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PRIVITY, PRODUCTS LIABILITY, AND UCC WARRANTIES: A RETROSPECT OF AND PROSPECTS FOR ILLINOIS COMMERCIAL CODE § 2-318

Our . . . law cannot hope to survive by stubborn adherence to decisions written for a different world. We cannot and should not apply seventeenth and eighteenth century rules to twentieth century conditions.¹

INTRODUCTION

Commentators often note the overlap between the law of sales and the law of torts in products liability litigation.² However, in Illinois, the division of products liability into these two fields³ has created gaps in the law of products liability as a whole. These gaps leave many injured consumers without a remedy.

This comment explores and seeks to remedy some of the gaps that the evolution of sales and tort law have created in their erosion of privity of contract,⁴ a common law prerequisite to products liability suits.⁵ Part I of this comment discusses the requirement of priv-

1. *Henderson v. Henderson*, 169 N.Y.S.2d 106, 115 (1957).

2. Numerous authors have cited the overlap between the law of sales and the law of torts in the field of products liability. See, e.g., RICHARD W. DUESENBERGER & LAWRENCE P. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE, U.C.C. Rep. Serv. (MB) § 7.06 [1], at 7-152 to 7-176 (1990) (noting the inherent relationship between strict products liability and warranty actions); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960) (arguing that warranties reflect the overlap between contract and tort law and that states should abandon the warranty theory of products liability); Donald J. Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 695-704 (1965) (identifying areas of consistency between strict products liability and warranty liability under the UCC); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages - Tort or Contract?*, 114 U. PA. L. REV. 539, 540 (1966) (noting the theoretical possibility of recovering for economic losses which defective products cause under either tort or sales law).

3. Dean Prosser was the most notable proponent for furthering this division. Prosser ardently fought to isolate the law of torts as the sole bastion of products liability. Prosser, *supra* note 2, at 1124-34.

4. "Privity of contract" is defined as "[t]hat connection or relationship which exists between two or more contracting parties." BLACK'S LAW DICTIONARY 1079 (5th ed. 1979). With respect to products liability actions, the contractual relationship is "usually that between the buyer and the seller." AMERICAN LAW OF PRODUCT LIABILITY § 21:1 (Timothy Travers et al. eds., 3d ed., The Lawyers Co-operative Publishing Co. 1987).

5. See *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842).

ity of contract as it existed at common law.⁶ Part II analyzes the subsequent erosion of privity in the law of sales and torts in the context of both common law and statutory law.⁷ Part III utilizes Illinois law to illustrate the judicial misconstruction and gaps which have resulted from the erosion of the privity requirement in sales and tort law.⁸ Finally, Part IV proposes and examines several potential revisions to Illinois Commercial Code § 2-318.⁹ Section 2-318 presently provides for a limited extension of Uniform Commercial Code ("UCC") warranties beyond a product's original buyer to third party beneficiaries.¹⁰ The proposed revisions would extend express and implied warranties¹¹ to broader classes of third party beneficiaries. Additionally, the proposed revisions would allow the broadened classes to recover for personal injury, property damage, and direct and consequential economic damages when sellers breach those warranties.¹² These revisions would functionally remove the antiquated remnants of the common law privity requirement from products liability actions brought under UCC warranty theories.

I. THE COMMON LAW PRIVACY REQUIREMENT

To understand the modern formulations of the requirement of privity of contract, it is first necessary to discuss the privity requirement as it existed at common law. As it developed in England, privity of contract was a relationship or connection between two or

6. See *infra* notes 13-18 and accompanying text for a discussion of the common law prerequisite of privity of contract to a products liability suit.

7. See *infra* notes 19-75 and accompanying text for a discussion of the gradual judicial and statutory erosion of the common law privity requirement.

8. See *infra* notes 75-118 and accompanying text for an analysis of how the erosion of the privity requirement has resulted in judicial misconstruction of Illinois Commercial Code § 2-318, as well as gaps in the law of products liability as a whole.

9. In Illinois, the language of Uniform Commercial Code ("UCC") § 2-318's Alternative A is codified at ILL. REV. STAT. ch. 26, para. 2-318 (1989). The UCC's § 2-318 is the sales statute which extends express and implied warranties to plaintiffs who are not in privity of contract with the original seller of the goods. U.C.C. § 2-318 (1990). Presently, there are three alternative versions of UCC § 2-318 which adopting states may choose from. *Id.* Each version embodies a different view of the relationship between sales and tort law and attempts to define the scope of the privity requirement in actions based on breach of express and implied warranties. See *infra* notes 50, 67 and 68 for the text of each UCC § 2-318 alternative and a listing of the states which have adopted each section.

10. See *infra* notes 42-74 and accompanying text for an explanation of the nature and functioning of the three alternative forms of UCC § 2-318.

11. The statutory authority which creates express and implied warranties in the law of sales are UCC §§ 2-313, 2-314, and 2-315. U.C.C. §§ 2-313, 2-314, 2-315 (1990).

12. See *infra* note 37-38 and accompanying text for an explanation of the term "economic damages."

more contracting parties.¹³ At common law, the courts required a product's buyer to establish that he was in privity with the person whose product caused his injury.¹⁴ The apparent justification for the privity requirement was that it limited tort liability to only those who had a social or contractual duty to conform their behavior to a known standard of care.¹⁵ Dean Prosser suggests another reason for the common law privity limitation was that courts were trying to protect and foster the developing English Industrial Revolution.¹⁶

Thus, at common law, privity of contract was an irrefutable prerequisite to the establishment of legal responsibility for an injury caused by sellers' products.¹⁷ Absent privity, a court would dismiss a buyer's suit for his injuries. When the United States adopted the English common law, it also adopted the English privity requirement.¹⁸

II. EROSION OF THE PRIVACY REQUIREMENT

To soften the harshness of the general requirement of privity of contract in products liability law, both the courts and the state legislatures have eroded the privity requirement.¹⁹ This part of the

13. BLACK'S LAW DICTIONARY 1079 (5th ed. 1979).

14. An often cited illustration of the common law prerequisite of privity of contract in a products liability suit is found in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842). In *Winterbottom*, the court dismissed the plaintiff's suit because he did not prove he was in privity with the person who had contracted to maintain a coach in which plaintiff was riding when a defect in the coach injured the plaintiff. *Id.* at 402-04.

15. The *Winterbottom* Court's reasoning for the privity requirement was that unlimited causes of actions would arise if the court permitted a plaintiff to maintain his suit, absent privity of contract. *Id.* at 404-05.

16. Dean Prosser argues that "courts sought, perhaps more or less unconsciously, to limit the responsibilities of growing industry within some reasonable bounds." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984).

17. § 96, at 681-83.

18. *Id.*

19. The widespread rejection of the common law privity requirement stems in large part from the change from agrarian and pre-industrial societies of the 1700's and 1800's to contemporary free market societies. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 289 (Alaska 1976). An important consequence of this change is that today a product's producer no longer deals directly with his ultimate consumer, because increasingly complex modern systems of product distribution require multiple layers of product transfers before the product actually reaches the consumer. *Id.* Thus, the incidence of a contractual relationship between manufacturer and consumer is now a rare occurrence. *Id.* However, the need to keep sellers responsible to their ultimate users has remained the same or has increased. *Id.*

In sum, in our modern society, it is necessary to remove the shield of privity to ensure that manufacturers remain responsible to their products' users for the safety of the products which they send into the stream of commerce. *Id.* See also *Kassab v. Central Soya*, 246 A.2d 848, 852-54 (Pa. 1968) (noting the modern

comment first addresses the courts' erosion of the privity requirement. This part then examines UCC § 2-318, the primary legislative attack on the common law privity requirement.

A. *Judicial Erosion of Privity*

The courts were the first to attack the privity requirement by creating several limited exceptions to the requirement. The courts first carved out an exception by barring manufacturers of "inherently dangerous products" from asserting lack of privity as a defense against buyers in the distributive chain.²⁰ Shortly thereafter, the courts recognized a similar exception for products which were dangerous to human life.²¹ These exceptions to the privity requirement were, however, quite limited since they only applied when the product's defective condition seriously threatened human life.

Another special, but frequently used, exception to the privity requirement involved the situation where a defective or unwholesome condition of food or beverages caused a non-privity plaintiff's injury.²² A primary reason underlying the food exception was the public policy favoring the wholesomeness of food and drink.²³ Traditionally, the food exception protected only buyers' family members,²⁴ although it was occasionally extended to others.²⁵ The

need to reject the privity requirement and extending warranty liability and protection to all parties in the chain of distribution), *overruled on other grounds by*, AM/PM Franchise Ass'n v. Atlantic Richfield Co., 584 A.2d 915 (Pa. 1990).

20. See, e.g., *Thomas v. Winchester*, 6 N.Y. 397, 407-11 (1852) (plaintiff allowed to recover for injuries from a drug manufacturer which sold a container of the poisonous plant belladonna, mislabeled as "dandelion," to a druggist, who resold it to plaintiff).

21. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (court expanded "inherently dangerous to human life" exception of *Thomas* to include not only products which were inherently dangerous, but also those which would be dangerous if a manufacturer made them defectively). Illinois adopted the *MacPherson* rule in 1934. *Rotche v. Buick Motor Co.*, 193 N.E. 529, 532 (Ill. 1934).

22. See Prosser, *supra* note 2, at 1103-10 for an exhaustive analysis of the courts which have and have not adopted the food exception to the privity requirement under various theories.

23. *Blarjeske v. Thompson's Restaurant Co.*, 59 N.E.2d 320, 322-23 (Ill. App. Ct. 1959) (social policy required that implied warranty of wholesomeness extend to buyer's friend); *Welch v. Schiebelhuth*, 169 N.Y.S.2d 309, 310-14 (Sup. Ct. 1957) (based on social policy, implied warranty of wholesomeness of food extended to ultimate consumer of food). See *Suvada v. White Motor Co.*, 210 N.E.2d 182, 185-86 (Ill. 1964). The *Suvada* Court summarized the following three policies that underlie the food exception: 1) the societal interest in protecting human life and health; 2) the fact that the seller has represented the unwholesome food as safe; and 3) the policy that one who profits from putting harmful food into the stream of commerce should be liable for resulting injuries. *Id.*

24. See, e.g., *Haut v. Kleene*, 50 N.E.2d 855, 857-58 (Ill. App. Ct. 1943) (extending implied warranty of wholesomeness of rabbit meat to buyer's wife and children); *Welter v. Bowman Dairy Co.*, 47 N.E.2d 739, 745-47 (Ill. App. Ct. 1943)

Illinois courts have also recognized this additional exception to the privity requirement.²⁶

In the 1960's, Dean Prosser developed a unique way of dealing with the troublesome privity requirement in products liability law. Prosser believed that it was necessary to separate the warranty concepts of sales law and the negligence concepts of tort law.²⁷ He

(extending implied warranty that milk was fit for human consumption extended to buyer's child).

25. See, e.g., *Blarjeske*, 59 N.E.2d at 322-23 (extending implied warranty of wholesomeness to mere friend of original buyer who joined her for lunch at restaurant).

