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Georgia's New Statutory Liability for Manufacturers: An Inadequate Legislative Response

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GEORGIA'S NEW STATUTORY LIABILITY FOR MANUFACTURERS: AN INADEQUATE LEGISLATIVE RESPONSE

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INTRODUCTION

DURING its 1968 session the Georgia Legislature passed a bill intending to create a right of action in tort, independent of negligence, in favor of consumers, users or other foreseeably affected parties against manufacturers of defective products. While Georgia has been in need of judicial or legislative action in this realm, it is the author's thesis that the recently enacted statute is unsatisfactory and should be redrafted.

The purpose of this article is as follows: (1) To describe and trace historically the problems which have been encountered in providing legal protection to the individual for injury caused by defective goods; (2) to describe briefly recent developments in other jurisdictions related to the problem; (3) to describe the provisions and potential effects of the new Georgia statute; (4) to examine the weaknesses of the statute and potential harms which may result from it; (5) and to suggest revisions which might be considered.

BACKGROUND—A HISTORY OF THE PROBLEM

In recent years many American courts and legislatures have begun to realize the need for protecting the public against defectively manufactured consumer goods since traditional theories have not provided adequate protection. Prior to 1778 recovery had been limited exclusively to tort, but in that year the buyer was allowed to proceed under a contract theory.[1] Accordingly, a person who was injured by a defective good could pursue a remedy based either upon an action for breach of warranty, which after 1778 came to be viewed as grounded in general contract law, or an action in tort for negligence.

Because the warranty action was grounded in contract, the plaintiff and defendant had to be in privity of contract. Thus, only the buyer could recover for breach of warranty, and his right to recovery was

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1 *See* Stuart v. Wilkins, 99 Eng. Rep. 15 (K.B. 1778); W. PROSSER, THE LAW OF TORTS § 95, at 651 (3d ed. 1964).

limited to his immediate seller. Also being founded upon contract principles, the notion of freedom of contract, which prevailed so unbridled during the nineteenth and first half of the twentieth century, allowed the seller in advance to contractually disclaim his warranty liability to the buyer.[2]

The tort remedy was also inadequate for an injured party. Again, though conceptually questionable, the concept of privity crept into tort law. *Winterbottom v. Wright*[3] evidenced the origin of the requirement in this context. In that case the defendant contracted to keep certain coaches in repair. Plaintiff, an employee of the other party to the contract, knew of the contract and relied upon the defendant's obligation under it when he agreed to drive the coach. As a result of the defendant's failure to keep the coach in repair, plaintiff was injured. The court denied liability to the plaintiff since no privity existed.

From this beginning, the principle evolved that a manufacturer or seller assumed liability for injuries resulting from defective goods only to those parties with whom he had contracted. The basis for this view was a determination that a manufacturer or other seller of goods owed no legal duty regarding the quality of the goods to anyone other than his immediate buyer.[4]

One of the several reasons offered as justification for the privity requirement was legal causation, which had been used as a rather arbi-

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[2] Two other serious problems were present when a warranty theory of liability was relied upon: (1) notice of the defect to the defendant-seller within a reasonable time after the breach and (2) the election of remedies doctrine, under which rescission of the contract would preclude later suit on the contract. Because a breach of warranty suit was an action on the contract, it also was precluded by a rescission. *See, e.g.*, Henry v. Rudge & Guenzel Co., 118 Neb. 260, 224 N.W. 294 (1929) (defective shoes returned and replaced thereby barring subsequent recovery for personal injuries caused by defect).

[3] 10 N. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). For a critical examination of *Winterbottom v. Wright*, see Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 273, 281-86 (1905).

[4] One clear indicator that the privity requirement is an after-effect of the "no-duty to non-immediate buyers" is the wording of GA. CODE ANN. § 105-106 (1956), *as amended* [1968] GA. LAWS, 166-67:

> No privity is necessary to support an action for tort; but if the tort results from the violation of a duty, itself the consequences [*sic*] of a contract, the right of action is confined to the parties and privies to that contract, except in cases where the party would have had a right of action for the injury done independently of the contract. . . .

