed examination because the decision reflects so many of the problems caused by the *Seely* doctrine. In *New Moon*, the plaintiffs purchased a house trailer manufactured by the

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159. 63 Cal. 2d at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

160. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965). One possible explanation for Chief Justice Traynor's refusal to recognize a right to recover, absent privity, in *Seely* is that precedent exists which denies recovery for economic loss for negligence to a party not in privity. See Franklin, *supra* note 142, at 983-84. Professor Franklin has suggested that the better course might have been for the court in *Seely* to reconsider prior negligence cases which had denied recovery for economic loss rather than to use those cases indirectly as a justification for refusing the plaintiff relief in *Seely*. *Id.*

161. The distinction between property damage-physical injury and economic loss was justified in *Seely* on the grounds that property damage-physical injury is likely to be a more "overwhelming misfortune" than mere economic loss. 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. Courts explain the distinction on the basis that physical injury-property damage is more likely to occur suddenly in an accident. *Price v. Gatlin*, 241 Or. 315, 320, 405 P.2d 502, 504 (1965) (O'Connell, J., dissenting). These distinctions, insofar as they attempt to explain the availability or unavailability of strict liability, are spurious. It is unclear why a consumer should recover in strict liability when a defect in his or her car causes it to catch fire, but be denied recovery when slow oxidation caused by a defect in the metal results in substantial rust damage. See Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability Jurisprudence*, 27 CASE W. RES. L. REV. 647, 652 (1977).

162. In *Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972), the plaintiff sought recovery for what the majority found to be mere economic loss caused by defective wheels purchased from the defendant. Having concluded that the plaintiff's loss was merely economic, the court denied recovery in the absence of privity. *Id.* at 446-48, 102 Cal. Rptr. at 114-16. A dissenting opinion maintained that because the vehicle suffered minor tire and spring damage caused by the defective wheels, the wheels were "constructively destroyed." The constructive destruction of the wheels made this a case of property damage and thus it was argued that privity should not bar recovery. *Id.* at 453, 102 Cal. Rptr. at 120 (Stephens, J., dissenting).

163. 548 P.2d 279 (Alaska 1976).



defendant. The trailer was never satisfactory because of numerous and substantial defects. Any loss to the plaintiffs, however, was merely economic. At the time plaintiffs brought suit, the retailer from whom they had purchased the trailer was no longer in business. The plaintiff's theory of recovery in the trial court was breach of implied warranty. The trial court, however, refused to award the plaintiff a judgment against the manufacturer because privity was lacking.

On appeal, the plaintiffs attempted to remedy the problem created by the lack of privity by arguing that strict liability in tort does not require privity and is so closely related to breach of implied warranty that the same pleadings will support recovery on either theory. With this the Alaska Supreme Court agreed. The court noted, however, that strict liability was available only in the case of physical injury or property damage. Conceding that the authorities were divided on the point, the court stated that it preferred the result in *Seely*.<sup>164</sup> The court also rejected strict liability analysis in cases of economic loss because it believed it owed deference to the legislative judgment represented by enactment of the Uniform Commercial Code (UCC).<sup>165</sup>

Having invoked the *Seely* decision to reject strict liability, the court concluded that the plaintiffs' right to recovery must be determined under relevant provisions of the UCC governing implied warranties. The court noted that the UCC provides the seller certain means to minimize liability for economic loss. Under the UCC the seller enjoys "a predictable definition of potential liability for direct economic loss."<sup>166</sup>

Yet even under the UCC warranty approach the Alaska Supreme Court faced the necessity of resolving the privity issue which the trial court had decided against the buyer. The court declared that "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

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164. *Id.* at 285.

165. See note 166 & accompanying text *infra*.

166. 548 P.2d at 286. Section 2-714(2) of the UCC provides: "The measure of damage for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted unless special circumstances show proximate damages of a different amount."

goods . . . ."<sup>167</sup> The more difficult question was whether to extend the abolition of privity to warranty actions in which purely economic loss was involved. The court noted that other courts had been hesitant to dispense with the privity requirement in nonpersonal injury cases. It also noted that the UCC maintained a distinction between direct economic loss and consequential economic loss which includes personal injury.<sup>168</sup>

Having observed that the privity question in warranty was the same as in strict liability and that the UCC distinguished mere economic loss from personal injury, the court abolished privity requirements in warranty actions involving economic loss. Moreover, after citing the majority opinion in *Seely* as a basis for rejecting the application of strict liability in economic loss cases, the court stated that Justice Peters' dissenting opinion in *Seely* "persuasively establishes that the cleavage between economic loss and other types of harm is a false one, that each species of harm can constitute the overwhelming misfortune in one's life which warrants judicial redress."<sup>169</sup>

The *New Moon* decision is difficult to explain.<sup>170</sup> The court rejected the relevance of strict liability because the *Seely* personal injury-economic loss distinction appealed to it, stating that it was compelled to resort to a UCC based contract-warranty analysis because the legislature had the final authority in the matter. The court even referred to UCC sections that preserved contract-warranty doctrines such as disclaimer and the requirement that the buyer give the seller prompt notice of defects. Yet, in dispensing with the requirement of privity, the court referred to economic realities which made the use of such contract doctrines irrelevant.<sup>171</sup> Finally, having cited the majority opinion in *Seely* as authority for

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167. 548 P.2d at 289.

168. *Id.* at 289-90 & n.34.

169. *Id.* at 291.

170. Professor Franklin would undoubtedly disagree. "The Code seems to be saying that so long as courts adhere to warranty principles they may follow or dispense with privity as they see fit, but they must limit liability by warranty principles in either case." Franklin, *supra* note 142, at 1001. Yet in light of the court's justification in *New Moon* for waiving the privity requirement (the irrelevancy of the distinction between property damage-physical injury and economic loss), one must ask once more why, given the court's explanation for the inapplicability of strict tort liability, it felt compelled to decide the case using a UCC analysis.

171. The court's opinion did, however, refer to the doctrine of unconscionability (U.C.C. § 2-302) as a means of providing buyer protection from seller's excesses within the framework of the court's preferred contract analysis. 548 P.2d at 292.

the importance of the personal injury-economic loss distinction, the court invoked the authority of Justice Peters' dissent in support of the view that the same distinction was irrational.

The reasoning of the court in *New Moon* suffered from a "confusion of the categories"<sup>172</sup> not unknown among those who have attempted to make sense out of this legal area. Symptoms of this confusion may be found in a number of other recent decisions.<sup>173</sup> Products liability law, as a discrete category of the law, developed at least partly as a means of making warranty principles relevant to modern economic conditions. Privity was perceived as a major barrier to modernizing warranty law. The perceived need to eliminate the privity bar was a major factor in developing rules of strict liability for defective products.<sup>174</sup> Although there has been general agreement that modern marketing conditions have created a different kind of consumer with special problems, there has been much less agreement as to the best means of extending protection to that consumer.<sup>175</sup>

Many commentators argue that tort concepts deserve primacy and that contract principles are antique impediments standing in the way of a sensible new legal order. This attitude is exemplified by the drafters of section 402A of the Restatement (Second) of Torts.

It should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the prod-

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172. This term is a borrowed and modified version of Professor John Dawson's wonderfully evocative phrase "a hardening of the categories." J. DAWSON & W. HARVEY, *CASES ON CONTRACTS* 132 (3d ed. 1977).

173. See, e.g., *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973). Compare *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973), with *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1, 342 A.2d 181 (1975).

174. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 24 (1965).

175. The tendency in recent years has been to permit consumer recovery for economic loss notwithstanding a lack of privity. See *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1976); *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967); *Nobility Homes of Texas, Inc. v. Shivers*, 539 S.W.2d 190 (Tex. Civ. App. 1976), *aff'd*, 557 S.W.2d 77 (Tex. 1977). Plaintiff buyers in a commercial setting have not always been successful in arguing the irrelevance of privity in cases of economic loss. See, e.g., *Salmon Rivers Sportsman Camps, Inc. v. Cessna Air. Co.*, 97 Idaho 348, 544 P.2d 306 (1975).

uct, and it is not affected by any disclaimer or other agreement. . . . It is much simpler to regard the liability here stated as merely one of strict liability in tort.<sup>176</sup>

It is not so simple as the drafters lead one to believe. The history of warranty is complex. Much of that history has involved an intimate association with the law of contract. The contract legacy with which that association has invested the law of warranty cannot be merely brushed aside by imperious words, analogizing its principles to strict liability in tort.

Other commentators have persuasively argued that a tort based approach to consumer protection in the warranty-products liability area is inconsistent with many of the policies embodied in article 2 of the UCC.<sup>177</sup> These scholars contend that the drafters of the UCC took note of the consumer's place in the modern economic order and intended to adjust the rights between consumers and sellers in accordance with the contract principles contained in article 2. The courts have generally ignored the scholarly arguments urging primacy of the UCC. Rather, a fair sampling of recent cases in the consumer-warranty area discloses the relative insignificance of the UCC in influencing judicial behavior in this area.<sup>178</sup>

Recalling the historical lessons of the preceding analysis of the decline of privity, the failure of the UCC's contractual analysis to prevail is quite understandable. The basic force which carried the antiprivacy advocates to victory was a broadly based recognition by the courts that the modern consumer was inadequately protected by classical contract doctrine. Indeed, the struggle over privity may have been the *cause* of the courts' recognition of consumers as a distinct class. The UCC, of course, introduced many innovations into the existing common law, but the drafters' very equivocal position on the privity question is suggestive that they only margin-

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176. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

177. See generally Franklin, *supra* note 142; Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 24 (1965); Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970).