26. Illinois' food exception began with the courts' creation of an "implied warranty of fitness and wholesomeness for consumption" in all sales of meat or domestically used provisions. *Wiedeman v. Keller*, 49 N.E. 210, 211 (Ill. 1897). A number of cases further extended *Wiedeman* to protect members of buyers' families, notwithstanding the lack of privity, under the warranty theory as applied in food and drink cases. See, e.g., *Haut*, 50 N.E.2d at 857-58 (implied warranty extended to buyer's immediate family); *Welter*, 47 N.E.2d at 745-47 (implied warranty extended to buyer's infant son).

Ultimately, the Illinois Appellate Court went even further when it extended the food exception beyond the buyer's family to protect the unrelated friend of a buyer. *Blarjeske*, 59 N.E.2d at 323 (implied warranty extended to buyer's friend who became ill when she ate a portion of buyer's meal).

27. Dean Prosser vehemently argued in his 1960 article, *Assault Upon the Citadel (Strict Liability to the Consumer)* that strict liability, not warranty, was the proper avenue of recovery in products liability litigation. Prosser, *supra* note 2, at 1124-34. Prosser felt that the sales warranty was a "freak hybrid born of the illicit intercourse of tort and contract." *Id.* at 1126.

Prosser gave nine reasons for his preference of tort law over contract law in products liability. *Id.* at 1127-34. First, he argued that warranty recovery was a crutch which hindered recognition of strict products liability because it was historically tied to contract law and to antiquated notions of the requirement of privity of contract between the plaintiff and the defendant. *Id.* at 1127-28. Second, Prosser noted that warranty theories prevent the recovery of damages which the law of contracts does not contemplate (e.g., wrongful death). *Id.* at 1128.

Next, he stated that consumers commonly forget or ignore the names of manufacturers which prevents them from identifying the proper defendant. *Id.* at 1128. Fourth, Prosser asserted that neither the Uniform Sales Act nor the UCC allowed for sufficient warranty protection to others beyond the initial buyer. *Id.* at 1128-29. Fifth, Prosser contended that implied warranties were so limited in scope that they failed to adequately protect consumers. *Id.* at 1129-30. For example, he stated that only "merchants" could give the implied warranty of merchantability, and buyers' prior inspection of the products could undermine this warranty. *Id.* Then, Prosser explained that the sellers' defense of buyers' failure to notify of the breach within a reasonable time would also be available to manufacturers against unwary consumers. *Id.* at 1130-31. Seventh, he warned that sales law would prevent a buyer from recovering for personal injuries from a seller if the buyer returned the product and rescinded the sale. *Id.* at 1131. Eighth, Prosser protested that sellers could easily disclaim implied warranties under the law of sales, thus defeating the social policy which created the implied warranty in the first place. *Id.* at 1131-33.

Last, he maintained that because warranties ran with the title to a product, warranty protection would not extend to one who did not acquire title to the product. *Id.* at 1133-34. He stated that this would leave buyers' employees and visiting friends unprotected from dangerous products. *Id.* Prosser concluded that public policy should not merely impose a contract warranty term, but that

claimed that products liability fell within the arena of tort law and not sales law.²⁸ Additionally, Prosser felt that the privity requirement of the common law no longer served its purpose and should be discarded.²⁹ Thus, Prosser characterized products liability as the social imposition of duties, rather than the imposition of duties through contractual agreement.³⁰ As the reporter for the Restatement (Second) of Torts, Prosser embodied his beliefs in Section 402A of the Restatement.³¹

Section 402A of the Restatement thus created strict products liability. It requires a plaintiff to prove that a product's defective and dangerous condition existed at the time the product left the defendant's control.³² The section also requires that the defendant be in the business of selling the product and the product's defect proximately caused the plaintiff's injury to his person or property.³³ Section 402A specifically rejects the common law defense of privity of contract.³⁴ Illinois adopted the Restatement (Second) of Torts § 402A in 1964 in *Suvada v. White Motor Company*.³⁵

it should impose strict tort liability on the seller to the ultimate consumer of the goods. *Id.* at 1134. See also William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

28. Prosser, *supra* note 2, at 1134.

29. *Id.* at 1116-18. See *supra* note 19 for an explanation of the prevailing reasons why courts began to discard the privity requirement.

30. Prosser viewed the imposition of liability for injury to the person from defective products as within the law of torts. See Prosser, *supra* note 2, at 1124-34. He criticized the use of implied warranties to impose such liability as an "illusory contract mask" for a remedy which was fundamentally strict products liability in tort. *Id.* at 1134.

31. Section 402A of the Restatement (Second) of Torts provides:

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

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to reach the user or consumer in the condition in which it is sold.

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

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relations with the seller.

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

32. *Id.*

33. *Id.*

34. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a), (b) (1977). Section 402A rejects another common law defense; the sellers' use of due care.

35. 210 N.E.2d 182, 187 (Ill. 1965). In *Suvada*, a milk delivery company sued the manufacturer of a defective air brake for injuries suffered when an air brake on the plaintiff's truck failed, causing an accident. *Id.* at 183-84. The *Suvada* Court held that the defendant's defense of lack of privity failed because the air brakes were in a defective and dangerous condition when the product left the manufacturer's control and caused the plaintiff's injury. *Id.* at 186-88.

However, Illinois courts have refused to apply strict products liability where the plaintiff has suffered only economic damages.³⁶ Economic damages include both direct and consequential economic losses.³⁷ These losses include those due to inadequate value, repair and replacement costs, lost profits, and diminution in the value of a product due to its inferior quality.³⁸ The definition of economic damages specifically excludes claims for personal injury and for damage to property other than to the seller's product.³⁹ The reason for Illinois courts' exclusion of economic damages in strict products liability cases is that suits for economic damages are more in the nature of contract actions.⁴⁰ Therefore, the Illinois courts' reason that the scheme of remedies under the UCC is the most appropriate form of relief for a plaintiff who suffers only economic damages.⁴¹

B. Legislative Erosion of Privity

In response to judicial erosion of the privity requirement, the drafters of the UCC⁴² codified the courts' prevailing notions of the

The court noted that its holding "coincide[d] with the position taken in section 402A." *Id.* at 187.

36. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 447-50 (Ill. 1982).

37. *Id.* at 449 (citing Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966), and Comment, *supra* note 2, at 541). See JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-2, at 457-58 (3d ed. 1988) (explaining the modern economic loss doctrine in products liability law). See also KEETON, *supra* note 16, § 95, at 678. Prosser's definition of economic damages includes "direct economic loss resulting from the purchase of an inferior product, and indirect loss, such as loss of profits, resulting from the unfitness of the product adequately to serve the purchaser's purposes." *Id.*

38. *Id.*

39. *Moorman*, 435 N.E.2d at 449 (citing Note, *supra* note 37, at 918). Cf. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1977).

40. *Id.*

41. *Moorman*, 435 N.E.2d at 448. Accord KEETON, *supra* note 16, § 95A, at 680. Prosser contended that the UCC "is generally regarded as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself." *Id.* (emphasis in original).

42. The UCC was, and continues to be, a joint drafting venture of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. See AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1962 OFFICIAL TEXT vii - viii (1962) (from "Report #1 of the Permanent Editorial Board of the Uniform Commercial Code"). These bodies have appointed an eleven-member Permanent Editorial Board ("PEB") to continually research problems concerning the UCC. Five of the PEB members are appointees from the American Law Institute and five are appointees from the National Conference of Commissioners on Uniform State Laws. *Id.* at xi. The eleventh member is the Director of the American Law Institute and is also the Chairman of the PEB. *Id.* In addition to its research function, the PEB must report at least every five years on the UCC, and is responsible for proposing revisions to the various articles of the UCC. *Id.*

concept of privity in UCC § 2-318.⁴³ The UCC drafters' conceptualization of products liability law substantially differed from that of Prosser.⁴⁴ They viewed products liability as arising out of the law of sales through a set of implied and express promises, called warranties.⁴⁵ The drafters of the UCC integrated their beliefs regarding the role of privity in products liability law in UCC § 2-318.⁴⁶

The thrust of UCC § 2-318, in its original form, was to embody the "food exception"⁴⁷ and extend it against sellers of all "goods"

at xi - xv. The PEB is also charged with the duty to propose revisions to the UCC when "court decisions have rendered the correct interpretation of a provision of the Code in doubt." *Id.* at xiv.

43. *Id.* at xxvii.

44. See *supra* notes 27-30 for an explanation of Prosser's view of products liability law as part of the law of torts, rather than the law of sales.

45. One commentator has noted that warranty actions are distinguishable from strict product liability actions based on the nature of the defective product. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 18:32, at 37. He states that a strict products liability action is based upon the "defective" and "unreasonably dangerous" status of the product, while a warranty action is based upon the diminished "utility" of the product. *Id.*

Other commentators have distinguished strict products liability and warranty actions on several additional grounds. For example, some writers have noted that, unlike warranty actions, strict products liability actions do not require plaintiffs to give notice of a breach. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 18:33, at 38 (noting that the UCC requires timely notice of breach of warranty); Morris G. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 CASE W. L. REV. 5, 27-29 (1965) (noting that, unlike warranty actions, strict products liability does not require a plaintiff to give notice of defects to seller). See U.C.C. § 2-607(3)(a) (1990).

Additionally, other writers note that a seller cannot disclaim his liability or limit his buyer's remedies under strict products liability, while he may do so, to a limited extent, under warranty law. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 18:33, at 38-39 (seller may disclaim warranties and limit remedies under UCC); Rapson, *supra* note 2, at 709-11 (UCC warranties may be disclaimed while strict tort liability cannot). See U.C.C. §§ 2-316(2)-(3), 2-719 (1990). See also RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1977) (discussing the relationship between strict products actions and warranty actions).

Commentators have also noted the differing statute of limitations for warranty actions and strict products liability actions. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 18:33, at 38-39. The statute of limitations for warranty actions is four years, while strict products liability actions tend to have a shorter statute of limitations (often two years). See U.C.C. § 2-725(1)-(3) (1990). See also Comment, *supra* note 2, at 547-48. Additionally, the statute of limitations for warranty actions begins to run at the time of sale, while the statute of limitations for strict products actions ordinarily begins to run at the time of injury. See, e.g., *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550, 552-56 (Ill. 1974). See also U.C.C. § 2-725(1)-(3) (1990).

46. U.C.C. § 2-318 (1990). The original version of UCC § 2-318 now appears as "Alternative A." For the text of UCC § 2-318, Alternative 4, see *infra* note 50.

47. The 1961 commentary to Illinois Commercial Code § 2-318 stated that the section "codifies prior Illinois decisions." ILL. ANN. STAT. ch. 26, para. 2-318 (Smith-Hurd 1961). The commentary then cites several Illinois cases which rec-

rather than just sellers of food.⁴⁸ Therefore, the section extended both express and implied warranties to a natural person who was injured and a member of the buyer's family or household or guest in the buyer's home.⁴⁹ Thus, the drafters went far beyond the common law exceptions and further eroded the privity requirement.