This same statement also appeared in § 105-106 of the Georgia Code of 1933; § 4408 of the Code of 1911; § 3812 of the Code of 1895; § 2956 of the Code of 1882; § 2905 of the Code of 1867; § 2899 of the Code of 1861. From this statement it is clear that lack of legally recognized duty rather than the privity requirement was the basis for not holding a manufacturer or seller liable to a non-immediate buyer.

trary means of limiting civil liability. The basis for this explanation of the privity requirement was the concept that the seller's conduct was not the legal cause of an injury to any person other than his immediate buyer. In other words, direct causation required a buyer-seller relationship, and injury to one other than the buyer was said to be beyond the realm of reasonable foreseeability.[5] Probably, the real explanation for the requirement was a desire to protect the emerging nineteenth century manufacturing industries.

As generally occurs prior to abandonment of any legal doctrine, exceptions to the privity requirement in tort began developing. The exceptions arose as manufacturing interests became stronger and more stable. The first exception was derived from ordinary tort concepts reinforced by the concept of fraud, and can be stated as follows: If the seller knew or had reason to know that the good would be dangerous for its intended use and failed to disclose such danger to the buyer, then the seller incurred liability to any third person injured as a result of the use of the good.[6] For example, *A* manufactured a rifle which he knew to be defective and sold it to *B*. The rifle exploded while being used by *B*. *C* was injured as a result of the explosion. *B* was in privity with *A* and thus could maintain an action in tort against *A*. *C* was also allowed, under the newly-developed exception to the privity requirement, to maintain successfully a tort action against *A*. Another, and actually the most important, exception to the privity requirement was that if a seller sold a good "inherently dangerous to human safety," he could be held liable in tort by injured third parties not in privity with him.[7] This category of "inherently dangerous goods," while not being precisely described was held to include drugs, food, firearms, explosives and other like goods.[8]

Finally in 1916 a breakthrough came in the landmark case of *MacPherson v. Buick Motor Co.*[9] The New York Court of Appeals, speaking through Justice Cardozo, struck the death knell to the privity requirement in tort actions. In *MacPherson*, a tort action based upon negli-

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5 *See* W. PROSSER, *supra* note 1, at 658-59.

6 *See, e.g.*, Woodward v. Miller, 119 Ga. 618, 46 S.E. 847 (1904); Bright v. Barnett & Record Co., 88 Wis. 299, 60 N.W. 418 (1894).

7 This exception is generally said to have originated in Thomas v. Winchester, 6 N.Y. 397 (1852).

8 *See* Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118 (1889) (drugs); W. PROSSER, *supra* note 1, at 660.

9 217 N.Y. 382, 111 N.E. 1050 (1916).

gence was brought against the manufacturer of an automobile for personal injuries which resulted when a defective wheel collapsed. The court held the manufacturer liable relying simply on an extension of the "inherently dangerous" rule.[10] The extension, which in effect ended the general rule requiring privity, included within the category of "inherently dangerous" any good which would be dangerous if negligently made. The *MacPherson* decision did not go beyond extending to the ultimate purchaser a legal action against the manufacturer.[11] In other words, *MacPherson* was addressed only to the abolition of the

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10 *Id.* at 390-91, 111 N.E. at 1053.

11 Some jurisdictions have distinguished between situations in which the intermediate seller sold with notice of the danger and those where he sold without notice. Where the intermediate seller sold with notice of the danger, a majority of jurisdictions, utilizing proximate cause reasoning, have insulated the prior seller from liability to the purchaser. *See, e.g.*, E. I. DuPont De Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954); Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P.2d 100 (1936). *See also* W. PROSSER, *supra* note 1, at 670. Other jurisdictions have not viewed the manufacturer as receiving such insulation. *See, e.g.*, Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S.W. 570 (1925).

Georgia apparently follows the majority position on this point. *Cf.* Harley v. General Motors Corp., 97 Ga. App. 348, 103 S.E.2d 191 (1958). In *Harley* the court explained:

> Upon discovery of the defect, the . . . [purchaser] took the automobile to the defendant Walton Pontiac Company for the purpose of having the defect repaired and corrected and Walton Pontiac Company returned the automobile to the father representing that the defect had been corrected and repaired. The plaintiff's injuries occurred subsequently, therefore, those injuries were not proximately caused by any negligence of General Motors Corporation in manufacturing a latently defective automobile but by the negligence, if any, of Walton Pontiac Company in failing to repair the defect.