178. See, e.g., *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80 (Fla. 1976); *Milbank Mut. Ins. Co. v. Prokosik*, 309 Minn. 106, 244 N.W.2d 105 (1976); *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1, 342 A.2d 181 (1975); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966). There have been exceptions. See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976).

ally considered problems relating strictly to consumer transactions.<sup>179</sup> A very able scholar has rightly argued that "the Code's general approach . . . is dealing with the process by which parties may allocate risks and not the substantive question of who winds up with how much of the risk."<sup>180</sup> The essence of consumer status, as understood by most courts, is that there is little capacity or opportunity, if any, to bargain over risk allocation. This is particularly true when the consumer is not in privity with the defendant seller-manufacturer.<sup>181</sup> Because the UCC operates on the assumption that the buyer can bargain over risk allocation even in transactions when such an ability is fictional, courts have found the UCC inadequate to deal with the reality of the typical consumer sales transaction. The courts therefore have sought and found other sources of legal rules more responsive to judicially perceived economic reality.

More than forty years ago it was presciently suggested that existing legal categories would prove inadequate to analyze the legal complications resulting from modern manufacturing and merchandising methods. It was further suggested that a new legal construct would be needed to deal with the new reality.<sup>182</sup> It probably would have been better if the courts had followed this suggestion. Not surprisingly, however, they did not. The profession's conservatism suggested that the courts choose a conservative method of dealing with the need for innovation by adapting existing doctrine.<sup>183</sup> The result has been the development of a highly complex and sometimes contradictory body of rules aimed at addressing consumer needs. The preceding pages focused on only one aspect of that process: the justification for eliminating the privity requirement. What may be observed is that in working to extend

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179. Section 2-318 of the UCC provides states with three alternatives that reflect varying degrees of liberality on the privity question. Comment 3 to § 2-318 professes neutrality beyond the rules contained in the section itself. Courts, intent on protecting a buyer not in privity, have not always been deterred by what seems to be the plain meaning of their state's version of § 2-318. See *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973); *Milbank Mut. Ins. Co. v. Prokosk*, 309 Minn. 106, 244 N.W.2d 105 (1976).

180. Franklin, *supra* note 142, at 995.

181. But see Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 681 (1977).

182. Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134, 155-58 (1937).

183. Professor Morris well described the inherent conservatism of the legal profession when he wrote that lawyers "tend to view every inroad on habit as a catastrophic revolution." R. MORRIS, *SEVEN WHO SHAPED OUR DESTINY* 86 (1973).

warranty protection to remote parties, the courts early developed a clear conception of the consumer as a special class and have been consistent in preserving the distinction between consumers and commercial buyers.<sup>184</sup>

### Consumers, Disclaimers, and Freedom of Contract

The concept of freedom of contract has had a powerful effect upon the development of the law; only with reluctance have courts countenanced its diminution.<sup>185</sup> Yet modern economic conditions have eroded the marketplace equality between contracting parties that is the basis of freedom of contract.<sup>186</sup>

One area of contract law in which the theory of freedom of contract collides with modern marketplace reality is attempted disclaimers or restrictions on warranties by sellers. The judicial response to such behavior has produced, in recent years, a recognition that the consumer belongs to a distinct legal class.

#### *Judicial Restriction of Disclaimers*

Many sellers, particularly in the early years of the 20th century, eschewed the outright disclaimer. Instead they carefully drafted warranties that required the buyer to overcome a number of difficult hurdles before asserting a breach of warranty against the seller.<sup>187</sup> Strict and often very short notice requirements were

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184. A handful of jurisdictions have resisted the relaxation of privity requirements long accepted elsewhere. See, e.g., *Necktas v. General Motors Corp.*, 357 Mass. 546, 259 N.E.2d 234 (1970). In at least one case the United States Court of Appeals found the means to avoid the consequences of the Massachusetts privity requirement. See *White's Farm Dairy, Inc. v. De Laval Separator Co.*, 433 F.2d 63 (1st Cir. 1970). The Massachusetts Legislature finally intervened to eliminate the privity requirement. See *Town of Mansfield v. G.A.F. Corp.*, 5 Mass. App. Ct. 551, 364 N.E.2d 1292 (1977); *Kinlaw v. Long Mfg. N.C., Inc.*, 40 N.C. App. 641, 253 S.E.2d 629 (1979).

185. See, e.g., *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940). Some eminent judges have vociferously defended the principle of freedom of contract. See *Adair v. United States*, 208 U.S. 161, 175 (1908) (Harlan, J.); *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875).

186. Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

187. To convey a sense of the burden seller's warranties imposed upon the buyer as well as the flavor of early 20th century warranty language, the following warranty is taken from *Acme Harvesting Mach. Co. v. Barkley*, 22 S.D. 458, 461, 118 N.W. 690, 691 (1908): "Any machine of our make is guaranteed to do good and efficient work for which it is intended when properly operated. The purchaser shall have one day to give it a fair trial. Should the implement then fail to fulfill this warranty, notice is to be given at once to the dealer from whom the machine was purchased, and after the dealer has used his best efforts,

imposed.<sup>188</sup> Buyers were sometimes commanded to send notice of defects only by registered letter.<sup>189</sup> Frequently, warranty provisions also notified the buyer that no agent of the seller was authorized to waive any of the many requirements imposed by the written warranty.<sup>190</sup>

Had the courts given literal effect to these seller-oriented warranty requirements, buyers rarely would have succeeded in imposing meaningful quality obligations upon commercial sellers. Many courts, however, found means by which to extend reasonable warranty protection to deserving buyers. The most frequently used judicial device was the doctrine of waiver.<sup>191</sup> When problems developed with contract goods, the seller would habitually dispatch an employee to correct the problem. Despite contract language which purported to preclude labeling this conduct a waiver of contract rights, courts were quite resourceful in discovering some facet of the seller's behavior which justified inferring an intention to forego

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and should the machine still fail to fulfill the warranty, then both the purchaser and the dealer are to give immediate notice to the Acme Harvester Company (incorporated) at Peoria, Peoria County, Illinois, or to their authorized general agent, stating wherein the machine fails to fulfill the warranty, and a reasonable time is to be allowed for instructions to be given or if necessary, the sending of a person to put it in order or to remedy the defects, if any; the purchaser rendering any necessary assistance and furnishing suitable teams, etc., when if it cannot be made to fulfill the warranty, he shall return it to the place he received free of charge, and in as good a condition as when received and a new machine will be given in its place, or the notes and money will be refunded. Under no circumstances will the machine be allowed to be returned without an understanding and direct instructions from the Acme Harvester Company. If notice of difficulty be not received as above states, it will be conclusive evidence of satisfaction." The burden placed upon the buyer by this "warranty" is substantial, and the seller has numerous defenses to an asserted breach if the buyer fails to satisfy any one of the numerous requirements. What is perhaps more surprising is that the standard warranty used by the farm implement industry has remained remarkably unchanged to the present. Compare the warranty language in *J.I. Case Co. v. Boothe*, 227 Ark. 69, 70, 296 S.W.2d 894, 895 (1956), with that reproduced from the *Acme Harvester* case decided fifty years before. The similarities are striking.

188. See, e.g., *J.I. Case Co. v. Boothe*, 227 Ark. 69, 269 S.W.2d 894 (1956); *Monroe & Monroe, Inc. v. Cowne*, 133 Va. 181, 112 S.E. 848 (1922).

189. See, e.g., *McDaniel v. Mallary Bros. Mach. Co.*, 6 Ga. App. 848, 66 S.E. 146 (1909).

190. See, e.g., *Peter v. Plano Mfg. Co.*, 21 S.D. 198, 110 N.W. 783 (1907).

191. See, e.g., *Gullett Gin Co. v. Seagraves*, 49 Ga. App. 850, 176 S.E. 922 (1934); *W. H. Bintz Co. v. Meuggler*, 65 Idaho 760, 154 P.2d 513 (1944); *Schaefer v. Fiedler*, 116 Ind. App. 226, 63 N.E.2d 310 (1945); *Maxwell Implement Co. v. Fitzgerald*, 85 Ind. App. 206, 146 N.E. 883 (1925); *Daugherty v. Advance-Rumely Thresher Co.*, 190 Iowa 424, 180 N.W. 277 (1920); *Nichols & Shepard Co. v. Mason*, 76 Kan. 607, 92 P. 545 (1907); *Juvland v. Wood Bros. Thresher Co.*, 212 Minn. 310, 3 N.W.2d 772 (1942); *Reitan v. Wilkinson*, 154 Okla. 163, 7 P.2d 486 (1932); *Peter v. Plano Mfg. Co.*, 21 S.D. 198, 110 N.W. 783 (1907); *Monroe & Monroe, Inc. v. Cowne*, 133 Va. 181, 112 S.E. 848 (1922).

strict compliance with burdensome warranty terms.<sup>192</sup> Only occasionally did the courts even obliquely suggest the reasons for finding a waiver of contract rights.<sup>193</sup>

The waiver doctrine was not always used to protect the buyer. Sellers often succeeded in claiming the full benefit of restrictive warranty provisions.<sup>194</sup> In many of the cases in which the buyer lost, however, there is clear evidence that the court doubted the buyer's good faith.<sup>195</sup> This suggests that refusal to invoke the waiver doctrine sometimes had less to do with a theoretical attachment to notions of freedom of contract than with the court's practical judgment about the decency of the buyer's behavior. This suspicion is explicitly confirmed in one case in which the court declined to use the waiver doctrine on the buyer's behalf because it was convinced that the seller "acted in the utmost good faith and that he was not looking for a pretext to avoid the terms of the contract . . . ."<sup>196</sup>

Waiver of warranty requirements was by no means the only device by which courts sought to protect the consumer from over-reaching sellers. Many courts manipulated the rules of offer and acceptance to push back or eliminate altogether the moment at which an unreasonably short "notice of defect" clause began to run.<sup>197</sup> Many judges were also prepared to deal firmly with a seller's attempts to give a strained reading to warranty language drafted with the seller's interests in view.<sup>198</sup> Other courts dealt

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192. See note 191 *supra*.