Twenty nine states continue to adhere to the original form of UCC § 2-318, which is presently known as Alternative A.⁵⁰ The drafters of that section originally intended the section to remain open to developing case law so that it could reflect the courts' rapidly changing conceptions of the privity requirement.⁵¹

The courts and legal commentators have identified two types of privity in discussing the parameters of UCC § 2-318: "vertical" and "horizontal" privity. Vertical privity refers to the existence of a relationship between or among all buyers and sellers in a distributive

ognized a "food exception" to the privity requirement in warranty actions where a buyer's family member suffered an injury. *Id.*

48. "Goods," as defined in the UCC, are "all things . . . which are moveable at the time of identification to the contract for sale." U.C.C. § 2-105(1) (1990). That definition is quite broad and even includes such diverse items as "the unborn young of animals" and "growing crops." *Id.*

49. See U.C.C. § 2-318, Alternative A (1990).

50. Alternative A to UCC § 2-318 provides:

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

U.C.C. § 2-318, Alternative A (1990).

Twenty-nine states have adopted UCC § 2-318 Alternative A. See ALASKA STAT. § 45.02.318 (1956); ARIZ. REV. STAT. ANN. § 47-2318 (1962); ARK. CODE ANN. § 4-2-318 (Michie 1987); CONN. GEN. STAT. § 42a-2-318 (1958); D.C. CODE ANN. § 28-2-318 (1981); FLA. STAT. ch. 672.318 (1941 & Supp. 1990); GA. CODE ANN. § 11-2-318 (Michie 1981); IDAHO CODE § 28-2-318 (1947 & Supp. 1990); ILL. REV. STAT. ch. 26, para. 2-318 (1961); IND. CODE § 26-1-2-318 (1971); KY. REV. STAT. ANN. § 355.2-318 (Michie/Bobbs-Merill 1970); MD. COMMERCIAL CODE ANN. § 2-318 (1975); MICH. COMP. LAWS § 440.2318 (1967); MISS. CODE ANN. § 75.2-318 (1981); MO. REV. STAT. § 400.2-318 (1965); MONT. CODE ANN. § 30-2-318 (1989); NEB. REV. STAT. § 2-318 (1943 & Supp. 1990); NEV. REV. STAT. § 104.2318 (1986); N.J. REV. STAT. § 12A:2-318 (1962); N.M. STAT. ANN. § 50A-2-318 (Michie 1978); N.C. GEN. STAT. § 25-2-318 (1990); OHIO REV. CODE ANN. § 1302.31 (Andersen 1990); OKLA. STAT. tit. 12A, § 2-318 (1963 & Supp. 1990); OR. REV. STAT. § 72.3180 (1988); 13 PA. CONS. STAT. § 2318 (1984); TENN. CODE ANN. § 47-2-318 (1988); WASH. REV. CODE ANN. § 62A.2-318 (1966); W. VA. CODE § 46-2.318 (1966); WIS. STAT. ANN. § 402.318 (1964).

When the Illinois legislature adopted the UCC in 1961, UCC § 2-318, Alternative A was the only option available with respect to the reach of UCC warranties to persons other than the original buyer. See AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1962 OFFICIAL TEXT 100-01 (1962). Since 1961, Illinois has retained that formulation without variation. See ILL. REV. STAT. ch. 26, para. 2-318 (1989).

51. See *infra* note 56 for an analysis of the drafters' intent of UCC § 2-318.

chain.⁵² Thus, the central issue in analyzing vertical privity is determining whether an ultimate buyer may maintain a suit against a party in the distributive chain who is not his immediate seller.⁵³

The second type of privity is horizontal privity. Horizontal privity focuses on the relationship between a defendant and a consumer, user, donee, employee, bailee, bystander, lessee or one whom the product otherwise affects, but who did not obtain the product through the distributive chain.⁵⁴ Thus, the central issue with respect to horizontal privity is determining whether one, other than the first consumer buyer, may maintain a suit against a seller in the distribution chain.⁵⁵ Accordingly, UCC § 2-318 was intended to remain subject to judicial development with respect to vertical privity, but not horizontal privity.⁵⁶

52. See *Knox v. North Am. Car Corp.*, 399 N.E.2d 1355, 1359 (Ill. App. Ct. 1980), *overruled in part on other grounds by Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 594 (Ill. App. Ct. 1987). The *Knox* court stated that "[v]ertical privity includes all parties up the distributive chain from the immediate seller." *Id.* See also WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-318:01, at 421 (1990) (vertical privity is the relationship among all the buyers and sellers within a marketing chain). Note that the terms of section 402A of the Restatement (Second) of Torts removes any remnant of the requirement of privity within the distributive chain in strict products actions. See RESTATEMENT (SECOND) OF TORTS § 402A (1977). For the text of this section, see *supra* note 31.

53. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 21:3, at 13.

54. *Id.* See also PAUL SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER § 9.22, at 280-81 (1981) (concept of horizontal privity is the relationship between the plaintiff and the initial consumer buyer of goods). Section 402A of the Restatement (Second) of Torts removed the requirement of privity between users and consumers not in the chain of distribution and sellers in the chain of distribution, but left open the question of whether bystanders must be in privity. RESTATEMENT (SECOND) OF TORTS § 402A cmt. o (1977).

55. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 21:3, at 13. Thus, "[h]orizontal privity is not, in reality, a state of privity, but rather one of non-privity. The term 'horizontal privity' refers to those who are not in the distributive chain of a product but who, nonetheless, use the product and retain a relationship with the purchaser." *Szajna v. General Motors Corp.*, 503 N.E.2d 760, 765 (Ill. 1986). See WHITE & SUMMERS, *supra* note 37, § 11-2, at 456-57 (both vertical and horizontal privity are *really states of non-privity* under which the law has recognized the non-privity plaintiff's cause of action against a defendant).

Some commentators have noted a third type of privity relationship, which they call "diagonal privity." See, e.g., HAWKLAND, *supra* note 52, § 2-318:01, at 421; Harry G. Prince, *Overprotecting the Consumer? 2-607(3)(a) Notice of Breach in Non-privity Contexts*, 66 N.C. L. REV. 107, 110 n.12 (1987). Diagonal privity focuses on the nature of the relationship between a party in the distributive chain and any ultimate user or person whom the product affects, regardless of whether he was the buyer from a party in the chain of distribution. HAWKLAND, *supra* note 52, § 2-318:01, at 421. Thus, diagonal privity seeks to combine the components of both horizontal and vertical privity. *Id.* ("Diagonal privity involves a combination of horizontal and vertical privity.")

56. Alternative A to UCC § 2-318 deals only with horizontal privity and not vertical privity. The drafters of the UCC wanted only vertical privity to be subject to developing case law on products liability. Thus, the third comment to UCC § 2-318 provides:

In 1974, the Illinois Supreme Court took advantage of this intended flexibility. The court determined that absence of privity between the consumer buyer and the manufacturer (vertical privity) does not, in light of UCC § 2-318, preclude a plaintiff from recovering for personal injuries under the theory of breach of implied warranty.⁵⁷ This move represented a major step away from the common law privity requirement. However, the Illinois courts have refused such suits where the plaintiff alleged only economic damages.⁵⁸ Furthermore, the law in Illinois as to horizontal privity has

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on *whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.*

U.C.C. § 2-318 cmt. 3 (1990) (emphasis added). The *Morrow* Court observed that UCC § 2-318 specifically addresses horizontal privity, but is "totally silent" as to vertical privity. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 287 (Alaska 1976). See also AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 21:1, at 11 (UCC § 2-318 addresses only horizontal privity). But see LEN YOUNG SMITH ET AL., BUSINESS LAW AND THE REGULATION OF BUSINESS 335 (1984) ("[T]he Code . . . sets a minimum beyond which the states may expand through case law. Most states have judicially accepted the Code's invitation to relax the requirements of horizontal privity."); Walter K. Swartzkoph, Note, *Products Liability: Employees and the Uniform Commercial Code, Section 2-318*, 68 DICK. L. REV. 444, 451-53 (1963) (arguing that UCC § 2-318 comment 3 provides an avenue for broadening the classes of third party beneficiaries stated in UCC § 2-318, Alternative A).

Several Illinois courts have interpreted comment three as a license to further "develop" the case law with respect to horizontal privity. See *Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1340 (Ill. App. Ct.) (court may add "employees" to UCC § 2-318, Alternative A classes), *appeal denied*, 545 N.E.2d 134 (Ill. 1989); *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 595 (Ill. App. Ct. 1987) (extending UCC § 2-318, Alternative A protection to include employee of buyer of defective band saw); *Boddie v. Litton Unit Handling Sys.* 455 N.E.2d 142, 151 (Ill. App. Ct. 1983) (in dictum, the court stated that UCC § 2-318, Alternative A can and should include buyers' employees); *Knox*, 399 N.E.2d at 1360 (in dictum, the court noted that buyers' employees may be included under UCC § 2-318, Alternative A).

In addition, other Illinois cases have stretched contract theories to expand warranty protection to plaintiffs who do not neatly fall within the UCC § 2-318 classes of third party beneficiaries. See, e.g., *Rhodes Pharmacal Co. v. Continental Can Co.*, 219 N.E.2d 726, 732 (Ill. App. Ct. 1966) (Under the UCC, court extended implied warranty of fitness for a particular purpose to common law third party beneficiary who was not in horizontal privity with defendant manufacturer); *Collins Co. v. Carboline Co.*, 532 N.E.2d 834, 843 (Ill. 1988) (extending UCC warranty protection to recipient of valid contractual assignment under Illinois Commercial Code § 2-210).

57. *Berry v. G.D. Searle & Co.*, 309 N.E.2d 550, 555-56 (Ill. 1974). For a similar result, see *Kassab v. Central Soya*, 246 A.2d 848, 852-56 (Pa. 1968) (extending UCC warranty liability and protection to all parties in the distributive chain), *overruled on other grounds by*, *AM/PM Franchise Ass'n v. Atlantic Ritchfield Co.*, 584 A.2d 915 (Pa. 1990).

58. *Rothe v. Maloney Cadillac Inc.*, 518 N.E.2d 1028, 1029-30 (Ill. 1988) (lack of privity of contract was defense in UCC warranty action where consumer buyer of automobile sued car manufacturer for direct and consequential economic damages); *Szajna v. General Motors Corp.*, 503 N.E.2d 760, 767 (Ill. 1986)

been turbulent and inconsistent.⁵⁹

In 1966, amidst growing hostility toward the requirement of privity in tort actions,⁶⁰ the Permanent Editorial Board ("PEB") of the UCC amended UCC § 2-318.⁶¹ The PEB added two even broader alternatives to the original section.⁶² The first of these, UCC § 2-318, Alternative B, extends both express and implied warranties to natural persons whom the seller could reasonably foresee that a personal injury would result from the breach of the warranty.⁶³ This alternative differs from Alternative A in that it does not specifically identify which groups are protected by warranties. The second new alternative, UCC § 2-318, Alternative C, is the broadest of the three alternatives. Alternative C extends express and implied warranties to *any* person, natural or artificial, whom the seller could reasonably foresee would suffer *any* injury as a result of a breach.⁶⁴

The PEB's essential purpose in adding these alternatives was to capture recent developments in the case law. These developments reflected the rapid erosion of the privity requirement in sales law.⁶⁵ The PEB maintained three separate alternatives because it felt that states, in addressing the issue, did not have to answer uniformly. Rather, the PEB wanted each state to have flexibility in tailoring its

(refusing to permit warranty action for economic damages where privity of contract did not exist between manufacturer and car buyer); Tokar v. Crestwood Importers, Inc., 532 N.E.2d 382, 385 (Ill. App. Ct. 1988) (where plaintiff alleged only economic damages, lack of privity between plaintiff and car manufacturer was a defense to warranty suit); Spiegel v. Sharp Elecs. Corp., 466 N.E.2d 1040, 1042-43 (Ill. App. Ct. 1984) (lack of privity in suit by ultimate consumer of a copy machine against manufacturer was valid defense to warranty action which sought only economic damages). For a contrary result under Alaska law, see *Morrow*, 548 P.2d at 290-92 (extending implied warranty protection to all parties in distributive chain notwithstanding fact that plaintiff sought only economic damages).