Id. at 351, 103 S.E.2d at 194. Even though in *Harley* the defect may not have been discovered until after the sale by Walton, though the plaintiff alleged otherwise, the court stated the following rule, which seems to indicate Georgia's acceptance of the majority position: "Once the defect was discovered and the dangerous condition of the defective machine became apparent, that discovery insulated the manufacturer from any damages resulting from its manufacture of a latently defective machine." *Id.* Thus, apparently the time of discovery of the defect is immaterial for the purpose of insulating the manufacturer from liability. In General Motors Corp. v. Jenkins, 114 Ga. App. 873, 152 S.E.2d 796 (1966), the view on the manufacturer's insulation from liability was altered to some degree. The court declared:

> Where a vehicle is brought to an automobile dealer by its owner for the purpose of having it repaired and the owner reveals to the dealer the fact that there is a dangerous defect in the vehicle, the failure of the dealer to discover and correct the defect when he could have done so by the exercise of ordinary care relieves the manufacturer of liability, *unless the manufacturer should have foreseen that a dealer might fail to discover and remedy the defect by the exercise of ordinary care.*

Id. at 876, 152 S.E.2d at 799 (emphasis added). As to the intermediate seller's duty to discover the defect, see King Hardware Co. v. Ennis, 39 Ga. App. 355, 147 S.E. 119 (1929).

requirement of vertical privity[12] in tort cases. Later cases, utilizing the rationale of the *MacPherson* decision, destroyed the horizontal privity requirement in tort enabling persons other than buyers to recover. These cases extended the *MacPherson* rule to the employees of purchasers and other users of the good, to members of the purchaser's family, to subsequent second-hand purchasers and finally to by-standers within the foreseeable ambit of the risk. Ultimately, the principle was extended to cover property damage to the purchaser and third parties resulting from the defective good.[13]

Even after relaxation of the privity requirement, the legal protection extending to consumers and others injured as a result of defective products was less than satisfactory. In order to recover in tort the injured party still had to prove negligence, which often proved to be an extremely difficult, if not impossible, task.[14] Although the doctrine of *res ipsa loquitur* had the potential of solving the problem of proof and providing a solution in some cases,[15] it generally proved unsatisfactory. In many instances the injured party was required to sustain the often impossible task of proving that the defect in the product had not been caused by him or some person other than the defendant.[16] Furthermore, since the plaintiff often would be unable to discover or establish any details concerning the history of the product, the defendant was sometimes able to produce a convincing and determinative case showing the exercise of due care.[17]

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12 *See* text accompany notes 24-40 *infra*.

13 *See* W. PROSSER, *supra* note 1, at 660-63.

14 *See, e.g.*, Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960); James, *Products Liability*, 34 TEXAS L. REV. 44, 68-77 (1955). *See generally* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 7 (1960); Noel, *Manufacturer's Negligence of Design or Directions For Use of a Product*, 71 YALE L.J. 816 (1962). The jury in *Peterson* returned a verdict for the defendant on the question of negligence in an action by a corporate employee against the manufacturer of an abrasive wheel for injuries sustained when during normal use by the employee the wheel "blew up" or disintegrated causing serious injuries. *Gottsdanker* involved a suit brought on behalf of two children who contracted poliomyelitis shortly after being inoculated with Salk vaccine manufactured by the defendant. In spite of substantial evidence to sustain a finding that the vaccine contained living virus of poliomyelitis, and that the injected vaccine caused the disease in each child, the jury found no negligence on the part of the defendant-manufacturer.

15 *See, e.g.*, Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912).

16 *See* W. PROSSER, *supra* note 1, at 671-72. *See generally* Ashe, *So You're Going to Try a Products Liability Case*, 13 HASTINGS L.J. 66 (1961).