193. In explaining its conclusion that the seller had waived its right to notice by registered mail, one court stated that such a construction allows the courts "to avoid the forfeiture and to leave the actual merits of the case open to investigation." *McDaniel v. Mallary Bros. Mach. Co.*, 6 Ga. App. 848, 851, 66 S.E. 146, 147 (1909).

194. See, e.g., *Kirkland v. John Deere Plow Co.*, 66 Ga. App. 304, 18 S.E.2d 109 (1941); *Neon Lights Advertising Co. v. Briggs*, 60 Ga. App. 135, 3 S.E.2d 113 (1939); *Jewell v. Massillon Engine & Thresher Co.*, 198 Ky. 22, 247 S.W. 1117 (1923); *Colt Co. v. Ryals*, 186 So. 315 (Miss. 1939); *Moline Plow Co. v. Adair*, 76 Okla. 4, 183 P. 499 (1919).

195. See *Massey-Harris Harvester Co. v. Burnett*, 126 Kan. 453, 268 P. 740 (1928); *Emerson-Brantingham Implement Co. v. Biddle*, 110 Kan. 365, 203 P. 725 (1922); *Acme Harvesting Mach. Co. v. Barkley*, 22 S.D. 458, 118 N.W. 691 (1908).

196. *Advance-Rumely Thresher Co. v. Born*, 189 Wis. 309, 316, 206 N.W. 904, 907 (1926).

197. See, e.g., *Williams v. Bullock Tractor Co.*, 186 Cal. 32, 198 P. 780 (1921); *Massey-Harris Co. v. Quick*, 227 Mo. App. 736, 42 S.W.2d 47 (1931); *Buckley v. Advance-Rumely Thresher Co.*, 106 Neb. 214, 183 N.W. 105 (1921); *Kemper v. Advance Thresher Co.*, 44 Tex. Civ. App. 128, 97 S.W. 1078 (1906).

198. A particularly striking example of this may be found in *Oliver Farm Equip. Co. v. Patch*, 134 Kan. 314, 5 P.2d 795 (1931). In *Patch* the seller of a threshing machine sued the



with arguably unfair warranty terms by insisting that language of limitation or disclaimer drafted by the seller be strictly construed.<sup>199</sup>

Many courts, however, took a less proconsumer view of contract warranty terms. They did not hesitate to give literal effect to restrictive clauses drafted by the seller.<sup>200</sup> Taken as a whole, the cases conflict and do not supply firm evidence of a consistent judicial sympathy for either the consumer or the commercial seller.<sup>201</sup>

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farmer-buyer for failure to pay the purchase price. The buyer counterclaimed for breach of warranty. The seller argued that language in the contract that "[f]ailure of any separate machine or part shall not involve other machines, or parts, or damages" meant that the defendant had agreed not to claim any damages for breach of warranty. To this argument the court replied: "If such interpretation is correct, we can but marvel what purpose was to be served by putting any warranty in the contract . . . . On the assumption that this well-sounding language [of warranty] meant something . . . [i]t would be stretching language unduly as well as unfairly to defendant—since he did not formulate its terms—to hold that the warranty for his benefit was set at naught by the debatable language of the clause which provided that the failure of a separate machine should not *involve* damages." *Id.* at 319, 5 P.2d at 797 (emphasis original). For another case to the same effect but with less unbridled language, see *Harrison v. Russell & Co.*, 12 Idaho 624, 87 P. 785 (1906).

199. See, e.g., *Murray Co. v. Morgan*, 280 F. 499 (4th Cir. 1922); *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161, 95 N.W. 886 (1903).

200. See, e.g., *O.S. Stapley Co. v. Newly*, 57 Ariz. 24, 110 P.2d 547 (1941); *Buckley v. Shell Chem. Co.*, 32 Cal. App. 2d 209, 89 P.2d 453 (1939); *Willson v. Riddle*, 128 Conn. 100, 20 A.2d 402 (1941); *Kibbe v. Woodruff*, 94 Conn. 443, 109 A. 169 (1920); *Payne v. Chal-Max Motor Co.*, 25 Ga. App. 677, 104 S.E. 453 (1920); *Harmon v. Coonrod*, 148 Kan. 146, 79 P.2d 831 (1938); *Advance-Rumely Thresher Co. v. Stoops*, 105 Kan. 16, 262 P. 604 (1928); *Hopkinsville Motor Co. v. Massie*, 228 Ky. 569, 15 S.W.2d 423 (1929); *Ray Motor Co. v. Stonyan*, 123 Me. 346, 122 A. 874 (1923); *Industrial Fin. Corp. v. Wheat*, 142 Miss. 536, 107 So. 382 (1926); *Russell & Co. v. Legg*, 222 Mo. App. 819, 10 S.W.2d 326 (1928); *Getzoff v. Von Lengerke Buick Co.*, 14 N.J. Misc. 750, 187 A. 539 (1936); *Armour Fertilizer Works v. Aiken*, 175 N.C. 398, 95 S.E. 657 (1918); *Allis Chalmers Mfg. Co. v. Hawhee*, 187 Okla. 670, 105 P.2d 410 (1940); *Stark v. George*, 252 S.W. 1053 (Tex. App. 1923).

201. The great majority of cases thus far cited in this section of the Article deal with contracts to buy farm implements. These cases remained the mainstay of the courts in developing rules regarding warranty limitation and disclaimer until well into the second decade of the 20th century. At that time, the impact of the automobile on American life began to be reflected in the case reports. There is little in this area of law to provide the weary scholar with humorous relief. One such rare moment has been made possible by Justice Silas Weaver of the Iowa Supreme Court who had irreverence enough to reproduce in full the following warranty: "The Worcester-Kemp manure spreader has had nearly thirty years of this field experience. Every part has been demonstrated in actual field work; it is strong, simple and mechanically right. It does its work with a certainty that is not disturbed by any possible local conditions. The Worcester-Kemp is well built in every detail. Every particle of material has its office to perform and forms its part of the magnificent whole." *Loxtercamp v. Lininger Implement Co.*, 147 Iowa 29, 31, 125 N.W. 830, 831 (1910). Justice Weaver had more than a good sense of humor; he had an exceptional grasp of warranty law. See *American Fruit Prod. Co. v. Davenport Vinegar & Pickling Works*, 172 Iowa 683, 154 N.W. 1031 (1915); *Ideal Heating Co. v. Kramer*, 127 Iowa 137, 102 N.W. 840 (1905).

Warranty cases decided in the first third of the 20th century reveal a growing sensitivity to the relevance of the contracting parties' status in interpreting particular warranty terms. Sensitivity to status is evidenced both in cases where the buyer is in business and in cases where the buyer is included in the definition of "consumer," relating to the buyer's capacity to bargain effectively and intelligently over warranty terms.<sup>202</sup> In commercial cases, the courts consistently rejected buyer's pleas for a liberal or elastic reading of warranty requirements, using language to the effect that both parties had equal technical ability<sup>203</sup> or that "both parties by reason of their occupation had expert knowledge of the kinds of [products] in question . . ."<sup>204</sup> Reluctance to relieve commercial buyers of the consequences of a hard bargain was thus not uncommon.<sup>205</sup> In contrast, the consumer was quite often the beneficiary of genuine judicial sympathy. In consumer cases, courts frequently emphasized that the "buyer had very little knowledge of automobiles"<sup>206</sup> or that the buyer "was no judge of the materials and from the looks of it could not tell whether it was defective or not."<sup>207</sup>

The cases involving restrictive warranties or general disclaimer provisions which limited the duties imposed upon sellers were frequently part of the so-called "form pad" or standardized contract.<sup>208</sup> It is enough to note that those who have assayed the significance of form contracts agree upon at least three propositions: (1) form contracts do not conform to the model of the individually negotiated agreement which was the basis for the development of traditional contract rules;<sup>209</sup> (2) the standardized contract is the in-

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202. See note 96 & accompanying text *supra*.

203. *Carleton v. Jenks*, 80 F. 937, 940 (6th Cir. 1897).

204. *Alexander v. Stone*, 29 Cal. App. 488, 490, 156 P. 998, 999 (1916).

205. See *Huber Mfg. Co. v. H. Crawford & Sons*, 175 F. 219 (D. Pa. 1909); *Bagley v. General Fire Extinguisher Co.*, 150 F. 284 (2d Cir. 1906); *William A. Davis Co. v. Bertrand Seed Co.*, 94 Cal. App. 281, 271 P. 123 (1928); *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N.E. 682 (1907).

206. *Gilmore v. Butts*, 198 A.D. 108, 109, 189 N.Y.S. 712, 713 (1921).

207. *Indiana Silo Co. v. Harris*, 134 Ark. 218, 223, 203 S.W. 581, 584 (1918). See also *Moore v. Koger*, 113 Mo. App. 423, 426, 87 S.W. 602, 603 (1905). But see *Hoyt v. Hainsworth Motor Co.*, 112 Wash. 440, 192 P. 918 (1920).