59. See *infra* notes 76-93 and accompanying text for an explanation of the turbulence in Illinois case law as to UCC § 2-318's horizontal privity requirement.

60. At the time of the revision of UCC § 2-318 in 1966, Illinois, for example, was embroiled in a battle against the privity requirement. See, e.g., *Suvada v. White Motors Co.*, 210 N.E.2d 182, 184-88 (Ill. 1965) (abolishing privity requirement in tort law by adopting strict products liability).

61. An additional reason as to why the PEB decided to amend UCC § 2-318 was that it sought to prevent the states from further creating modified versions of that section. HAWKLAND, *supra* note 52, § 2-318:01, at 426. See *supra* note 42 for an explanation of the structure and function of the PEB.

62. See U.C.C. § 2-318, Alternatives B, C (1990). See *infra* notes 67 and 68 for the text of UCC § 2-318, Alternatives B and C.

63. U.C.C. § 2-318, Alternative B (1990).

64. U.C.C. § 2-318, Alternative C (1990).

65. HAWKLAND, *supra* note 52, § 2-318:01, at 426. Also, the PEB wanted to prevent the states from creating additional versions of UCC § 2-318 so that uniformity would be encouraged to the greatest extent possible, even though each state had varying products liability policies. *Id.*

products liability law to meet its needs.⁶⁶ Since 1966, nine states have adopted UCC § 2-318 Alternative B,⁶⁷ and seven states have adopted UCC § 2-318 Alternative C.⁶⁸ Illinois, however, has not adopted either of these alternatives and retains its original codification of UCC § 2-318.⁶⁹

Consistent with the the UCC's erosion of privity, the PEB is presently considering a major revision to Article 2 of the UCC, and UCC § 2-318 is a prime target for change.⁷⁰ The PEB, in conjunction with the American Law Institute and the National Conference of Commissioners on Uniform State Laws, appointed a study group in March, 1988 to determine whether Article 2 of the UCC needed revision.⁷¹ The study group completed and published its prelimi-

66. See AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT xxviii (1972) ("The [Permanent Editorial] Board . . . felt that Section 2-318 . . . is not a section requiring uniformity throughout all American jurisdictions" so it proposed two additional sections to preserve uniformity at a basic level).

67. Alternative B to UCC § 2-318 provides:

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

U.C.C. § 2-318, Alternative B (1990). Nine states have adopted UCC § 2-318, Alternative B. See ALA. CODE § 2-318 (1975); COLO. REV. STAT. § 4-2-318 (1973); DEL. CODE ANN. tit. 6, § 2-318 (1961); KAN. STAT. ANN. § 84-2-318 (1964); N.Y. UCC LAW § 2-318 (Consol. 1971); S.C. CODE ANN. § 36-2-318 (Law. Co-op. 1987); VT. STAT. ANN. tit. 9A, § 2-318 (1966); V.I. CODE ANN. tit. 11A, § 2-318 (1990); WYO. STAT. § 34-21-235 (1990).

68. Alternative C to UCC § 2-318 presently provides:

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

U.C.C. § 2-318, Alternative C (1990). Seven states have adopted UCC § 2-318, Alternative C. See HAW. REV. STAT. § 490-2-318 (1985); IOWA CODE ANN. § 554.2318 (1967 & Supp. 1990); MINN. STAT. ANN. § 336.2-318 (1966); N.D. CENT. CODE § 41-02-35 (1983); R.I. GEN. LAWS § 6A-2-318 (1985); S.D. CODIFIED LAWS ANN. § 57A-2-318 (1988); UTAH CODE ANN. § 70A-2-318 (1990).

Several state legislatures have completely omitted or rewritten UCC § 2-318 to more closely reflect their own state's products liability policies. See, e.g., California: omitted; Maine: MAINE REV. STAT. ANN. tit. 11, § 2-318 (1964 & Supp. 1990) (lack of privity is no defense to a warranty action under the UCC); Massachusetts: MASS. GEN. L. ANN. ch. 11, § 2-318 (West 1990) (lack of privity is not a defense to a UCC warranty action); New Hampshire: N.H. REV. STAT. ANN. § 382A:2-318 (1986) (lack of privity is no defense in warranty action); Virginia: VA. CODE ANN. § 8.2-318 (1950 & Supp. 1990) (lack of privity is not a defense to a UCC warranty action). See *infra* note 142 for the text of the Massachusetts version of UCC § 2-318.

69. ILL. REV. STAT. ch. 26, para. 2-318 (1989).

70. See RICHARD E. SPEIDEL, PRELIMINARY REPORT OF THE ARTICLE 2 STUDY GROUP pt. 3, at 31-32 (1990).

71. *Id.* pt. 1, at 1.

nary report in March, 1990.⁷²

In its report, the study group closely scrutinized the reach of express and implied warranties to third party beneficiaries under UCC § 2-318.⁷³ The study group cited numerous problems with UCC § 2-318 in its present form.⁷⁴ The study group concluded that UCC § 2-318 was "an anachronism" and determined that "a major revision of § 2-318 was required."⁷⁵ Thus, the process of statutory erosion of privity in the law of sales is far from complete. However, it appears that the PEB is contemplating another step towards the complete elimination of the privity requirement in sales law in the near future.

III. ILLINOIS LAW: JUDICIAL MISCONSTRUCTION OF UCC § 2-318 AND GAPS IN THE LAW OF PRODUCTS LIABILITY

The erosion of the privity requirement in tort and sales law has led to judicial misconstruction of UCC § 2-318 and gaps in the law of products liability as a whole. This section examines Illinois courts' misconstruction of Illinois Commercial Code § 2-318. This section then analyzes some of the gaps which Illinois must fill in order to have an integrated body of products liability law. This section concludes that a revision to UCC § 2-318 is necessary to remedy these misconstructions and gaps.

A. Judicial Misconstruction of UCC § 2-318

In an attempt to provide plaintiffs with a remedy where one is needed, the Illinois courts have gone beyond the intended scope of UCC § 2-318, Alternative A. In other words, Illinois courts are extending warranty protection to a broader sphere of horizontal privity plaintiffs than the Illinois legislature intended at the time it adopted UCC § 2-318.

72. *Id.*

73. *Id.* pt. 3, at 31-36.

74. The study group members agreed that a remote seller's express warranties, which "become part of the basis of the [new] buyer's bargain with its seller" should carry over to the new buyer. SPEIDEL, *supra* note 70, pt. 3, at 32. They further agreed that an implied warranty of fitness for a particular purpose would not extend to a remote buyer where the remote seller and remote buyer have not directly bargained. *Id.* pt. 3, at 33. However, the study group split on the issue of whether implied warranties of merchantability may run to third party beneficiaries. *Id.* pt. 3, at 33-35. Some members felt that privity was essential to UCC warranty actions except where the original buyer assigned his rights to a new buyer or where the original seller's express warranty was "part of the basis of the bargain" in the sale to the new buyer. *Id.* pt. 3, at 33-34. Other members posited that privity requirements should be entirely eliminated from UCC § 2-318 because the requirements place unfair and unrealistic obstacles to manufacturers' accountability for their products and to buyers' recovery for economic damages. *Id.* pt. 3, at 34-35.

75. *Id.* at 31-32.

In 1961, Illinois adopted UCC § 2-318, Alternative A,⁷⁶ which was the only option available to the states at that time.⁷⁷ At first, Illinois courts firmly adhered to the language of the relatively narrow section.⁷⁸ Since that time, a number of Illinois courts have expanded the UCC § 2-318 classes of third party beneficiaries of warranties to impose liability on manufacturers apparently trying to avoid unjust results.⁷⁹

A recent case which is representative of Illinois' trend is *Whitaker v. Lian Feng Mach. Co.*⁸⁰ In *Whitaker*, an employee of the purchaser of a band saw was injured while using the saw.⁸¹ The employee sued the manufacturer, the importer and the seller of the

76. The original comment to Illinois Commercial Code § 2-318 states "[t]he first sentence [of UCC § 2-318] codifies prior Illinois decisions." ILL. ANN. STAT. ch. 26, para. 2-318 (Smith-Hurd 1961). See, e.g., *Welter v. Bowman Dairy*, 47 N.E.2d 739, 745-47 (Ill. App. Ct. 1943) (extending implied warranty extended to child of buyer of defective milk). But see *Blarjeske v. Thompson's Restaurant*, 59 N.E.2d 320, 323 (Ill. App. Ct. 1945) (extending implied warranty of quality of food to buyer's unrelated friend).

77. One Illinois court mistakenly reported that Illinois' choice of Alternative A was a conscious and voluntary selection among the three alternatives presently available under UCC § 2-318. *Miller v. Sears, Roebuck & Co.*, 500 N.E.2d 557, 558-59 (Ill. App. Ct. 1986), *overruled by*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987). The *Miller* Court's mistake lies in the fact that the three alternatives did not exist under the heading of UCC § 2-318 until 1966, five years after Illinois adopted UCC § 2-318. See U.C.C. § 2-318 (1990).

78. See, e.g., *Hemphill v. Sayers*, 552 F. Supp. 685, 693 (S.D. Ill. 1982) (college football player's implied warranty suit for personal injury allegedly due to defective football helmet which school purchased from defendant failed because player was not technically within a UCC § 2-318 class); *In re Johns Manville Asbestos Cases*, 511 F. Supp. 1235, 1239-40 (N.D. Ill. 1981) (rejecting plaintiff's argument that he was the functional equivalent of a class stated in UCC § 2-318); *Miller*, 500 N.E.2d at 557-59 (customer of transmission shop was not "functional equivalent" of a "guest," and was not entitled to UCC warranty protection under § 2-318 because he did not fit any of the UCC § 2-318 classes).

79. Several recent Illinois cases have over-analyzed UCC § 2-318 through the use of commentary language intended for expansion of vertical privity, not horizontal privity. See, e.g., *Wheeler v. Sunbelt Tool Co. Inc.*, 537 N.E.2d 1332, 1339-41 (Ill. App. Ct.) (expanding Illinois Commercial Code § 2-318 to include employees as third party beneficiaries of UCC warranties), *appeal denied*, 545 N.E.2d 134 (1989); *Whitaker*, 509 N.E.2d at 594-95 (holding that Illinois Commercial Code § 2-318 comment 3 authorizes the judiciary to read into that section an extension of implied warranty of merchantability to buyers' employees); *Boddie v. Linton*, 455 N.E.2d 142, 151 (Ill. App. Ct. 1983) (third party beneficiary status includes employees of purchasers under Illinois Commercial Code § 2-318); *Knox v. North Am. Car Co.*, 399 N.E.2d 1355, 1359-60 (Ill. App. Ct. 1980), (in dicta, court found buyer's employee within scope of Illinois Commercial Code § 2-318 since he was the "functional equivalent" of guest or family member) *overruled in part by*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d at 594 (Ill. App. Ct. 1987). Cf. R. HENSON, *THE LAW OF SALES* § 6.10, at 250 (1985) (noting the potential for judicial expansion of UCC § 2-318 classes of third party beneficiaries).