17 W. PROSSER, *supra* note 1, at 672.

RECENT TRENDS AND DEVELOPMENTS

Strict Liability in Tort

Once the tort privity requirement was destroyed, a few jurisdictions began to extend limited recognition to a strict liability tort theory.[18] At first those few jurisdictions recognizing the doctrine of strict liability held it applicable only to cases involving injury resulting from defective products of such a nature that would foreseeably receive intimate bodily use.[19] Then, as described by Professor Prosser, the "real bursting of the dam"[20] occurred in Michigan in 1958 in *Spence v. Three Rivers Builders & Masonry Supply, Inc.*[21] *Spence* extended the strict liability theory to include defective cinder blocks which caused the user's house to collapse. Thereafter, all strict liability cases involved physical property damage or personal injuries. Then in 1965 another major breakthrough occurred. In *Santor v. A & M Karagheusian, Inc.*,[22] the strict liability theory was extended to allow recovery for loss of bargain. The buyer, although incurring no personal injury or property damage, was allowed to recover directly against the manufacturer for the loss of value of defective carpeting.[23]

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18 *Id.* at 674-76.

19 *See, e.g.*, Wright v. Carter Products, Inc., 244 F.2d 53 (2d Cir. 1957) (deodorant) Braun v. Roux Distrib. Co., 312 S.W.2d 758 (Mo. 1958) (hair dye).

20 W. PROSSER, *supra* note 1, at 677.

21 353 Mich. 120, 90 N.W.2d 873 (1958).

22 44 N.J. 52, 207 A.2d 305 (1965).

23 The court in *Santor* said the measure of damages should be "the difference between the price paid by plaintiff and the actual market value of the defective carpeting at the time when plaintiff knew or should have known that it was defective. . . ." *Id.* at 68, 207 A.2d at 314.

The court further declared:

> As we have indicated, the strict liability in tort formulation of the nature of the manufacturer's burden to expected consumers of his product represents a sound solution to an ever-growing problem, and we accept it as applicable in this jurisdiction. And, although the doctrine has been applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective, . . . *the responsibility of the maker should be no different where damage to the article sold* or to other property of the consumer is involved.

Id. at 66, 207 A.2d at 312 (emphasis added).

It is doubtful that the strict liability theory will be extended beyond personal injury and direct property damage to encompass simple loss of bargain even by those jurisdictions which have adopted the theory. The California court, often providing leadership in formation of strict liability policy, has refused to extend the theory to cover loss of bargain. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). *See also* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (strict liability limited to personal injuries and direct property damage).

Where adopted, the strict liability theory has solved many of the difficult legal problems of the person injured as a result of a defective good. The theory, however, has not provided a universal solution in this country because a substantial number of jurisdictions have not adopted it.[24]

Abolition of Privity Requirement in Warranty Prior to the Uniform Commercial Code

The same privity requirement which restricted recovery in tort for damage caused by defective goods loomed as a barrier to recovery in the contract based warranty area. The privity requirement caused a problem at two different levels. First, the requirement at the vertical level prevented an injured buyer from recovering against one other than his immediate seller. Second, the requirement of privity at the horizontal level prevented parties other than the buyer from maintaining an action in warranty against the immediate seller even though the product was defective and the defect caused the injury in question. The conceptual justification in both instances was the idea that a warranty is "in the nature of a contract of personal indemnity with the original purchaser. It does not 'run with the goods.' "[25]

Several fictional theories were adopted to avoid the consequences of the privity requirement. For example, in the most troublesome type case involving privity at the horizontal level— a family member buys a defective good which causes injury to another member of the family— some courts reasoned that the person purchased the good as an agent for the individual injured. Therefore, the necessary contractual relationship between seller and the injured party was established.[26] Another

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24 See note 73 and accompanying text *infra*.

25 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.16, at 1571 (1956). Not every jurisdiction adhered to this view. The Mississippi Supreme Court in Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927), reasoned that warranty runs with title.

26 *See, e.g.*, Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943); Timmins v. F.N. Joslin Co., 303 Mass. 540, 22 N.E.2d 76 (1939); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Visusil v. W.T. Grant Co., 253 App. Div. 736, 300 N.Y.S. 652 (2d Dep't 1937).