208. See generally Dugan, *Standardized Form Contracts—An Introduction*, 24 WAYNE L. REV. 1307 (1978); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

209. See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Con-*

evitable product of modern mass production and distribution techniques;<sup>210</sup> and (3) although form contracts are an aid to economic efficiency, they can easily become an instrument to exploit the weaker party to the agreement.<sup>211</sup>

By the first years of the 20th century, form contracts with consumers were common in some industries. The courts quickly distinguished a form contract from the more traditional agreement in which terms were individually negotiated.<sup>212</sup> More importantly, form contracts were early recognized as not only different, but it was acknowledged that their interpretation and application required different standards than those traditionally applied to fully negotiated contracts. This sensitivity is reflected in one court's response to a seller's argument that a disputed contract warranty said nothing about fitness for threshing grain even though the subject of the sale was a threshing machine: "The contract is upon a form for general use in the sale of any and all kinds of machinery. From anything stated in the contract itself the machine sold in this instance might have been designed to do the work of drilling oil wells, sawing wood or separating cream."<sup>213</sup>

When a form contract had been used there was often a special interest in whether the disputed term was in "bold type."<sup>214</sup> Some decisions simply stated that when the seller's form had defined the limits of the bargain, it must be strictly construed against the seller.<sup>215</sup>

These early courts had a clear grasp of the realities of typical form pad transactions between a commercial seller and a con-

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tract, 84 HARV. L. REV. 529, 630-32 (1971).

210. RESTATEMENT (SECOND) OF CONTRACTS § 237, Comment a (Tent. Draft 1970).

211. See Dugan, *Standardized Form Contracts—An Introduction*, 24 WAYNE L. REV. 1307, 1317 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 237, Comment f (Tent. Draft 1970).

212. Compare the warranty language reproduced by the court in *Lindsay v. Fricke*, 130 Wis. 107, 109 N.W. 945 (1906), with the warranty provision reprinted in *Peter v. Plano Mfg. Co.*, 21 S.D. 198, 110 N.W. 783 (1907). Form contracts were also used in transactions between manufacturers and their retail dealers. See, e.g., *Miller Rubber Co. v. Blewster Stevens Serv. Stations*, 171 Ark. 1179, 287 S.W. 577 (1926).

213. *Nichols & Shepard Co. v. Maxon*, 76 Kan. 607, 607, 92 P. 545, 545 (1907).

214. See *Parsons Band Cutter & Self-Feeder Co. v. Gadeke*, 1 Neb. 605, 95 N.W. 850 (1901).

215. See *Case Threshing Mach. Co. v. Tate*, 70 Colo. 67, 70, 197 P. 764, 765 (1921); *Hansmann v. Pollard*, 113 Minn. 429, 432, 126 N.W. 848, 850 (1911); *Parsons Band Cutter & Self-Feeder Co. v. Gadeke*, 1 Neb. 605, 95 N.W. 850 (1901).

sumer.<sup>216</sup> In none of these opinions, however, did the courts directly address the relative inability of the buyer to negotiate the removal of a restricted warranty or disclaimer provision. Little, if any, language betrayed a sympathy for the inability of the average Kansas farmer to negotiate better warranty terms as part of the purchase of a new thresher from the McCormick Harvester Company in Illinois. Although none of the opinions individually yielded evidence of an early explicit recognition of the special status of the consumer, the cumulative evidence suggests that by a variety of means, many American jurisdictions prior to 1930 consistently interpreted restrictive warranty and disclaimer clauses in a manner that gave consumers notably more protection than commercial sellers had intended.

### *Judicial Response to Public Policy Arguments*

Direct attacks against disclaimers and restrictive warranties on public policy grounds were rarely made<sup>217</sup> before the mid-1920's.<sup>218</sup> Furthermore, the public policy invoked by buyers was not always clear or consistent. In some cases the buyer did not directly attack the seller's superior bargaining position. The policy

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216. The fact that a court noted the disputed disclaimer of warranty provision was part of a form contract, however, did not always translate into a victory for the buyer. *See, e.g.,* Troendly v. J.I. Case Co., 51 Idaho 578, 8 P.2d 276 (1932); *Rowe v. Emerson-Brantingham Implement Co.*, 61 Mont. 73, 201 P. 316 (1921); *Case Threshing Mach. Co. v. McClamrock*, 152 N.C. 405, 67 S.E. 991 (1910).

217. One early case in which such an attack was made was *International Harvester Co. v. Bean*, 159 Ky. 842, 169 S.W. 549 (1914). In *Bean* the buyer of an "auto wagon" sought rescission of the contract. The seller contended that it had given a very limited express warranty and that it had disclaimed all implied warranties. In affirming the judgment for the buyer, the court stated that unless such restrictive clauses were fairly made a part of the contract they would not be enforced. The court continued: "Such a stipulation, relieving, as it does, the manufacturer from duties imposed by law, will be conclusively presumed to have been inserted in the contract for the sole benefit of the manufacturer . . . and effect will not be given to such stipulation unless its inclusion in the contract was fairly procured . . . . [T]his stipulation was contained in a printed form . . . used by appellant company. The language of the stipulation is extremely technical . . . its meaning is clear but to few persons . . . . To hold that it was so included would be to give life to the letter of the contract and render inanimate the spirit thereof." *Id.* at 845, 169 S.W. at 551. This remarkably "modern" decision had little impact on later Kentucky decisions with similar facts. *See, e.g.,* *Sears, Roebuck & Co. v. Lea*, 198 F.2d 1012, 1015 (6th Cir. 1952).

218. *See, e.g.,* *Bridgeport L.A.W. Corp. v. Levy*, 110 Conn. 255, 147 A. 841 (1929); *Nemeth v. Becker Roofing Co.*, 151 S.W.2d 559 (Mo. 1941); *Thare v. Allis-Chalmers Mfg. Co.*, 42 N.M. 443, 81 P.2d 703 (1938); *Palaniuk v. Allis-Chalmers Mfg. Co.*, 57 N.D. 199, 220 N.W. 638 (1928); *Minneapolis Threshing Mach. Co. v. Hocking*, 54 N.D. 559, 209 N.W. 996 (1926).

argument asserted did not even address the fundamental lack of a fully negotiated bargain. Instead, public policy was simply said to be contrary to the use of fine print terms or obscurely worded warranty disclaimers.<sup>219</sup> Consequently, the "public policy" argument amounted to little more than a relabeling of the arguments that had been made with fewer pretensions many years before.<sup>220</sup> Therefore, these cases did not represent a real movement towards confronting modern bargaining reality and the consequent need to recognize the special status of the consumer.

Some buyers did argue against the validity of seller-imposed warranties and disclaimers upon a broader ground. Contending that the notion of freedom of contract was in need of critical reexamination, they urged the courts to "keep pace . . . with the march of the times toward a more liberal system of jurisprudence."<sup>221</sup> The initial judicial response to this broader gauged argument was not favorable. Its rejection by the courts was based on three conclusions: (1) disclaimers and restricted warranties were sanctioned by long judicial usage and if these clauses were to be proscribed, it was a matter for the legislature;<sup>222</sup> (2) the buyer in the case at bar was neither helpless nor unable to take reasonable steps to protect himself or herself;<sup>223</sup> (3) the use of disclaimers was common in the commercial world and represented a legitimate attempt by contracting parties to allocate the risk of failure of a particular transaction to the buyer.<sup>224</sup>

Two of the three arguments used by the courts in rejecting the buyers' demands for the proscription of disclaimers did not address the basic point of the buyers' contentions. In cases where the court found the buyer capable of self-protection, there was no need

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219. See, e.g., *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1975); *Minneapolis Threshing Mach. Co. v. Hocking*, 54 N.D. 559, 209 N.W. 996 (1926).

220. See notes 208-12 & accompanying text *supra*.

221. *Tharp v. Allis-Chalmers Mfg. Co.*, 42 N.M. 443, 450, 81 P.2d 703, 707 (1938).

222. *Id.* See also *Knecht v. Universal Motor Co.*, 113 N.W.2d 688, 694 (N.D. 1962).

223. See *E.S. Peterson Co. v. Parrott*, 129 Me. 381, 383, 152 A. 313, 314 (1930); *Minneapolis Threshing Mach. Co. v. Hocking*, 54 N.D. 559, 567, 209 N.W. 996, 999 (1926).

224. *Nemeth v. Becker Roofing Co.*, 151 S.W.2d 559, 564 (Mo. 1941). Even in North Dakota which had adopted legislation that, in effect, precluded the disclaimer of implied warranties in the sale of farm machinery, the courts were not disposed to move beyond a restrictive interpretation of the legislative mandate. In *Palaniuk v. Allis-Chalmers Mfg. Co.*, 57 N.D. 199, 205-06, 220 N.W. 638, 639 (1928), the court rejected a buyer's argument that a clause which denied the right to damage recovery was inconsistent with the spirit of the North Dakota statute. The court stated that a limited damage clause was a proper exercise of freedom of contract.

to reach the substance of the buyer's claim. Similarly, deference to the legislative prerogative allowed the court to evade consideration of the merits of a buyer's case. The proposition that disclaimers served a valid commercial purpose can be considered a direct response to the buyer's argument for the proscription of disclaimers. Yet even this argument did not really meet the substance of the buyers' argument because the objection went to the use of disclaimers in a *noncommercial context*. Invocation of commercial utility thus begged the question.