80. 509 N.E.2d 591 (Ill. App. Ct. 1987).

81. *Whitaker*, 509 N.E.2d at 592.

saw, under various theories of liability.⁸² The trial court dismissed the employee's warranty counts for lack of privity, and the employee subsequently appealed.⁸³

On appeal, the *Whitaker* Court overruled several prior Illinois cases⁸⁴ and held that UCC warranties extend to a buyer's employees under certain circumstances. Specifically, the *Whitaker* Court held that the warranty would extend to the injured employee if the employee's safety and use of the product were part of the basis of the bargain when the employer purchased the saw.⁸⁵

The *Whitaker* Court based its reasoning entirely on comment 3 to UCC § 2-318⁸⁶ and comment 2 to UCC § 2-313.⁸⁷ The court interpreted those comments as revealing an intent to allow the courts to add classes of horizontal non-privity plaintiffs to those stated in UCC § 2-318, Alternative A.⁸⁸

82. *Id.* The plaintiff in *Whitaker*, asserted several other theories of liability at trial. *Id.* However, these other theories were not material to the *Whitaker* case, since the only issue on appeal was whether an employee of a purchaser had standing to sue the seller on a breach of warranty theory under UCC § 2-318. *Id.*

83. *Id.*

84. The *Whitaker* Court specifically overruled the *Knox* and *Miller* Court's decisions. *Whitaker*, 509 N.E.2d at 594. See *Knox v. North Am. Car Corp.*, 399 N.E.2d 1355 (Ill. App. Ct. 1980), overruled in part by *Whitaker v. Lian Feng Machine Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987); *Miller v. Sears, Roebuck and Co.*, 500 N.E.2d 557 (Ill. App. Ct. 1986), overruled in part by *Whitaker v. Lian Feng Machine Co.*, 509 N.E.2d 591 (Ill. App. Ct. 1987).

85. *Whitaker*, 509 N.E.2d at 595. Illinois courts have upheld the *Whitaker* Court's reasoning and holding as recently as 1989. See *Wheeler v. Sunbelt Tool Co., Inc.*, 537 N.E.2d 1332, 1340 (Ill. App. Ct.) (upholding *Whitaker's* reasoning and applying it to extend UCC warranty to employee of buyer), appeal denied, 545 N.E.2d 134 (Ill. 1989).

86. See *supra* note 56 for the text of UCC § 2-318 comment 3 and a discussion of other courts' and commentators' construction of that comment. The *Whitaker* Court even went so far as to state that "it is apparent that where the comment speaks of 'developing case law' it includes developing case law regarding persons in horizontal privity with sellers." *Whitaker*, 509 N.E.2d at 594.

87. Comment 2 to UCC § 2-313 states in pertinent part that the "warranty sections . . . are not designed . . . to disturb those lines of case growth which have recognized that warranties need not be confined . . . to the direct parties to . . . a contract. . . . Section 2-318 expressly recognize[s] . . . case law development within one particular area. Beyond that the matter is left to the case law. . ." U.C.C. § 2-313 cmt. 2 (1990).

88. In *Whitaker*, the court added "employees" of a buyer of goods as a class of non-privity plaintiffs to those stated in UCC § 2-318, Alternative A. *Whitaker*, 509 N.E.2d at 594-95. Accord R. HENSON, *supra* note 79, § 6.10, at 250 (claiming potential for judicial expansion of third party beneficiaries who may receive UCC warranties); 1 THOMAS M. QUINN, QUINN'S UCC FORMS AND PRACTICE ¶ 2-318, at 2-256 to 2-257 (1987) (warning that UCC § 2-318 should not be taken too literally because courts sometimes construe that section quite liberally); Swartzkoph, *supra* note 56, at 447-53 (arguing that UCC § 2-318 comment 3 can be read to permit courts to extend that section's classes of third party beneficiaries to include buyers' employees). The *Whitaker* Court's reasoning, however, leaves the door open to other broader interpretations of Illinois Commercial Code § 2-318.

However, the *Whitaker* Court's interpretation of the comments is inconsistent with the real intent of UCC § 2-318. The primary goal of UCC § 2-318 is to expressly identify the precise scope of the state's horizontal privity requirement in products liability suits based on UCC warranties.⁸⁹ The commentary to that section was intended to permit state courts control of only vertical privity.⁹⁰

Thus, the *Whitaker* Court deviates from the language and true intent of Illinois Commercial Code § 2-318. The cumulative effect of the *Whitaker* approach is that Illinois courts have adopted UCC § 2-318, Alternative B through judicial fiat.⁹¹ Even though the *Whitaker* Court misinterpreted UCC § 2-318, it does not necessarily follow that the court's goal of providing a needed remedy was an unworthy one.⁹² However, the Illinois legislature is far better

89. See *supra* note 56 and accompanying text for an explanation of the drafter's intent of UCC § 2-318 comment 3.

90. Contrary to the *Whitaker* Court's interpretation, UCC § 2-318 comment 3 merely identifies the fact that the section contemplates no infringement on developing state law regarding the *vertical* privity requirement, or more precisely, the reduction thereof. *Szajna v. General Motors Corp.*, 503 N.E.2d 760, 765-66 (Ill. 1986). Comment 3 of UCC § 2-318 thus identifies the drafters' intent to clearly identify the scope of the state's horizontal privity requirement, and does not provide an avenue for judicial reduction of the horizontal privity requirement of that section.

This point receives additional support from the fact that comment 3 and UCC § 2-318's Alternatives B and C were written in the mid-1960's at a time when state tort law regarding vertical privity was in a state of rapid change. See, e.g., *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1964). Thus, UCC § 2-318 identifies and limits the permissible relaxation of the horizontal privity requirement while expressly recognizing judicial flux in the requirement of vertical privity.

91. The *Whitaker* decision leaves open the question whether the courts may add classes, other than employees, to the terms of UCC § 2-318 through judicial action. However, other courts may easily apply the reasoning of *Whitaker* if they wish to remove the privity barrier beyond that which the Illinois Legislature has authorized through its adoption of UCC § 2-318, Alternative A.

It is interesting to note that only one year prior to *Whitaker*, the same court that handed down the *Whitaker* decision specifically addressed the exact same issue of extending the UCC § 2-318 classes and proclaimed that "[a] court's function is to declare and enforce the law as enacted by the legislature and interpret the language when necessary but not enact new provisions or substitute different ones." *Miller v. Sears, Roebuck & Co.*, 500 N.E.2d 557, 559 (Ill. App. Ct. 1986), *overruled in part by*, *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 594 (Ill. App. Ct. 1987).

92. In fact, like the *Whitaker* Court, a number of other courts have held that other classes of non-privity plaintiffs may be added to those expressly stated in UCC § 2-318, Alternative A. See, e.g., *Speed Fasteners, Inc. v. Newsum*, 382 F.2d 395, 398 n.5 (10th Cir. 1967) (using UCC § 2-318 comment 3 to add classes of third party beneficiaries to that section); *Green v. A.B. Hagglund and Soner*, 634 F. Supp. 790, 794-95 (D. Idaho 1986) (stretching UCC § 2-318 to include corporate buyers' employees); *Hoffman v. A.B. Chance Co.*, 346 F. Supp. 991, 993 (M.D. Pa. 1972) (relying on comment 3 to UCC § 2-318 to reduce the horizontal privity barrier); *Delta Oxygen Co. v. Scott*, 383 S.W.2d 885, 892-93 (Ark. 1964) (including employees under UCC § 2-318, Alternative A); *Barfield*

equipped to pursue the goal of providing remedies for breach of warranties, through its ability to amend Illinois Commercial Code § 2-318 or adopt other UCC § 2-318 alternatives.⁹³

v. Atlantic Coast Line R.R. Co., 197 So. 2d 545, 546-47 (Fla. Dist. Ct. 1967) (no longer requiring privity of contract in an implied warranty cause of action, therefore, employee allowed to sue manufacturer of hose bought by employer); Wheeler v. Sunbelt Tool Co., 537 N.E.2d 1332, 1340 (Ill. App. Ct.) (applying *Whitaker* to extend warranty protection to buyer's employee under UCC § 2-318), *appeal denied*, 545 N.E.2d 134 (1989); Boddie v. Litton Unit Handling Sys. 455 N.E.2d 142, 151 (Ill. App. Ct. 1983) (in dictum, broadening UCC § 2-318, Alternative A to include employees); Knox v. North Am. Car Co., 399 N.E.2d 1355, 1360 (Ill. App. Ct. 1980) (noting, in dictum, that employees may be included under UCC § 2-318, Alternative A), *overruled in part by*, *Whitaker v. Lian Feng Machine Co.*, 509 N.E.2d 591, 594 (Ill. App. Ct. 1987); McNally v. Nicholson Mfg. Co., 313 A.2d 913, 916-23 (Me. 1973) (including employees as donees-beneficiaries within classes of UCC § 2-318 third party beneficiaries); Ciampichini v. Ring Bros., Inc., 339 N.Y.S.2d 716, 718-20 (App. Div. 1973) (employees included within UCC § 2-318); Western Seed Prod. Corp. v. Campbell, 442 P.2d 215, 217, (Or. 1968), *cert. denied*, 393 U.S. 1093 (1969) (noting that pursuant to Oregon's Commercial Code, the court has joined in abolishing the privity requirement in warranty recovery); Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 904-08 (Pa. 1974) (extending UCC § 2-318 coverage to employees by abolishing horizontal privity requirement); Dippel v. Sciano, 155 N.W.2d 55, 62 (Wis. 1967) (authorizing the addition of third party beneficiary classes to those already stated in UCC § 2-318, Alternative A). *Accord* 1 STATE OF NEW YORK LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 412-16 (reprint ed. 1990) (arguing that the UCC was wrong in failing to add "employees" to UCC § 2-318).

In addition, all drafts of UCC § 2-318 between May, 1949 and September, 1950 would have permitted the buyers' employees recovery for breach of warranty. See AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT 104-06 (1949) (text and cmt. 2); AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: SPRING 1950 PROPOSED FINAL DRAFT 122-24 (text and cmt. ed. 1950). However, the drafters of the UCC excluded "employees" from § 2-318 in the spring of 1952. Compare AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: SPRING, 1950 PROPOSED FINAL DRAFT 122-23 (text and cmt. ed. 1950) (comment 3 expressly states that employees fall within § 2-318) with AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1952 OFFICIAL DRAFT (1952) (modified § 2-318 through a subtle manipulation of language resulting in a narrowing of the scope of that section. Additionally, comment 3 states that beyond family, household and guests of the purchaser, § 2-318 is neutral, especially as to employees of a buyer). Thus, it appears that the drafters of the UCC made a conscious decision to exclude employees from the classes entitled to protection under UCC § 2-318.

93. It is desirable that the arbitrary classes established under UCC § 2-318 be expanded under the proper legislative authority. However, judicial activism should be neither a substitute nor a replacement for reasoned state legislative policy determination. See, e.g., *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 342 (Ill. 1990) (stating that the legislature's ability to "hold hearings and determine public policy" made it a more appropriate forum for the adoption of expansive tort theories, such as market share liability).