Utilization of this agency theory produced outrageous results when some judges failed to comprehend the reform aim of circumventing the privity requirement as the reason for the development of the fictitious agency approach. In Gearing v. Berkson, 223 Mass. 257, 111 N.E. 2d 785 (1961), and in Hazelton v. First Nat'l Stores, 88 N.H. 309, 190 A. 280 (1937), the courts reasoned that an injured wife who purchased defective food purchased it in an agency capacity. Therefore, she was not a party to the contract of sale and thus not in privity with the seller as required for the maintenance of a successful breach of warranty action.

approach to reach the same result was to view the injured party as a third-party beneficiary of the contract between seller and buyer. Because this approach had the effect of making the injured party a party to the contract, the privity problem was avoided.[27]

In the other problem area where the manufacturer was insulated from the injured buyer by an intermediate seller, several fictional theories were utilized to overcome the privity obstacle. Some courts proceeded under a theory that the retailer was the consumer's agent to buy from the manufacturer, and thereby created privity between the manufacturer and the injured buyer.[28] Other courts, employing a fictional agency approach in a different manner, declared that the retailer was an agent of the manufacturer with authority to sell to a consumer. This approach made the sale from the retailer to the consumer actually one from the retailer's principal, the manufacturer, thereby supplying the necessary contractual relationship between the injured buyer and the manufacturer.[29] Still another theory relied upon to avoid the privity requirement on a vertical level was that of a fictional assignment. The essence of this theory was that when the retailer sold to the consumer he assigned his warranty from the manufacturer.[30] Finally, a fourth theory considered the consumer a third-party beneficiary of the retailer's contract with the manufacturer.[31]

While some jurisdictions were utilizing fictional agency or third-party beneficiary contract theories to circumvent the privity requirement at both the horizontal and vertical levels in warranty actions, and while a majority of jurisdictions rigidly imposed the privity requirement as an essential element of the breach of warranty action, a few state courts met the problem head-on and dropped the requirement. One of the leading cases adopting this approach was *Henningsen v. Bloomfield Motors, Inc.*[32] While the decision in this case anticipated developments in the area of strict liability in tort which were to come later in New

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27 *See, e.g.*, Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); Singer v. Zabelin, 24 N.Y.S.2d 962 (New York City Ct. 1941).

28 *See, e.g.*, Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 P. 1050 (1929).

29 *See, e.g.*, Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

30 *See, e.g.*, Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936).

31 *See, e.g.*, Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928). For a collection of the many theories utilized in this area, see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958) (29 different theories).

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

Jersey,[33] the rationale of the opinion rested primarily upon a contract warranty approach. A combination warranty and disclaimer clause in small print on the reverse side of the sales contract stated in part:

> The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; *this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part,* and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles. . . .[34]

The court reasoned that due to its obscure location, the warranty terms and disclaimer were not sufficiently revealed to the buyer to become a part of the offer by the seller. Because there was no acceptance of these terms by the buyer, they did not become a part of the contract.[35] In addition, the *Henningsen* court, also held that the retailer's implied warranty extended not only to the buyer but also to his wife who was injured while driving the car. In allowing recovery, the court, in effect, dropped the privity requirement in warranty at the horizontal level.

In 1961, the New York Court of Apeals in the case of *Greenberg v. Lorenz,*[36] abolished the requirement of privity at the horizontal level in warranty actions involving household products. In *Greenberg,* a father purchased a can of defective salmon which when eaten by his son caused personal injury. The son was allowed to recover from the retailer for breach of implied warranty. The court, in abolishing the privity requirement in cases involving household products, reasoned that where one member of a family purchased such a product, then it was obviously

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33 See note 23 *supra.*

34 32 N.J. at —, 161 A.2d at 74 (emphasis added by court).

35 Not only was the warranty term and disclaimer on the reverse side of the contract in small type, but the reference to it on the front of the contract was in even smaller type.

36 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

intended for the use of the entire family. In 1962, in *Randy Knitwear, Inc. v. American Cyanamid Co.*,[37] an express warranty case, the New York Court of Appeals held that an express warranty ran from the manufacturer to the ultimate user, notwithstanding an absence of the traditionally required privity of contract. By way of dictum, the court indicated that the same reasoning would be applicable to an implied warranty arising by operation of law.[38] In 1963 this reasoning was applied in such an implied warranty case. In *Goldberg v. Kollsman Instrument Corp.*,[39] and the vertical privity requirement was dropped as an element of the warranty action. Furthermore, *Goldberg* merged the warranty action with the doctrine of strict liability in tort. Thus, a legal protection which began in tort and then expanded into contract[40] appears to be returning to its original source.