Not every court rejected the buyers' public policy plea.<sup>225</sup> Well into the 1960's, however, buyers won in most cases only because the courts freely resorted to the oblique interpretative devices noted earlier.<sup>226</sup> The courts' reluctance to confront squarely the problem of the commercial seller's superior bargaining leverage is puzzling. Although the courts sometimes were quite frank in expressing their disapproval of inequitable conduct by a commercial seller,<sup>227</sup> they were largely unwilling to employ the most obvious remedy of drawing a bright line around consumers and extending special protection to those within that circle. On the other hand, they did not hesitate to help the buyer if some device could be employed short of declaring the seller's conduct out of bounds. The lack of judicial creativity in this area is especially notable considering the great enthusiasm so many courts displayed in dismantling the privity barrier.<sup>228</sup> The assault upon privity and disclaimers were impelled by the same exigency: the displacement of traditional individual buyer-seller relationships by the remote commercial seller-consumer model. Although in many cases the courts responded to the privity problem by excising the privity requirement, there was much greater timidity in treating the matter of disclaimers.

Explanations for the uneven development of the law in the areas of privity and of warranty disclaimers can be only speculative. Recall, however, that the most dramatic advances in the struggle against privity occurred after the courts converted breach of war-

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225. See, e.g., *Grey v. Hayes-Sammons Chem. Co.*, 310 F.2d 291, 300 (5th Cir. 1962).

226. See, e.g., *Buchanan v. Dugan*, 82 A.2d 911 (D.C. 1951); *Case Credit Corp. v. Andreason*, 90 Idaho 12, 408 P.2d 165 (1965); *Allen v. Brown*, 181 Kan. 301, 310 P.2d 923 (1957); *Wade v. Chario Trailer Co.*, 331 Mich. 576, 50 N.W.2d 162 (1951); *Frigidinnors, Inc. v. Branchtown Gun Club*, 176 Pa. Super. Ct. 643, 109 A.2d 202 (1954).

227. See, e.g., *Moss v. Gardner*, 228 Ark. 828, 832, 310 S.W.2d 491, 493 (1958).

228. See notes 95-184 & accompanying text *supra*.

ranty into a tort. For unknown reasons, courts did not readily transfer the warranty-as-tort analysis into the disclaimer cases.<sup>229</sup> Had they viewed breach of warranty as a tort in the disclaimer context, they might have found it easier to accept public policy arguments aimed at voiding disclaimers. So long as the disclaimer was viewed purely as a matter of contract law, however, the courts were faced with the sacred shibboleth of freedom of contract.<sup>230</sup> The failure of the courts to extend the warranty-as-tort analysis beyond the privity context appreciably delayed judicial recognition of the consumer in disclaimer cases.

A significant change occurred with the celebrated case of *Henningsen v. Bloomfield Motors*.<sup>231</sup> In *Henningsen* the plaintiff suffered serious physical injury when an automobile manufactured by Chrysler Corporation and purchased from a local dealer went out of control. The plaintiff had signed a form sales contract used generally in the automobile industry that included narrowly drawn express warranties. Implied warranties had been completely disclaimed. The court refused to give literal effect both to the warranty clauses and to the disclaimer provision in the seller's form, noting that the disputed clauses were not part of a freely bargained contract but were part of a standardized form "in which one predominant party will dictate its law to an undetermined multiple rather than to an individual."<sup>232</sup> The court went on to state:

Although courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions, *they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer.* They have endeavored thus far to avoid a drastic departure from age-old tenets of freedom of contract by adopting doctrines of strict construction, and notice and knowledgeable assent by the buyer to the

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229. There were rare exceptions. See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (Traynor, C.J.).

230. The courts have tended to view contract as a "private affair and not a social institution. The judicial system, therefore, provides only for their interpretation . . . [T]he courts cannot make contracts for the parties." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

231. 32 N.J. 358, 161 A.2d 69 (1960).

232. *Id.* at 390, 161 A.2d at 85-86.

attempted exculpation of the seller.<sup>233</sup>

The *Henningsen* opinion supplied a general statement, founded on policy grounds, which permitted courts to examine disclaimers and limited warranty clauses with a new candor. *Henningsen* thus provided authority for rejecting reliance on conventional interpretative devices in favor of a more direct approach in dealing with form warranties which were manifestations of unequal bargaining power. In addition, the *Henningsen* opinion had a value independent of its reasoning. The court's unusual outspokenness seemed to give courage to other courts which had been timid in their treatment of restrictive warranty and disclaimer provisions.<sup>234</sup>

### Unconscionability

The widespread adoption of the UCC seemed to hasten the changes *Henningsen* foreshadowed.<sup>235</sup> The concept of unconscionability, explicitly recognized by the UCC, became the chief weapon of the courts in dealing with disclaimer clauses and warranty provisions deemed to be unfair.<sup>236</sup> Reliance on indirect means to police unfair warranty terms was no longer necessary.<sup>237</sup> Judicial opinions which have invoked the UCC's concept of unconscionability, when measured against earlier decisions, reflect a new boldness both in rhetoric and in reasoning. This new, explicit concern for the consumer manifests itself in a variety of ways. Courts refer directly to the rights of the average purchaser;<sup>238</sup> great care is devoted to ascertaining whether the buyer in a particular case was a "consumer" or whether the sale took place in a "commercial setting."<sup>239</sup> One judge has even written that there is "an urgent need to protect the

233. *Id.* at 391, 161 A.2d at 87-88 (emphasis added).

234. Not every jurisdiction, however, accepted the rationale or the result in *Henningsen*. See, e.g., *Knecht v. Universal Motor Co.*, 113 N.W.2d 688, 694 (N.D. 1962); *Harris v. Hampton Roads Tractor & Equip. Co.*, 202 Va. 958, 963, 121 S.E.2d 471, 473-74 (1961).

235. The Uniform Sales Act gave the parties broad discretion to shape the terms of their agreement. Its provision treating disclaimers and variations of implied or express obligation by agreement reflected the ideal of freedom of contract. See Uniform Sales Act § 71. The UCC thus represents an important change in the statutory law.

236. U.C.C. § 2-302. The courts also refer to U.C.C. §§ 2-316, -719(3) in addressing the legal issues raised by a challenged limited warranty-remedy provision or disclaimer. For a more detailed treatment of the UCC provisions dealing with disclaimers, see text accompanying notes 267-307 *infra*.

237. This is consistent with the intent of the drafters of the UCC. See U.C.C. § 2-302, Comment 1.

238. See *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452, 455 (Fla. App. 1972).

239. *Hiigel v. General Motors Corp.*, 190 Colo. 57, 66, 544 P.2d 983, 989 (1976).



heedless seekers of [consumer products] from the few unscrupulous merchants who prey upon them . . . ."<sup>240</sup> Another judge simply refused to enforce a disputed disclaimer provision on the broad grounds that the unconscionability doctrine rendered void any contract clause which operates to deprive the buyer of the benefit of his or her bargain.<sup>241</sup> All of these decisions, and others of similar character,<sup>242</sup> assume that the first step in judging the validity of a challenged clause is to determine whether the buyer may qualify for consumer status.<sup>243</sup>

Many courts have enthusiastically seized upon the concept of unconscionability introduced by the UCC. These courts have given unconscionability a meaning that justifies the routine use of the

240. *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 30 N.Y.S.2d 390, 394 (1969).

241. *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

242. See, e.g., *Matthews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973); *Ford Motor Co. v. Pittman*, 227 So. 2d 246 (Fla. App. 1969); *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975); *Dougall v. Brown Bay Boat Works & Sales, Inc.*, 287 Minn. 290, 178 N.W.2d 217 (1970); *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973). Some of the sharpest distinctions between consumers and commercial sellers have been made in cases where the seller was commercial in character. See *Cryogenic Equip., Inc. v. Southern Nitrogen*, 490 F.2d 696 (8th Cir. 1974); *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3rd Cir. 1974); *American Elec. Power Co. v. Westinghouse Elec. Co.*, 418 F. Supp. 435 (S.D.N.Y. 1976); *Johnson v. Mobil Oil Co.*, 415 F. Supp. 20 (N.D. Ala. 1975); *Jorgenson v. Mark Constr. Co.*, 56 Hawaii 466, 540 P.2d 978 (1975); *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976); *Billings v. Joseph Harris Co., Inc.*, 76 N.C. App. 689, 220 S.E.2d 361 (1975); *Schroeder v. Fageol Motors Co.*, 80 Wash. 2d 256, 544 P.2d 20 (1975).

243. The doctrine of unconscionability has attracted an exceptional measure of scholarly attention. See, e.g., Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970). This scholarly interest has produced a number of conflicting views as to what unconscionability means and how the concept may be best employed. For a comparison of the various approaches, see Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1164-66 (1976). The courts' use of unconscionability in the disclaimer area evidences a distinct tendency to employ unconscionability as a blunt instrument in aid of results believed to be appropriate in the case at hand. The courts have, in the main, assumed that in judging whether a disputed clause is or is not unconscionable, an inquiry into the status of the contracting parties is wholly appropriate. This assumption has been almost universal despite persuasive commentary which suggests that it may not be justified. See Schwartz, *Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367 (1974). The drafters of the UCC themselves suggest that unconscionability should not be used to disturb "allocation of risks because of superior bargaining power." U.C.C. § 2-302, Comment 1. The absence of judicial opinions in the warranty disclaimer area that reflect much sensitivity to the scholarly gloss on the unconscionability doctrine is not hard to explain. The UCC's explicit recognition of unconscionability has served to release and channel an accumulated judicial frustration that the perceived inadequacy of prior law had caused. The uncommonly strong language of the *Henningsen* opinion suggests the depth of that frustration.

commercial buyer-consumer test in judging the validity of limited warranty or disclaimer clauses. There is substantial doubt, however, whether this use of unconscionability in the disclaimer field is supported by relevant sections of the UCC.<sup>244</sup> Nonetheless, the undeniable effect of what may be fairly called interpretative abuse has been to achieve a widespread recognition of the special status of the consumer in disclaimer cases. Whether that recognition is justified or not, many courts are deciding cases in conformity with such reasoning.