B. U.C.C. § 2-318 and Strict Products Liability: The Gaps

1. Purely Economic Damages

A major gap between Illinois strict products liability law and Illinois Commercial Code § 2-318 is in dire need of filling. In its most fundamental terms, this gap encompasses persons who are not in privity with the defendant and who have no remedy for purely economic losses⁹⁴ under either sales or tort law in Illinois.

The Illinois courts have refused to extend strict products liability⁹⁵ to provide a remedy for plaintiffs who suffer solely economic losses.⁹⁶ This rule is in accord with that of many other states.⁹⁷ The reasoning for this rule is that the predominant character of the injury sounds in contract rather than in tort.⁹⁸ Furthermore, the courts argue that since a "comprehensive scheme of remedies" exists under sales law for breach of warranty, a plaintiff should avail himself of those remedies instead of relying on strict products liability.⁹⁹ Therefore, the Illinois courts have concluded that recovery

94. See *supra* notes 37-39 and accompanying text for a definition of "economic losses."

95. See *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965). In *Suvada*, the Illinois Supreme Court quoted section 402A of the Restatement (Second) of Torts in adopting strict products liability. *Id.* at 187.

96. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 447-50 (Ill. 1982) (denying recovery of purely direct and consequential economic losses due to defects in a grain storage tank on a strict products liability theory).

Illinois has created an exception to the rule that one suffering only economic loss may not recover under strict products liability in tort. *Vaughn v. General Motors Corp.*, 466 N.E.2d 195, 196-98 (Ill. 1984). This exception is quite narrow, however, and requires that the economic loss occur in a "sudden and calamitous" manner. *Id.* at 196-98. The *Vaughn* Court held that where defective brakes caused the plaintiff's truck to crash, the plaintiff could recover purely economic damages (loss of the vehicle) under a theory of strict products liability although plaintiff alleged no other type of damages. *Id.* at 197.

97. See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 283-86 (Alaska 1976) (strict products liability count properly dismissed where plaintiff sought only economic damages); *Seely v. White Motor Co.*, 403 P.2d 145, 148-51 (Cal. 1965) (stating, in dictum, that strict products liability is applicable only where there has been physical injury to person or property); *Spring Motors Distrib. v. Ford Motor Co.*, 489 A.2d 660, 665-72 (N.J. 1985) (purely economic damages not recoverable under theory of strict products liability). See also Timothy L. Bertschy, *The Economic Loss Doctrine in Illinois after Moorman*, 71 ILL. B.J. 346, 354-55 (1983) (criticizing *Moorman's* bar on non-privity plaintiffs' recovery of economic damages); Bruce W. McGee, Comment, *Implied Warranties and Economic Loss*, 24 BAYLOR L. REV. (1972) (noting that plaintiffs may not recover economic damages under strict products liability as general rule). But see *Santor v. A. & M. Karagheusian, Inc.*, 207 A.2d 305, 312-13 (N.J. 1965) (permitting recovery for economic damages under strict products theory).

98. See, e.g., *Moorman*, 435 N.E.2d at 450 ("The remedy for economic loss . . . lies in contract.").

99. *Kishwaukee Community Health Serv. Ctr. v. Hospital Bldg. and Equip Co.*, 638 F. Supp. 1492, 1502 (N.D. Ill. 1986) (agreeing with *Moorman* that UCC should be the source of remedy in economic loss cases as a general rule); *Moorman*, 435 N.E.2d at 448 (noting that the remedies under the UCC should apply

for these plaintiffs should be under sales law, rather than tort law.¹⁰⁰

Similarly, Illinois sales law bars many would-be plaintiffs from recovering economic damages. Illinois' Commercial Code § 2-318 extends warranty protection to anyone within the product's distributive chain, and also to a buyers' employees, family, household and guests in his household.¹⁰¹ However, none of these groups may sue for purely economic losses unless they are in privity of contract with the defendant. This effect results from the operation of Illinois Commercial Code § 2-318 which permits these groups to recover only for personal injuries.¹⁰² Also, section 2-318 only extends warranties to "natural persons" who fall within its terms.¹⁰³ Thus, the section's negative implication similarly excludes all "artificial persons" from recovering for purely economic losses unless they

to economic loss cases). See Terrance A. Turner, Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 174-76 (1972) (acknowledging the general rule that the law of sales governs actions for economic loss).

100. *Moorman*, 435 N.E.2d at 448. *But cf.* *Morrow v. New Moon Homes*, 548 P.2d 279, 290-92 (Alaska 1976) (barring recovery of economic loss under strict products liability, but permitting non-privity plaintiff's recovery under implied warranty theory); *Moorman*, 435 N.E.2d at 455-57 (Simon, J., specially concurring) (law of contracts should develop a system of sales remedies for non-privity plaintiffs who allege only economic loss).

101. ILL. REV. STAT. ch. 26, para. 2-318 (1989). Note that *Whitaker*, and not Illinois UCC § 2-318, is the reason why UCC warranty protection is extended to employees under that section. *Whitaker*, 509 N.E.2d 591, 594-95 (Ill. App. Ct. 1987).

102. *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028, 1029-30 (Ill. 1988) (non-privity consumer could not maintain a breach of implied warranty action against car manufacturer where he alleged solely economic damages); *Szajna v. General Motors Corp.*, 503 N.E.2d 760, 762-767 (Ill. 1986) (lack of privity of contract between consumer purchaser and car manufacturer barred plaintiff's implied warranty count which sought only economic damages); *Spiegel v. Sharp Elecs. Corp.*, 466 N.E.2d 1040, 1042-45 (Ill. App. Ct. 1984) (lack of privity between purchaser of copier and manufacturer was bar to recovery for economic damages on an implied warranty theory).

Prosser supports this proposition. He states in his treatise on the law of torts that privity should still be a defense to a warranty action where the alleged damages are economic. KEETON, *supra* note 16, § 95A, at 681. He supports this contention "on the theory that the parties should be permitted by contract to allocate the risk of losses as they choose." *Id.*

Alaska has held to the contrary. In *Morrow v. New Moon Homes, Inc.*, the court noted other courts' apparent fear that acknowledging suits for economic loss under warranty theory, absent privity, would make forecasting losses speculative, and make it impossible for manufacturers to insure against risk of losses. *Morrow*, 548 P.2d 279, 290-92 (Alaska 1976). However, the *Morrow* Court stated that such reasoning improperly diverted courts' attention away from the real reason that implied warranties exist in the first place, i.e., to provide protection for the consumer. *Id.* at 291. The court concluded that lack of privity was not a defense to a consumer's implied warranty action for direct economic losses against the manufacturer. *Id.* at 291-92.

103. See ILL. REV. STAT. ch. 26, para. 2-318 (1989).

have contracted with the defendant.¹⁰⁴

The Illinois courts have recognized two situations in which plaintiffs who do not meet section 2-318's requirements may recover economic losses caused by defective products. The first situation occurs where a non-privy plaintiff acquires the product through a valid assignment of the original purchaser's sales contract.¹⁰⁵ The second situation occurs where a non-privy plaintiff is a common law third party beneficiary of the original buyer's contract.¹⁰⁶

104. UCC § 2-318, Alternative C is the only alternative presently available to legislatures if they desire to have warranty protection extended to artificial persons (*i.e.*, corporations) which are not in the chain of distribution. See *supra* note 68 for the text of that section. Similarly, Alternative C is the only alternative which extends protection to include solely economic damages.

105. In Illinois, ILL. REV. STAT. ch. 26, para. 2-210(2) (1989) permits assignment of contracts for the sale of goods unless the parties to the original contract have agreed otherwise. In 1988, the Illinois Supreme Court held that an assignee of an express warranty *acquires* privity of contract with the warrantor and may thus sue for purely economic damages. *Collins Co. v. Carboline Co.*, 532 N.E.2d 834, 843 (Ill. 1988).

However, the *Collins* decision creates an anomaly which must be remedied. It is entirely anomalous that a UCC warranty on a product would be extended to a party if the product is transferred under a technical assignment, but not extended to a party if the goods were received other than through an assignment. The only difference is the lack of payment for the transfer of the product to the subsequent user. However, both parties have the same expectation that the stated warranties or implied warranties will run to the non-privy plaintiff's benefit.

106. Several Illinois courts have held that one may recover purely economic damages for breach of warranty under sales law if he is a common law third party beneficiary of the original sales agreement. *Crest Container Corp. v. R.H. Bishop Co.*, 445 N.E.2d 19 (1982) (where manufacturer knew identity and needs of consumer buyer, and manufactured goods in conformance, consumer could sue manufacturer directly for economic losses); *R & L Grain Co. v. Chicago Eastern Corp.*, 531 F. Supp. 201, 208-209 (N.D. Ill. 1981) (plaintiff was common law third party beneficiary of implied warranty of fitness and could recover economic damages where manufacturer knew of plaintiff's intended use of grain storage bin and knew that plaintiff relied on fitness of bin); *Frank's Maintenance & Eng'r Inc. v. C. A. Roberts Co.*, 408 N.E.2d 403, 412 (Ill. App. Ct. 1980) (where manufacturer knew that product was intended for the plaintiff, and manufacturer delivered goods directly to plaintiff, plaintiff was a common law third party beneficiary and could recover economic losses); *Rhodes Pharmacal Co. v. Continental Can Co.*, 219 N.E.2d 726, 730-32 (Ill. App. Ct. 1966) (plaintiff was intended beneficiary of implied warranty of fitness and could, thus, recover economic losses, notwithstanding UCC § 2-318, from manufacturer who knew plaintiff's intended use of aerosol cans and knew that plaintiff relied on fitness of the cans).

For a somewhat more restrictive view of the common law third party beneficiary exception to UCC § 2-318, see *Altevogt v. Tom Brinkoetter & Co.*, 401 N.E.2d 1302, 1305 (Ill. App. Ct. 1980) (holding that in order for the benefit of implied warranty of habitability to run from third party to original seller, the seller must also have *actually known the identity* of beneficiary). On this point, the *Altevogt* court stated "[t]o extend third party beneficiary status on plaintiffs we would have to be implying an intent to benefit them upon an agreement that was itself implied." *Id.* See also *Spiegel v. Sharp Elecs. Corp.*, 466 N.E.2d 1040, 1044-45 (Ill. App. Ct. 1984). See *infra* note 124 for an analysis of intended beneficiary status in sales of products.

The cumulative result of the above sales and tort rules is that, in Illinois, many persons, natural or artificial, in Illinois cannot sue for economic damages under tort law. Additionally, they may do so under sales law only if they were either the original purchaser, received the goods through a valid contractual assignment, or were an intended beneficiary of the original purchaser's contract. Thus, the following groups have no remedy whatsoever for solely economic injury under any theory in Illinois if they have not directly contracted with the defendant: all of the groups listed in Illinois Commercial Code § 2-318, corporations, recipients of gifts, subsequent purchasers other than assignees, and lessees.¹⁰⁷

The reality is that many plaintiffs cannot avail themselves of the UCC's "comprehensive scheme of remedies" because they are not in privity with the defendants.¹⁰⁸ Such a bizarre result makes it necessary to provide an appropriate remedy for plaintiffs' economic losses when the breach of a warranty invades their economic interests.¹⁰⁹ A plaintiff who has suffered only economic losses should not be subject to a more rigorous privity requirement than one who

107. See *Zanzig v. H.P.M. Corp.*, 480 N.E.2d 1204, 1211 (Ill. App. Ct. 1985). Lessees may become entitled to warranty protection in Illinois if the Illinois Legislature adopts Article 2A of the UCC. See U.C.C. § 2A-216 (1990). However, unless the Illinois legislature adopts UCC § 2A-216, Alternative C, the same result described in the text will occur with respect to lessees.