Pre-Code Georgia Law

At an early date, Georgia courts began to drop the privity requirement in the tort action against a manufacturer based upon negligence. The breakthrough began with the "inherently dangerous" exception to the privity requirement. In *Blood Balm Co. v. Cooper*,[41] the court relaxed the privity requirement in a typical "inherently dangerous" product case but also, by way of its reasoning, anticipated the broad general relaxation yet to come. The court reasoned:

> We can see no difference whether the medicine was directly sold to the defendant in error by the proprietor or by an intermediate party to whom the proprietor had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general . . . .[42]

By 1904 the Georgia courts were clearly anticipating *MacPherson's* rejection of the privity requirement. In *Woodward v. Miller*[43] a manufacturer, not in privity with the plaintiff, was held liable for an injury caused by his negligent construction of a buggy. In 1905 the trend

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37 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

38 *Id.* at 14, 181 N.E.2d at 403, 226 N.Y.S.2d at 368.

39 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

40 *See* note 1 and accompanying text *supra*.

41 83 Ga. 457, 10 S.E. 118 (1889).

42 *Id.* at 461, 10 S.E. at 119.

43 119 Ga. 618, 46 S.E. 847 (1904).

toward relaxation of the privity requirement in tort continued. In the case of *Watson v. Augusta Brewing Co.*,[44] the court declared:

> When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious. . . . It does not matter that the plaintiff in the present case did not buy the soda water from the defendant, or that there was no privity of relationship between them. The duty not negligently to injure is due by the manufacturer . . . to the general public for whom his wares are intended.[45]

Unfortunately, as indicated by Professor Patterson, the soft drink cases have little value as precedents: "The soft drink cases indicate that this product had the dubious distinction of having special rules of law applied to it."[46] Although the Georgia courts had trouble completely shedding the shackles of the privity requirement in tort,[47] by the late 1940's this requirement was no longer meaningful in the context of manufacturer's liability to consumer.[48]

While the Georgia courts finally have emancipated tort law from the privity requirement, there has been very little indication of their adopting a strict liability theory. Instead, the courts have, for the most part, relied upon a principle requiring greater care in the manufacture of those goods which will, if defective, be imminently dangerous.[49]

The primary area in which the courts have adopted what, in effect, results in a strict liability theory is in the area of food and drugs. In *Donaldson v. Great Atlantic & Pacific Tea Co.*,[50] the Georgia Supreme

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44 124 Ga. 121, 52 S.E. 152 (1905).

45 *Id.* at 123-24, 52 S.E. at 152-153.

46 Patterson, *Manufacturer's Statutory Warranty: Tort or Contract?*, 10 MERCER L. REV. 272, 315 (1959).

47 *Id.* at 287.

48 *See, e.g.*, G. Bernd Co. v. Rahn, 94 Ga. App. 713, 96 S.E.2d 185 (1956); Eades v. Spencer-Adams Paint Co., 82 Ga. App. 123, 60 S.E.2d 543 (1950); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947). Moreover, vitality of the privity requirement in Georgia has been raised recently in the case of Griffith v. Chevrolet Motor Div., 105 Ga. App. 588, 125 S.E.2d 525 (1962). Here the court commented: "It would appear that, given the requisite negligence on the part of the manufacturer, the privity requirement is without vitality in Georgia." *Id.* at 591, 125 S.E.2d at 528.

49 *See, e.g.*, Hand v. Harrison, 99 Ga. App. 429, 108 S.E.2d 814 (1959) (gas stove); Flint Explosive Co. v. Edwards, 84 Ga. App. 376, 66 S.E.2d 368 (1951) (explosives).

50 186 Ga. 870, 199 S.E. 213 (1938).