### Warranties and The Uniform Commercial Code

This Article has examined at length the evolution of judicial sensitivity to the special status of the consumer in warranty transactions. In recent years, the UCC has become the dominant statutory influence in shaping the law of sales warranties. The character of the UCC's warranty provisions must be understood in order to assay the continued relevance, if any, of prior judicial decisions that favored the consumer. Moreover, to evaluate fairly the argued need for the Magnuson-Moss Act, something must be known of the statutory regime it was intended to reform.

The UCC recognizes the two traditional categories of warranty: express and implied.<sup>245</sup> An express warranty is defined as "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . . ." <sup>246</sup> Although no specific intent is required by the UCC to make an express warranty,<sup>247</sup> not every statement made during the course of a sales transaction amounts to an express warranty. An affirmation of fact relating to the goods must be distinguished from a mere commendation of the goods, a puff. This distinction has bedeviled judges, lawyers, and law students alike.<sup>248</sup>

To meet the requirements of an express warranty under the UCC, an affirmation of fact must become a part of the basis for the bargain. This has led some courts to conclude that the UCC, like

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244. See note 243 *supra*.

245. This Article will not discuss warranties of title (U.C.C. § 2-312) because such warranties are of relatively little significance in consumer transactions.

246. U.C.C. § 2-313.

247. *Id.* § 2-313, Comment 3.

248. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 328-32 (2d ed. 1980).

its predecessor act,<sup>249</sup> requires that the buyer rely upon the seller's affirmation. The UCC's drafters disavow any intention to require reliance by the buyer. They provide little guidance, however, as to what precisely was intended by the phrase "basis of the bargain."<sup>250</sup>

Despite the problems of language and interpretation just noted, the UCC does require that the seller deliver goods of the agreed quality.<sup>251</sup> Moreover, once given, the seller is without power to negate an express warranty; disclaimers of express warranties are not permitted.<sup>252</sup>

The implied warranties of merchantability<sup>253</sup> and fitness for a particular purpose<sup>254</sup> are frequently of greater benefit to the buyer than express warranties. Express warranties can be narrowly drawn with a view to affording the seller maximum protection.<sup>255</sup> In contrast, the quality standard imposed upon a seller under implied warranties is not as easily manipulated because the UCC itself supplies their content. The function of the implied warranty of merchantability, for example, "has been to give legal effect to buyer's reasonable expectations based on trade understanding of the quality of goods normally supplied under such a contract."<sup>256</sup> The implied warranty of merchantability thus assures that the goods may be used for their intended purpose.

The UCC provides a full complement of potential remedies for breach of warranty. These remedies are of two types: goods-ori-

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249. "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Uniform Sales Act § 12.

250. See U.C.C. § 2-313, Comment 3. Precisely what the drafters intended by the phrase "basis of the bargain" has caused considerable uncertainty and has been the subject of much scholarly writing. See, e.g., Note, "Basis of the Bargain"—What Role Reliance, 34 U. PITT. L. REV. 145 (1972). Courts also are divided as to the proper meaning of the phrase. Some decisions see the phrase as a continuation of the reliance standard in the Uniform Sales Act. See, e.g., *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977), *aff'd mem.*, 568 F.2d 770 (3d Cir. 1978); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972).

251. U.C.C. § 2-313, Comment 4.

252. *Id.* § 2-316(1).

253. *Id.* § 2-314.

254. *Id.* § 2-315.

255. See, e.g., *Bickett v. W.R. Grace & Co.*, 12 U.C.C. Rep. 629 (W.D. Ky. 1972); *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D.W. Va. 1971).

256. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 398 (1955) [hereinafter cited as 1955 N.Y. LAW REVISION COMM'N].

ented and money damages. The buyer's goods-oriented remedies consist of the right to reject goods that fail in any respect to conform to the contract<sup>257</sup> or to revoke acceptance of defective goods, which, after the period for rejection has passed, prove to be substantially nonconforming.<sup>258</sup> In the case of rejected goods, the seller retains a limited right to cure by making a conforming tender;<sup>259</sup> ordinarily the buyer should have no reason to object to the seller's prompt redelivery of conforming goods.

The consumer's goods-oriented remedies under the UCC are potentially powerful weapons. Undoubtedly, however, few have the knowledge<sup>260</sup> or the confidence to act as quickly as required to preserve these remedies. For the buyer who has accepted and retained nonconforming goods, the UCC provides remedies designed to compensate for lost expectancy.<sup>261</sup> Section 2-714(2) allows the buyer to recover the difference between the value of goods accepted and the value they would have had if the goods had been as warranted.<sup>262</sup> Damages recovered under this provision of the UCC

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257. U.C.C. § 2-601.

258. *Id.* § 2-608.

259. *Id.* § 2-508.

260. There is a developing school of thought which argues that many of the problems faced by consumers can be solved inexpensively by adopting a regulatory scheme that requires sellers to provide maximum information about product quality and consumers' rights to the buyer. Thus armed, the consumer will make rationale choices which will enhance economic efficiency and eliminate the need for further governmental regulation of consumer transactions. See, e.g., Rhoades, *Reducing Consumer Ignorance: An Approach and Its Effect*, 20 ANTITRUST BULL. 309 (1975); Note, *The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation*, 51 IND. L.J. 397 (1976). Some empirical studies suggest, however, that full disclosure does not necessarily influence consumer behavior, because, among other things, modern advertising techniques create a desire for goods which impels purchase without much regard for the character of the information provided at the time of sale. See Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006, 1097. See generally Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Controls*, 63 VA. L. REV. 841 (1977). But see Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

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

262. Although the damage formula provided in § 2-714(2) is easily stated, its application has frequently presented difficulties. Such difficulties have resulted because of the UCC's failure to identify the variables to be used in the formula. Courts are thus left to decide what measure of damage is appropriate in a particular case. The results are not always consistent. Compare *Neuman v. Spector Wrecking & Salvage Co.*, 490 S.W.2d 875 (Tex. Civ. App. 1973), with *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F.

have been called "primary"<sup>263</sup> damages. Yet the buyer's loss may exceed the compensation to which he or she is entitled under section 2-714. Recognizing this, the drafters provided sections 2-714(3) and 2-715 to allow recovery of "resultant" damages.<sup>264</sup> Resultant damages include property damage, personal injury, and general reliance expenditures. Recovery of resultant damages, however, depends upon the buyer's effort to limit such losses by taking economically reasonable actions after discovery of the breach of warranty.<sup>265</sup>

If the warranty and remedy sections surveyed above constituted the whole of the UCC insofar as it pertains to a buyer's rights, the buyer would be well protected. Section 2-316, however, allows a seller to disclaim implied warranties, and section 2-719 permits a seller to limit a buyer's remedies for breach of warranty.<sup>266</sup> Although the UCC restricts the seller's power to disclaim warranties or to limit remedies, a well-advised seller is frequently able to gain a distinct advantage over the buyer despite the drafters' clear intent to limit the seller's freedom of contract.<sup>267</sup>

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Supp. 435 (S.D.N.Y. 1976).

263. Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 106 (1978).

264. *Id.*

265. The drafters of the UCC intended to impose the obligation to limit damages or lose the right to recover resultant losses on the aggrieved party. See U.C.C. § 1-106, Comment 1.

266. The UCC provides other protective clauses for the seller. They are not, however, the kinds of provisions that can be exploited by a contracting party with superior bargaining power. See, e.g., U.C.C. § 2-607(3)(a) (requires the buyer to give notice of breach within a reasonable time or be barred from any remedy); *id.* § 2-725(1) (imposes a four-year statute of limitations on actions for breach of warranty). These provisions and others like them require the consumer to act reasonably to protect his or her rights.

267. U.C.C. § 2-316(1) does not permit the seller to limit or negate express warranties to the extent that such a construction of the contract is unreasonable. U.C.C. § 2-316(2) imposes certain conditions on the seller's right to disclaim implied warranties. While it is not difficult to draft form contract provisions which meet the literal requirement of U.C.C. § 2-316(2), in an effort to protect consumers, courts have made compliance with § 2-316(2) difficult. See text accompanying note 268 *infra*. U.C.C. § 2-719 limits the seller's power to restrict buyer remedies; the stipulated remedy is optional unless the agreement expressly provides otherwise; limitations on consequential damages for personal injury are prima facie unconscionable and limitations on consequential damages of any kind may be unconscionable in consumer transactions. *Id.* § 2-719(3). Finally, when circumstances cause an exclusive or limited remedy to fail of its essential purpose, the aggrieved buyer may take advantage of all other Code remedies. Recent commentary suggests that the phrase "failure of essential purpose" has a more limited meaning than had been assumed. See Eddy, *On the "Essential" Purpose of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CALIF. L. REV. 28 (1977). Professor Eddy contends that too many courts have used § 2-719(2) as a

The typical consumer contract contains a familiar battery of clauses aimed at reducing to a minimum the seller's liability for breach.<sup>268</sup> These exculpatory clauses frequently appear as part of an impressive document ornately decorated and bearing the prominent legend "Guarantee" or "Warranty." While the consumer may believe that he or she is protected in the event the goods prove defective, what the consumer actually has received is a contract carefully drafted to minimize the buyer's rights and to maximize the seller's protection against liability.