108. The *Moorman* Court asserted that the UCC remedies should govern economic loss cases rather than requiring the seller to insure against the possibility that his product would injure a consumer. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 448 (Ill. 1982). Aside from the factual inaccuracy of this proposition (*i.e.*, sellers are free to disclaim warranties and limit remedies for economic loss under UCC §§ 2-316 and 2-719), this view controverts the fundamental policy of implied warranties—that sellers should be held accountable for the defects in their products.

109. *Id.* In *Moorman*, Illinois Supreme Court Justice Simon argued in a concurring opinion that "[t]he proper approach is to develop a system of warranties out of privity to protect warranty-like, that is contract-like, interests while using a tort theory to protect tort interests." *Id.* at 457 (Simon, J., specially concurring) (emphasis added). Justice Simon contended that when defective products cause purely economic damages, privity of contract should not be a bar to a suit for those damages under sales law. *Id.* This sound reasoning would mandate a sweeping revision of Illinois Commercial Code § 2-318 to allow for such recovery. Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void*, 67 B.U.L. REV. 9, 35-57 (1987) (arguing in favor of a limited form of strict warranty liability under the UCC to remove the privity barrier in cases which present only economic losses). *But see* *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 675 P.2d 887, 898 (Kan. 1984) (arguing that the privity barrier in warranty actions for economic loss could not be lowered without creating several other problems in the operation of Article 2 of the UCC).

Neither the Illinois courts nor the Illinois legislature have created a remedy for this rather large class of non-privity plaintiffs to which the text, Professor Speidel, and Justice Simon refer. The lack of such a remedy may allow a plaintiff to invoke the Illinois Constitution's provision which mandates the state to provide a "certain remedy" for any injury to person, property, or reputation. ILL. CONST. art. 1, § 12.

has suffered personal injury.¹¹⁰

2. Non-Dangerous Defects

A second major gap in Illinois products liability law is that many non-privy plaintiffs cannot recover damages unless the product is *both* defective and dangerous. As described above,¹¹¹ strict products liability in tort applies only where the product is both defective and dangerous when it leaves the defendant's control.¹¹² Thus, a user or consumer of a defective, although non-dangerous, product¹¹³ may not recover under tort law unless he is in privity with the defendant.¹¹⁴

Also, as described above, the Illinois Commercial Code limits non-privy warranty plaintiffs to a narrow group of individuals who may recover for personal injuries only.¹¹⁵ Thus, Illinois Commercial Code § 2-318 bars these plaintiffs' warranty actions unless they are in a buyer's family or household, or are guests in his home.¹¹⁶ Thus, in Illinois, many recipients of products who are not

110. SPEIDEL, *supra* note 70, pt. 3 at 32. The PEB study group stated that a revision of UCC § 2-318 should impose upon a warranty plaintiff who suffered economic loss the same privity requirement that a warranty plaintiff who suffers personal injury or property damage must meet. *Id.* See also Bertschy, *supra* note 97, at 354-55 (1983) (noting that Illinois' economic loss doctrine in strict products liability law leaves subsequent purchasers with substantially reduced remedies for economic losses).

111. See text accompanying *supra* notes 31-34 for a discussion of the requirements of a strict products liability cause of action.

112. It is critical to note that a strict products liability cause of action requires that a product be both defective *and* dangerous at the time it left the defendant's control. See AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 18:34 at 40. However, an action for breach of warranty *only* requires that the product be defective, and that defect need *not* be dangerous. *Id.* See also William R. Clement, Jr., *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the UCC in Cases Involving Economic Loss, Used Goods, and Non-dangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347, 1358-59 (1982) (plaintiff "does not have to prove that the defective product is dangerous" in a UCC warranty action).

113. The product's defective condition must be the source of its unreasonable danger. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977). The very nature of some products makes them "unavoidably unsafe products" (e.g., vaccines, poisons, etc.). However, these products are not "unreasonably dangerous" *per se* for purposes of strict products liability. *Id.* at cmt. k.

114. See, e.g., *Fanning v. LeMay*, 230 N.E.2d 182, 184 (Ill. 1967) (non-privy plaintiff barred from asserting strict products liability theory against manufacturer of shoes whose soles were highly slippery, although not "dangerous").

115. See *supra* notes 47-50 for a discussion of the scope of non-privy plaintiffs UCC warranties under UCC § 2-318, Alternative A.

116. These plaintiffs may be entitled to warranty protection, however, if they are common law third party beneficiaries or have received the product through a valid contractual assignment. See *supra* notes 105-06 for an explanation of these exceptions to Illinois Commercial Code § 2-318. Note that the *Whitaker* Court added "employees" to the list in the text of Illinois Commercial Code § 2-318. See *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 595 (Ill. App. Ct. 1987).

in privity with the original seller, have no protection if the product is merely defective, although not unreasonably dangerous.

Beneficiaries of UCC warranties deserve a remedy for injuries caused by defective but non-dangerous products.¹¹⁷ These groups may even have a state constitutional right to a remedy for such injury under the Illinois Constitution, which guarantees a certain remedy for every violation of a right.¹¹⁸ However, if plaintiffs do not neatly fall within one of the UCC § 2-318, Alternative A classes they will, at present, have no remedy under either tort or sales law.

Many non-privity plaintiffs are, therefore, currently denied a cause of action under either strict products liability or under the UCC warranty provisions for damages resulting from non-dangerous, but defective goods. Thus, the legislature should amend Illinois Commercial Code § 2-318 to permit a broader class of non-privity plaintiffs to recover for damages caused by non-dangerous, but defective goods. Such an amendment would ideally extend such warranty protection to any ultimate user or consumer, privity notwithstanding.

IV. SOLUTIONS

Illinois needs a legislative remedy to solve the problems of judicial misconstruction of § 2-318 of non-dangerous defects cases, and economic damages cases. This section first discusses three possible solutions to the problem of judicial misconstruction of section 2-318 and the problem associated with many non-privity plaintiffs' inability to recover damages caused by non-dangerous defects. This section then discusses three potential solutions to the economic damages problem.

There are three possible solutions to the problems of judicial misconstruction of section § 2-318 and of non-recovery in non-dangerous defects cases. Each of these solutions engender a significant expansion of the existing classes of third party beneficiaries in section 2-318. Expanding these classes will serve two fundamental policy concerns. One policy concern is the reconciliation of inconsistencies between decisional law and the statutory language

117. See Clement, *supra* note 112, at 1358-59 (noting the inability of non-privity plaintiffs to sue for defective, although non-dangerous products). Cf. AMERICAN LAW OF PRODUCT LIABILITY, *supra* note 4, § 18:32, at 37 (noting that strict products liability is based upon the "defective" and "unreasonably dangerous" status of a product, while warranty actions are based on diminished "utility" of product).

118. ILL. CONST. art. 1, § 12 (1970). See *supra* note 109 for further discussion regarding a possible constitutional violation.

of Illinois Commercial Code § 2-318.¹¹⁹ The other policy concern is the creation of a remedy for plaintiffs who justly deserve one.¹²⁰

The first, and most limited, solution would be a legislative amendment to Illinois Commercial Code § 2-318 to add "employees" to the existing classes of third party beneficiaries under that section.¹²¹ At present, the Illinois courts have added buyers' employees to section 2-318 through judicial fiat.¹²² The Illinois legislature should, at the very least, reflect this addition in the text of Illinois Commercial Code § 2-318.¹²³

The second solution would be a legislative amendment to extend warranty protection to any "ultimate user." Ultimate users are the real beneficiaries of implied warranties, even though the seller may not know the precise identity of the ultimate user.¹²⁴ Thus, an amendment which adopts this broader third party benefi-

119. See *supra* notes 76-93 and accompanying text for an analysis of the present inconsistency between Illinois decisional law and Illinois Commercial Code § 2-318.

120. A recent judicial trend towards expanding Illinois Commercial Code § 2-318 classes emphasizes the fact that providing a remedy to many plaintiffs whose expectational interests are violated when sellers breach their express and implied warranties is a valid policy concern. See *Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1339-41 (Ill. App. Ct.) (Illinois Commercial Code § 2-318 expanded to include employees), *appeal denied*, 545 N.E.2d 134 (1989); *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 594-95 (Ill. App. Ct. 1987) (Illinois Commercial Code § 2-318 permitted employee to recover for seller's breach of plaintiff's employer's warranty); *Boddie v. Litton Unit Handling Sys.*, 455 N.E.2d 142, 151 (Ill. App. Ct. 1983) (ultimate buyer's employees included); *Knox v. North Am. Car Co.*, 399 N.E.2d 1355, 1359-60, (Ill. App. Ct.) (in dicta, buyer's employee within scope of Illinois Commercial Code § 2-318 as he was the "functional equivalent" of guest or family member), *overruled in part by Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 594 (1987). The *Boddie* Court boldly stated that "third party beneficiary status can and should be expanded to include employees of ultimate purchasers even under the restrictive section 2-318 adopted in Illinois." *Boddie*, 455 N.E.2d at 151.

121. The three statutory classes of third party beneficiaries to UCC warranties which presently exist in Illinois are the original buyer's family, household, and guests in his home. ILL. REV. STAT. ch. 26, para. 2-318 (1961).

122. See *supra* note 120 for a summary of the Illinois cases responsible for extending Illinois Commercial Code § 2-318 to include "buyers' employees."

123. Florida has chosen to amend UCC § 2-318 in this manner. FLA. STAT. ch. 672.318 (1967 & Supp. 1990). The Florida amendment to UCC § 2-318 adds "employees," "servants," and "agents" of the buyer to the standard classes of third party beneficiaries already in Alternative A. *Id.*

124. See *supra* note 106 for a compilation of Illinois law with respect to the treatment of common law third party beneficiaries in products liability law. The "ultimate user" is an intended, or at least contemplated, beneficiary of implied warranties in the original sale of a product. The Restatement (Second) of Contracts offers significant support for this proposition.

The Restatement (Second) of Contracts § 302 provides that "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979). Not surprisingly, the Restatement specifically notes that section 302 in-

ciary class would be consistent with recent case law interpreting Illinois Commercial Code § 2-318.¹²⁵ This solution would also reduce the arbitrary lines which Illinois Commercial Code § 2-318 draws between a buyer's family, household and guests in his home, and other classes of ultimate users of the product.¹²⁶ Further, this amendment would give statutory recognition to, and thus legitimize, Illinois' divergent trend with respect to "employees" under

cludes the classifications noted in UCC § 2-318. RESTATEMENT (SECOND) OF CONTRACTS § 302, cmt. d, illus. 15 (1979).

Once an individual falls within the section 302 class of intended beneficiaries, a duty arises in the promisor to perform his promise for the benefit of the beneficiary. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1979). The intended beneficiary also has a right to enforce the promise directly against the promisor. *Id.* Of particular note, the Restatement does not require that an intended beneficiary be identified at the time of contracting to qualify as an intended beneficiary. § 308. Thus, to summarize, the Restatement takes the position that one is a third party beneficiary of a contract where it appears that the parties to the contract intended the benefit of the contract to run to the beneficiary even though he has not been specifically identified.