Court held that a violation of the Georgia Pure Food and Drug Act[51] amounted to negligence per se. In other words, if a manufacturer, processor or vendor of food or drug products in Georgia does not comply with the Act's regulations, such person is automatically liable for any injury caused by a defect in the product. Similar reasoning for all practical purposes has been adopted in other areas where illegal conduct results in a foreseeable injury. In *Milton Bradley Co. v. Cooper*,[52] the plaintiff was injured when a firecracker sold by defendant-wholesaler to a retailer was thrown from the retailer's store into the street by a 12-year-old child. Selling or otherwise disposing of such fireworks was a violation of a city ordinance. The court seemed to require as requisites of liability only that the defendant violated a statute and that he knew of the dangerous character of the article.[53] On this point the court adopted the reasoning of the Wisconsin court in *Pizzo v. Wiemann*:[54]

> [O]ne who does an unlawful act, knowing, or with reasonable ground to believe that it may probably result, in the natural course of events, in causing injury to some human being, and regardless of whether it does or not, is liable in legal damages for the consequences, though directly brought about by the interveners, set in motion by the first unlawful act, and regardless of such interveners having acted with such knowledge as to be likewise liable.[55]

While the judicial development of consumer protection in tort law has been slow in Georgia, the development of such principles in the law of warranty has been even slower. The same courts which had difficulty in completely shedding the privity requirement in tort have had even more difficulty and have demonstrated greater reluctance toward abolishment of the privity requirement in the rather narrow warranty action recognized under Georgia law.[56] In 1957 a limited but

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51 GA. CODE ANN. §§ 42-101 to -9932 (1957).

52 79 Ga. App. 302, 53 S.E.2d 761 (1949).

53 *See id.* at 309, 53 S.E.2d at 765-66.

54 149 Wis. 235, 134 N.W. 899 (1912).

55 *Id.* at 239, 134 N.W. at 900.

56 *See generally* Patterson, *supra* note 46, at 301-13. In Bel v. Adler, 63 Ga. App. 473, 11 S.E.2d 495 (1940), the court held that the representation by a sales lady that face cream was "pure, beneficial, and harmless, and that it would not harm the most tender skin, and that if it were not such the store would not sell or recommend it," given in response to plaintiff's inquiry did not constitute an express warranty. In Meyer v. Rich's, Inc., 63 Ga. App. 896, 12 S.E.2d 123 (1940), the court held that the statement, "Mr. Meyer, I will guarantee on my word of honor there is nothing to be alarmed about, with that

significant step forward was taken when the Georgia legislature passed a statute which provides as follows:

> The manufacturer of any personal property sold as new property, either directly or through wholesale or retail dealers, or any other person, shall warrant the following to the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and, provided there is no express covenant of warranty and no agreement to the contrary:
>
> 1. The article sold is merchantable and reasonably suited to the use intended.
>
> 2. The manufacturer knows of no latent defects undisclosed.[57]

The weaknesses of the protection provided by this statute were obvious and many. To begin with, the protection provided was limited to purchasers[58] and secondly, the protection afforded by the statute could be easily disclaimed. Not only would an express disclaimer negate the effect of the statute, but also the simple inclusion of an express warranty would likewise negate the effectiveness of the statute.[59]

Despite its weaknesses,[60] the statute was a beginning toward needed abolition of the privity requirement at the vertical level in warranty actions. Then in 1962 when Georgia adopted the Uniform Commercial Code, the 1957 statute was repealed.[61] At first glance, this action would appear to be both surprising and illogical, until one considers that the change was probably a compromise that was necessary to gain needed support for adoption of the Code. Thus, with the passage of the Code in

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label out of there, you can rest assured that the suit is all right. You would be perfectly safe in wearing this suit," warranted only that the quality and workmanship of the suit would prove satisfactory. Thus, the plaintiff was denied recovery even though injured by poisonous and injurious dye and chemicals.

The privity requirement in express warranty cases was relaxed in Georgia by judicial action. *See* Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950); Hall v. Studebaker Corp. of Am., 13 Ga. App. 632, 79 S.E. 750 (1913). In both cases, the court held that where a warranty was expressly made and relied upon by the purchaser, a breach of warranty action could be maintained even in the absence of privity.

57 No. 342, [1957] GA. LAWS 405 (repealed 1962). This statute was held constitutional in Bookholt v. General Motors Corp., 215 Ga. 391, 110 S.E.2d 642 (1959).