Two conclusions can be drawn from the UCC's treatment of warranty principles. First, if unaltered by specific contractual provisions, the UCC provides reasonable protections for the buyer's expectations as to the quality of contract goods. Second, the contracting parties are free to limit these protections by agreement. The UCC thus is founded on the principle of freedom of contract.<sup>269</sup> While this freedom is not absolute,<sup>270</sup> it is considerable. In transactions between parties with equal power to bargain over warranty terms, freedom of contract may be salutary. In the typical consumer contract where the consumer retains little power to bargain over the warranty terms, however, freedom of contract can be dictatorial.<sup>271</sup>

The law of sales, of which article 2 of the UCC is but the most

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license to indulge in judicial moralism at the sellers' expense.

268. The following clauses regularly appear in the typical sales contract: (1) an express warranty against defects in the goods, usually limited to materials and workmanship; (2) a limitation of buyer's remedy to repair or replacement of defective goods or parts; (3) a clause excluding all other express or implied warranties; (4) a provision insulating the seller from liability for consequential damages; (5) a clause limiting the seller's liability based on the purchase price of the goods. Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code*, 63 VA. L. REV. 791, 793 (1977). Typical warranty provisions in consumer sales contracts are treated in *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D. Del. 1972); *Durfee v. Rod Baxter Imports, Inc.*, 226 N.W.2d 474 (Minn. 1977); *Recreative, Inc. v. Myers*, 67 Wis. 2d 255, 226 N.W.2d 474 (1975).

269. U.C.C. § 1-102, Comment 2.

270. Some of the UCC's limitations upon the freedom to contract have already been discussed. See, e.g., U.C.C. § 2-719(3). The principal UCC section that operates to limit freedom of contract is § 2-302, which allows a court to refuse to enforce an unconscionable contract or term. Attempts to define "unconscionability" have produced a plethora of scholarly work including Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976). Professor Dawson's thoughtful article assesses the idea of unconscionability in German law and then applies it to the American system.

271. See Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006, 1095-98; S. REP. NO. 151, 93d Cong., 1st Sess. 6-8 (1973).

recent embodiment, developed to supply the needs of those with a substantial and continuing economic stake in the operation of contractual agreements.<sup>272</sup> Although the drafters of the UCC attempted to distinguish nonmerchants from merchants in drafting the rules governing contracts,<sup>273</sup> the same warranty restrictions are applicable to both.<sup>274</sup>

A major objective of this Article has been to suggest that there exists an important body of judicial decisions which substantially supplements statutory schemes designed to regulate sales warranties. This judicial tradition predates the UCC; indeed, in its origins, it predates Professor Williston's Uniform Sales Act. This body of judicial law, which has grown almost irresistibly in influence and complexity, has created a wealth of decisions which have served effectively to protect consumer interests.<sup>275</sup> The willingness of many courts to adapt principles of commercial law to shield the consumer from exploitation in the marketplace prior to the enactment of the UCC demonstrates that the law of sales warranties must not be seen as requiring only mastery of selected sections of the UCC. Rather, the UCC should be viewed in the context of the broader proconsumer judicial tradition that continues to exert a subtle but persistent influence upon courts which must interpret UCC warranty provisions. The UCC itself strikes a somewhat ambiguous balance between the importance of consumer protection and the perceived need to facilitate the conduct of commercial

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272. Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 590 (1969). The typical merchant's contracts are frequently a part of continuing business relationships. The long term character of commercial agreements imposes special demands upon conventional contract law. See generally Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). See also Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622-23 (1975). Professor Llewellyn, the chief drafter of article 2, was a leader in the realist school of jurisprudence. As Professor Danzig notes, the primary argument of those attacking the realists was that the realists conceived of law "as a body of devices for the purposes of business instead of a body of means toward general social ends." *Id.* at 627-28 (quoting Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931)).

273. The UCC defines merchant in § 2-104(1). Sections in which the merchant-non-merchant distinction is relevant include §§ 2-201(2), 2-205, 2-403(2), and 2-609(2). Determining who is a merchant is not always easy. Compare *Loeb & Co. v. Schreiner*, 294 Ala. 722, 321 So. 2d 199 (1975), with *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

274. Only a merchant-seller can give an implied warranty of merchantability. See U.C.C. § 2-314(1). But see *id.* § 2-314, Comment 4. The UCC warranty sections do not utilize the merchant-nonmerchant dichotomy to protect the consumer who is victimized by the commercial seller's superior bargaining power.

275. See notes 191-92 & accompanying text *supra*.

transactions. It is precisely this ambiguity which suggests that the pre-UCC judicial tradition of sensitivity to consumer needs will continue to play a meaningful role in the evolution of warranty law in the years ahead.

### The Magnuson-Moss Warranty Act: The Argument For Reform

In the 1950's, Congress and the Federal Trade Commission (FTC) began receiving numerous complaints about defective consumer products from purchasers who had received warranties which, in the consumer's view, were insufficient.<sup>276</sup> Beginning in 1962, successive Presidents delivered messages to Congress addressing the need for federal regulation of automobile warranty practices. In 1967, legislation was introduced to strengthen consumer warranties.<sup>277</sup> President Johnson appointed a special task force to study warranty practices in the appliance industry in 1969.<sup>278</sup> By 1970, results of the FTC field study on automobile warranties and the presidential task force on the appliance industry suggested that there was a need for federal legislation imposing substantive and procedural warranty standards on the manufacturers of consumer goods.<sup>279</sup> In 1975, after a number of failed attempts, Congress enacted the Magnuson-Moss Warranty Act<sup>280</sup> (Act).

A detailed analysis of the Act would be superfluous in light of the wealth of scholarly publications on the subject.<sup>281</sup> A brief overview of the Act's major provisions is justified, however, in light of its impact on warranty law. Some attention will also be given to criticisms of the Act that have emerged since its enactment.

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276. C. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 11 (1978) [hereinafter cited as REITZ].

277. Magnuson, *Fair Disclosure in the Market Place of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C. L.J. 117, 119 (1975).

278. H.R. REP. NO. 93-1107, 93d Cong., 2d Sess. 24, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7705, 7707.

279. For a general discussion of the events preceding the adoption of the Magnuson-Moss Act, see Magnuson, *Fair Disclosure in the Market Place of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C. L.J. 117, 118-22 (1975).

280. 15 U.S.C. §§ 2301-2312 (1976 & Supp. III 1979).

281. Among the many studies of the Magnuson-Moss Act perhaps the most useful are: REITZ, *supra* note 276; Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C.L. REV. 835 (1977); Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335 (1976).



The Act does not apply to oral warranties,<sup>282</sup> and does not impose a written warranty requirement on any seller. If a seller does give a written warranty within the meaning of the Act, then that written warranty must meet certain statutory standards.

The Act's definition of a written warranty is highly technical and does not correspond precisely with the definition of express warranty in the UCC.<sup>283</sup> For a written warranty to arise under the Act, the seller must assert that the goods are free from defects or will meet "*a specified level of performance over a specified period of time.*"<sup>284</sup> Consequently, energy ratings on electrical appliances, for example, may be express warranties under the UCC, but do not constitute written warranties under the Act because a specified level of performance over a specified period of time can not be inferred from such a rating.<sup>285</sup>

A written warranty within the meaning of the Act must be labeled "full" or "limited."<sup>286</sup> A full warranty must provide the purchaser certain remedies in the event of breach,<sup>287</sup> but it need not extend any particular qualitative assurances about the product.<sup>288</sup> The duration of implied warranties may not be limited,<sup>289</sup> and any exclusion or limitation of consequential damages must be conspicuous.<sup>290</sup> Finally, the seller who extends a full warranty must allow the buyer to elect a refund or replacement of the goods after a

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282. The Senate version of the Act attempted to extend its reach to oral warranties by allowing a plaintiff to recover attorneys' fees in cases where a breach of an express oral warranty had been proven. The House version which was ultimately adopted did not include a parallel provision. S. CONF. REP. No. 93-1408, 93d Cong., 2d Sess. 25, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7755, 7758.

283. Compare 15 U.S.C. § 2301(6)(A) (1976 & Supp. III 1979) ("The term 'written warranty' means any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier . . . which relates to the nature of the material or provides workmanship is defect free or will meet a specified level of performance over a specified period of time . . .") with U.C.C. § 2-313(1)(a) ("Express warranties by the seller are created as follows: Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise").

284. 15 U.S.C. § 2301(6)(A) (1976 & Supp. III 1979) (emphasis added).

285. See 16 C.F.R. § 700.3(a) (1979).

286. 15 U.S.C. § 2303(a) (1976).

287. *Id.* § 2304(a)(1).

288. There are some commentators who argue that the term "full warranty" is deceptive. See *Consumer Warranty Protection—1973: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate Commerce*, 93d Cong., 1st Sess. 91, 92-93 (1973) (statement of Professor Fairfax Leary, Jr.).

289. 15 U.S.C. § 2304(a)(2) (1976).

290. *Id.* § 2304(a)(3).

reasonable number of unsuccessful attempts to repair.<sup>291</sup> A limited warranty is any written warranty that does not qualify as a full warranty.<sup>292</sup>

The Magnuson-Moss Warranty Act authorizes the FTC to promulgate rules and regulations governing the character and timing of disclosure of warranty information.<sup>293</sup> The Commission has drafted regulations that require sellers to disclose in clear, conspicuous, and simple language certain essential information on consumer products costing more than fifteen dollars.<sup>294</sup> In addition, the Commission's interpretation of the Act requires the seller to disclose warranty terms prior to sale.<sup>295</sup> The regulations also impose presale disclosure requirements on catalog or mail order sellers<sup>296</sup> and on sellers who utilize door to door salespersons.<sup>297</sup> The retail in-store seller may make such disclosures in a variety of ways.