This concept is likewise applicable in the context of UCC express and implied warranties by analogy, or through the use of UCC § 1-103, which introduces into the UCC principles of common law which the UCC has not superceded. See ILL. REV. STAT. ch. 26, para. 1-103 (1961). For example, a seller's implied promise that the goods are "merchantable" is essentially a promise which the seller makes to the ultimate user or consumer of goods. Cf. Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void*, 67 B.U. L. REV. 9, 42-44 (1987) (arguing that UCC warranty provisions may be interpreted to extend implied warranties to foreseeable purchasers). One New York court commented on the reach of implied warranties to ultimate users, and stated that "interpretation of the implied warranty rule [was] that an obligation is imposed by law upon one who impels the wrong and that the *ultimate consumer* . . . has a cause of action against the violator privity notwithstanding." *Welch v. Schiebelhuth*, 169 N.Y.S.2d 309, 314 (1957) (emphasis added). Anyone who intimates that the ultimate user is not an intended beneficiary of the promise of merchantability is guilty of: 1) ignoring the reality of modern product distribution, 2) exalting the formalistic and irrelevant specific identification of the third party beneficiary over the substance of transactions in consumer goods, and 3) denying consumers an adequate remedy against profitters who dump their defective products on the public while insulating themselves from liability with a multi-level distribution scheme. Cf. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 457 (Ill. 1982) (Simon, J., specially concurring).

Thus, the implied warranties of the UCC should extend to the ultimate user through an amended version of UCC § 2-318 which removes the privity barrier to "ultimate users." These individuals are the ones whom the parties to the contract impliedly intended the ultimate benefit of the warranties to attach and protect. Such a revision would be, in essence, analogous to the formulation used in RESTATEMENT (SECOND) OF TORTS § 402A (1967). That section allows "users or consumers" to bring suit under strict products liability theories notwithstanding any notion of privity of contract. *Id.*

125. See *supra* note 120 for a summary of Illinois cases indicating this intent.

126. The arbitrary nature of the third party beneficiary classes in UCC § 2-318, Alternative A becomes more clear when, for some reason, the court cannot allow a strict products liability count (*e.g.*, where the product is defective, but not dangerous, where plaintiff seeks only economic damages, where the tort statute of limitations has run, etc.). One Illinois case illustrates the stark injustice of the arbitrary lines which UCC § 2-318 draws between buyers' family,

the Illinois Commercial Code.¹²⁷

The third way in which the legislature could remedy the courts' misconstruction of Illinois Commercial Code § 2-318 and the non-dangerous defect problem would be to adopt the type of third party beneficiary classes identified in UCC § 2-318, Alternatives B and C.¹²⁸ Those formulations extend warranty protection to non-privity plaintiffs who "may reasonably be expected to use, consume or be affected by the goods."¹²⁹ Doing so would give courts express permission to make determinations as to the appropriate reach of UCC warranties to non-privity plaintiffs beyond the original buyer. However, such an amendment may have a broader reach than recent Illinois cases interpreting Illinois Commercial Code § 2-318.¹³⁰

The Illinois legislature must also remedy the economic damages problem. Like the preceding section, the following set of potential solutions would significantly expand the ability of non-privity plaintiffs to recover economic damages.¹³¹ These solutions would serve the important policy concern of providing a meaningful remedy for deserving consumers who currently have no remedy under Illinois law.¹³² There are three ways in which Illinois could achieve this result.

household, or guests in his household, and individuals who do not fit those classes. See *Hemphill v. Sayers*, 552 F. Supp. 685 (S.D. Ill. 1982).

In *Hemphill*, a football player was injured when a defect in his helmet allegedly caused severe injury to his cervical spine. *Id.* at 685-86. The football player sued various school officials and the manufacturer of the helmet on negligence, implied warranty, and strict products liability counts. *Id.* at 687. The court dismissed the strict products liability counts for various reasons. *Id.* When the court addressed implied warranty counts, it simply dismissed them on the ground that the plaintiff could not recover since he did not fit neatly within an Illinois Commercial Code § 2-318 class. *Id.* at 690-93. Thus, plaintiff's entire cause of action was left to the possibility that he might be able to recover on a single negligence count which the court granted him leave to refile. *Id.* at 694. Although the court was correct in adhering to the language and intent of Illinois Commercial Code § 2-318, the result of the court's proper application of that statute was unquestionably a bitter one for the plaintiff.

127. Maryland has followed this suggestion and has amended and expanded the classes of beneficiaries under § 2-318, Alternative A to include the "ultimate user or consumer" of the goods or persons whom the goods affect. MD. COMMERCIAL CODE ANN. § 2-318 (1975).

128. See *supra* notes 67-68 for the full texts of UCC § 2-318, Alternatives B and C.

129. U.C.C. § 2-318, Alternatives B, C (1990).

130. At present, Illinois courts have only expanded Illinois Commercial Code § 2-318 by including "employees". See *supra* note 120 for the cases which broaden the scope of Illinois Commercial Code § 2-318.

131. See *supra* notes 37-39 and accompanying text for the definition of economic damages, and see *supra* notes 94-110 and accompanying text for an examination of the economic damage problem in Illinois products liability law.

132. See *supra* notes 94-110 and accompanying text for an analysis of the non-privity plaintiffs' inability to recover economic damages under Illinois' products liability law.

First, Illinois could recognize the recovery of purely economic damages in strict products liability actions.¹³³ However, doing so would cut against the trend in modern strict products liability law toward barring recovery of purely economic damages.¹³⁴ Thus, judicial alteration of this settled rule is unlikely, since Illinois is firmly entrenched in its belief that sales law should govern claims for purely economic damages.¹³⁵

The second solution would require the Illinois legislature to revise section § 2-318, Alternative A, which currently extends warranty protection to third party beneficiaries who seek recovery for personal injury only.¹³⁶ This revision would require the removal of the words "in person" which follow the word "injured." This revision would effectively permit a non-privity plaintiff to recover direct and consequential economic damages under the UCC warranty provisions.¹³⁷ This revision would preserve most of the present structure of section 2-318, yet would effectively fill a considerable portion of the economic damages gap.¹³⁸

The third solution to the economic damages problem would be Illinois' adoption of UCC § 2-318, Alternative C.¹³⁹ That section expressly permits any reasonably foreseeable plaintiff to recover for *any* injury which was proximately caused by a breach of war-

133. Allowing a plaintiff to recover solely economic damages in strict product liability actions would require a reversal of *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982). A minority of jurisdictions have permitted recovery of purely economic losses under strict products liability theory. *See, e.g., Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 310 (N.J. 1965) (permitting plaintiff's suit for recovery of economic losses against manufacturer under implied warranty theory, despite a lack of privity); *LaCrosse v. Schubert, Schroeder & Assoc.*, 240 N.W.2d 124, 127 (Wis. 1976) (recognizing recovery of purely economic losses in strict products liability).

134. *See, e.g., Seely v. White Motor Co.*, 403 P.2d 145, 150-51 (Cal. 1965) (refusing to allow a strict products liability cause of action where plaintiff alleged only economic damages); *Moorman*, 435 N.E.2d at 445-49 (Illinois court holding that economic losses should be recoverable under contract, not tort law).

135. *See supra* notes 96-100 and accompanying text for a discussion of the Illinois courts' entrenchment in their belief that sales law must control suits for solely economic damages.

136. *See supra* note 50 for the full text of UCC § 2-318, Alternative A.

137. Several states have omitted the words "in person" from its versions of UCC § 2-318, thus indicating that the requisite "injury" can include injury to a person, his property, or his economic interests. *See DEL. CODE ANN. tit. 6, § 2-318* (1974); *S.D. CODIFIED LAWS ANN. § 57A-2-31S* (1988); *WYO. STAT. § 34.1-2-318* (1991).

138. Note, however, that the changes proposed in the text would extend warranty protection for purely economic loss only to the third party beneficiary classes provided in Illinois Commercial Code § 2-318. In order to completely fill the economic damages "gap" it would be necessary to *both* expand the classes of third party beneficiaries *and* remove the words "in person" following "injured" in Illinois Commercial Code § 2-318.

139. *See supra* note 68 for the full text of UCC § 2-318, Alternative C.

ranty.¹⁴⁰ The Illinois legislature's adoption of UCC § 2-318, Alternative C would unambiguously give plaintiffs a remedy for purely economic injuries in sales law where the Illinois courts have demanded that it remain.¹⁴¹ This appears to be the most complete solution since it would resolve the problem of judicial misconstruction of section 2-318, the problem of non-recovery in non-dangerous defects cases, *and* the problem of non-privity plaintiffs' inability to recover economic damages.

To summarize, the basic solutions which this section proposes should serve as the framework for the Illinois legislature's revision of Illinois Commercial Code § 2-318. Fundamentally, the revisions should create a broadened class of third party beneficiaries who may recover for both non-economic and economic losses under a UCC breach of warranty theory.¹⁴² If the Illinois legislature chooses to make such a revision, Illinois products liability law as a whole will be more cohesive and the antiquated concept of privity in products liability law will be one step closer to extinction.

140. See U.C.C. § 2-318, Alternative A (1990).

141. See *Kishwaukee Community Health v. Hospital Bldg. and Equip. Co.*, 638 F. Supp. 1492, 1502 (N.D. Ill. 1986) (noting the strong Illinois policy that contract law alone governs warranty actions which allege only economic damages); *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 448 (Ill. 1982) (holding that sales law provides warranty plaintiffs with their sole remedy when they allege only economic loss).

142. Based on the potential solutions stated in the text, a possible rewritten Illinois Commercial Code § 2-318 might appear as follows:

A seller's warranty, whenever express or implied, shall extend to any person, natural or artificial, who is an ultimate user or consumer of the warranted goods and who is injured by a breach of the warranty. For the purposes of this section no distinction shall be made between injury to the person, injury to property, and direct or consequential economic injury. A seller may not exclude or limit the operation of this section.

The Illinois legislature should not fear deviating from or even rewriting UCC § 2-318 since doing so will ultimately serve Illinois' public interests. In fact, the PEB has even stated that "Section 2-318, which has been non-uniformly amended in a number of states and entirely omitted in California and Utah, is a section not requiring uniformity throughout all American jurisdictions." AMERICAN LAW INST. & NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT xxvii (1972) (from "Report No. 3 of the Permanent Editorial Board of the Uniform Commercial Code").

The Massachusetts version of UCC § 2-318 is another prime example of a state legislature's unilateral variation of that section to fulfill its state policy concerns:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor, or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods.

MASS. GEN LAWS. ANN. ch. 11, § 2-318 (West 1990).

V. CONCLUSION

This comment illustrates the necessity for a major revision of Illinois Commercial Code § 2-318. The Illinois legislature should revise that section, keeping in mind the recent judicial misinterpretation of § 2-318, the existing gaps in products liability law, and public policy concerns. The revised version should expand the classes of third party beneficiaries and should expand the recoverable damages to include personal injury, property damage, *and* direct and consequential economic losses. Illinois could achieve the same results by adopting UCC § 2-318, Alternative C.

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