Advocates of the Act argued that the availability of adequate warranty information prior to sale would produce rational consumer behavior; consumers equipped with adequate warranty information prior to sale would make choices in the marketplace that would encourage competition among sellers to provide better warranties. In order to make the cost of these better warranties tolerable, the argument continues, manufacturers will produce higher quality products.<sup>298</sup> Skeptics of this reasoning argued that if written warranties were not required, many sellers would elect to escape the burden of compliance with the Act by giving no warran-

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291. *Id.* § 2304(a)(4).

292. A limited warranty is not defined by the Act. The seller who undertakes to give a limited warranty is legally free to fashion the character of the warranty obligation he or she assumes. It is quite possible that a limited warranty may be more useful to a consumer than a full warranty. RERTZ, *supra* note 276, at 60.

293. 15 U.S.C. § 2302(a)-(b) (1976).

294. 16 C.F.R. § 701.3 (1980). Matters subject to mandatory disclosure include: (1) persons to whom protection of the warranty is extended; (2) a description of the product or parts thereof which the warranty covers; (3) a statement of what the seller will do in the event of product malfunctions; (4) the time at which warranty protection commences; (5) a description of what the consumer should do to obtain warranty service; (6) information respecting the availability of any informal dispute settlement mechanisms; (7) any limitation on the duration of implied warranties or the exclusion or limitation of consequential damages; (8) a notation that limitations or exclusions of implied warranties or damages may not be enforceable under state law. *Id.*

295. *Id.* § 702.3(a)(1).

296. *Id.* § 702.3(c).

297. *Id.* § 702.3(d).

298. 120 CONG. REC. 40,712 (1974) (statement of Senator Magnuson).

ties at all.<sup>299</sup> There has been, however, no discernible trend towards the sale of consumer goods without any warranties.<sup>300</sup>

Consumer critics have focused on two other asserted deficiencies of the Act. First, the Act seems to countenance the exclusion or limitation of consequential damages.<sup>301</sup> This is perceived by some as significantly undermining the benefit to consumers of other salutary provisions of the Act.<sup>302</sup> Such concern is largely misplaced because the Act does not displace existing consumer rights under state law.<sup>303</sup> Second, consumer advocates fear that many innovative state laws designed to improve warranty standards will be neutralized by the Magnuson-Moss Act.<sup>304</sup> The Act itself, however, should be sufficient to preserve prior innovative state rules regulating warranties.<sup>305</sup>

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299. Many commentators have recognized that the effect of the Act has been principally to protect against warranty deception and not to regulate the substantive content of the bargain. See, e.g., Schroeder, *Private Actions Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, 66 CALIF. L. REV. 1, 9 (1978).

300. *Emerging Issues Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, 45 A.B.A. ANTITRUST L.J. 72, 74 (1976) (introductory remarks of J. Bernstein).

301. Although the Act does not expressly sanction the exclusion or limitation of consequential damages, a fair reading of its provisions implies an intent not to prohibit such exclusions. See 15 U.S.C. § 2304(a)(3) (1976).

302. See Comment, *The Federal Consumer Warranty Act and Its Effect on State Law*, 43 TENN. L. REV. 429 (1976).

303. 15 U.S.C. § 2311(b)(1) (1976). Recall that article 2 of the UCC restricts the right of sellers to exclude or limit liability for consequential damages in many consumer sales. In addition, many courts have invoked the UCC's general unconscionability section to police purported limitations of consequential damages in consumer transactions. See *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972); *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975); *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 29 (1975). But see *Billings v. Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975).

304. See Schmitt & Kovac, *Magnuson-Moss vs. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection*, 30 ARK. L. REV. 21, 25-26 (1976). A number of states had responded to the problem of inadequate consumer warranties in consumer sales prior to the enactment of the Magnuson-Moss Warranty Act. For a survey of state legislation, see Clark & Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 U. KAN. L. REV. 567, 584-97 (1975).

305. See 15 U.S.C. § 2311(b)(1) (1976). The ubiquitous Professor Leary may be responsible for preserving the full vigor of prior state consumer protection laws. Testifying before the Subcommittee on Commerce and Finance, Professor Leary argued that an early version of the Act which preserved only state law remedies was inadequate. He contended language should be added which preserves substantive rights under state law. The existing law reflects Professor Leary's recommendation. *Consumer Warranty Protection—1973: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate Commerce*, 93d Cong., 1st Sess. 91, 93-94 (statement of Professor

In light of these criticisms, it is surprising that consumer advocates have not exploited the provision in the Act that prohibits a seller who gives either a full or limited warranty from disclaiming any implied warranty.<sup>306</sup> Although the Act creates no new implied warranties, its prohibition of disclaimers precludes a seller from escaping liability for a failure of the goods to conform to reasonable qualitative standards. In this sense, the Act does address the substantive content of warranties.

### Conclusion

There has been surprising agreement—even among many of the Act's critics—on the proposition that federal warranty legislation is needed. This consensus may be attributed to the compelling—often vivid—empirical evidence of consumer abuse gathered by the many executive commissions and congressional committees that examined the realities of the modern marketplace.<sup>307</sup> Yet the existence of consumer exploitation does not suffice as a justification for federal intervention. It must also be shown with equal clarity that existing state law does not provide an adequate basis for the redress of consumer grievances.

The cases reviewed in this Article demonstrate that, over time, the courts have been successful in breaking down the privity barrier which stood between the aggrieved consumer and a remote solvent defendant. This result was achieved by resort to a variety of interpretive devices and doctrinal innovations. The key to the consumer's triumph over the privity barrier, however, was the willingness of courts to view breaches of warranty as actions not completely confined within a contractual context. Once this procedural obstacle was overcome, the cases reflect a remarkable disposition to innovate in aid of the consumer. This proconsumer attitude in warranty-privity actions made a major contribution to the development of the broader field of products liability law. Once the privity

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Fairfax Leary, Jr.).

306. 15 U.S.C. § 2308(a) (1976). Some observers have noted the importance of the Act's prohibition on disclaiming implied warranties. See, e.g., RERTZ, *supra* note 276, at 63-64; Roberts, *The Magnuson-Moss Federal Warranty Act and Failure of Its Essential Purpose*, *Uniform Commercial Code* 2-719(2), 33 BUS. LAW. 1845, 1849 (1978); Comment, *The Federal Consumer Warranty Act and Its Effect on State Law*, 43 TENN. L. REV. 429 (1976); Note, *The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation*, 51 IND. L.J. 397, 411-12 (1976).

307. See notes 276-79 & accompanying text *supra*.

problem was solved, the courts began the process of dismantling the limitations on damage recoveries in consumer "warranty-products liability" actions. This process is still ongoing.

The courts have forcefully dealt with warranty disclaimers and remedy limitations which sellers have routinely inserted in the typical form warranty provided to consumers. Judicial approaches to this particular manifestation of consumer exploitation have varied greatly over the last century. In earlier years, acting in deference to the idea of freedom of contract, courts felt constrained to protect the consumer by the use of oblique interpretative devices which checked seller overreaching without seeming to abuse then fashionable notions of judicial nonintervention in private bargains. In recent times, the courts have more directly expressed public policy objections to the enforcement of unreasonable warranty terms. The advent of unconscionability, given explicit sanction in the UCC, has been a particularly significant development in the struggle to deal with continuing manifestations of seller overreaching.

Why, then, the need for the Magnuson-Moss Act? Essentially, the Act is designed to deal with the more marginal and less fundamental frustrations which consumers have encountered in the purchase of consumer goods.<sup>308</sup> The Act attempts to force sellers to disclose in understandable language the nature of the warranty they have given and, in the event the warranty is breached, to ensure that sellers will deal with buyers in an equitable manner. These are legitimate goals, but there is substantial doubt whether the Magnuson-Moss Act has been a success even when judged against its own relatively modest objectives.<sup>309</sup> Moreover, whether the cost of complying with the Act is equal to the benefits it has conferred upon consumers is by no means clear.<sup>310</sup>

Careful analysis reveals that much state case law prior to the adoption of the Act was sensitive to and supportive of the special needs of the consumer. Moreover, the clear trend of state law in

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308. It is not intended to suggest that the concerns addressed by the Magnuson-Moss Warranty Act are unimportant or irrelevant. The Act's aim is to deal with "contracts of frustration" in the sense intended by Professor Mueller. See generally Mueller, *Contracts of Frustration*, 78 YALE L.J. 576 (1969).

309. See Note, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979). The author struggles to conclude that the Act has been at least modestly successful. *Id.* at 1145-46. The empirical evidence gathered, however, makes it difficult to argue that the Act has been a success in terms of achieving its objectives.

310. See generally Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

the sales warranty field has been to broaden the rights of the consumer at the expense of the commercial buyer. The existence of this significant body of state law deserved more serious attention than it received from those who argued that the need for federal legislation was overwhelming.<sup>311</sup> The significant and enduring impact of the common law as a device for consumer protection in warranty transactions must be considered in the continued evaluation of the Magnuson-Moss Warranty Act.

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311. The Act's sponsors have tended to dismiss state law as a body of rules whose "essence lies buried in a myriad of reported legal decisions and in complicated state codes of commercial law." Magnuson, *Fair Disclosure in the Market Place of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C. L.J. 117 (1975). To criticize state law because it is "complicated," however, is hardly an argument that it is inadequate to protect the consumer. The Magnuson-Moss Warranty Act itself could not be described as a model of simplicity.