58 *See* R. H. Macy & Co. v. Vest, 111 Ga. App. 85, 140 S.E.2d 491 (1965) (donee); Wood v. Hub Motor Co., 110 Ga. App. 101, 137 S.E.2d 674 (1964) (guest in automobile); Revlon, Inc. v. Murdock, 103 Ga. App. 842, 120 S.E.2d 912 (1961) (employee).

59 This seems only to continue the prior law on this point. *See, e.g.*, Smith Bros. v. Webb & Maury, 20 Ga. App. 313, 93 S.E. 74 (1917).

60 For further discussion of these weaknesses, see note 115 and accompanying text *infra*.

61 [1962] GA. LAWS 156, 427.

Georgia[62] and repeal of the 1957 statute, which had marked a first step toward relaxation of the privity requirement at the vertical level, an odd step backward was taken in Georgia in the area of products liability.

UNIFORM COMMERCIAL CODE AND THE PRIVITY REQUIREMENT

Section 2-318 of the Uniform Commercial Code

At the time the Uniform Commercial Code came under consideration, important developments had occurred which would ultimately lead to abolition of the privity requirement, both horizontal and vertical, in breach of warranty actions. Rather than compromise the chance for widespread adoption of the Code, the drafters took only a very limited step forward in relaxing the privity requirement at the horizontal level and a neutral position at the vertical level. Section 2-318 provided:

> 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.[63]

In explaining the philosophy of the section, the drafters in Official Comment 3 declared:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[64]

Thus, the Code, to a similar degree already accomplished by courts through the utilization of fictional agency theories relaxed the privity requirement at the horizontal level but took no position on the privity requirement at the vertical level.

Assuming that a basic aim of law is to afford like treatment to parties in like positions, the decisions already rendered under section 2-318 reflect the general inadequacy of its provisions. In *Thompson v. Reed-*

62 GA. CODE ANN. §§ 109A-1-101 to -10-106 (1962).

63 UNIFORM COMMERCIAL CODE § 2-318 (1962 version).

64 UNIFORM COMMERCIAL CODE § 2-318, Comment 3.

man,[65] even though the court found for the plaintiff buyer, recovery under section 2-318 was denied to a guest passenger. The court reasoned: "It is too much of a leap . . . to classify a guest passenger in an automobile as a guest in the *home*."[66] While the reasoning is unquestionably consistent with the literal language of section 2-318, there is no logic for distinguishing between the two types of guests.

Two other Pennsylvania decisions further reflect the irrational decisions which can be produced by section 2-318. In *Hochgertel v. Canada Dry Corp.*,[67] the plaintiff, a bartender, suffered injury from flying glass caused by an explosion of a previously unopened bottle purchased by his employer. The court held that the employee was not entitled to recovery under section 2-318 because he was neither a guest in the home of the buyer, nor a member of the buyer's household or family. Contrast *Hochgertel* with *Yentzer v. Taylor Wine Co.*,[68] where plaintiff, a hotel manager, had personally purchased bottled liquor for his employer. During preparation for a party plaintiff was injured by a cork which suddenly popped out of one of the bottles. The lower court, relying upon the *Hochgertel* decision, denied recovery.[69] The Pennsylvania Supreme Court, with two Justices dissenting, held in reversing the lower court decision that because the plaintiff had personally purchased the allegedly defective bottle, he was a "buyer" within the meaning of that term as defined in section 2-103(1)(a). As a "buyer" he could recover for breach of warranty, not under section 2-318, but because warranties always run to the buyer. There can be no justification in plaintiff's recovery in *Yentzer* while denying it in *Hochgertel*. Certainly the fact that one purchase was made in a representative capacity should not be a sufficient basis for distinguishing the two cases.

In *Wolovitz v. Falco Products Co.*[70] the purchaser of a folding table gave the table to the person in whose home plaintiff was writing. The plaintiff was subsequently injured due to a defect in the table. The court dismissed the complaint and held that the plaintiff did not come within the scope of section 2-318 because he was a guest of the purchaser's donee and not a guest of the purchaser. The manufacturer of

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65 199 F. Supp. 120 (E.D. Pa. 1961).

66 *Id.* at 121.

67 409 Pa. 610, 187 A.2d 575 (1963).

68 414 Pa. 272, 199 A.2d 463 (1964).

69 The lower court declared that an action may lie in negligence if the doctrine of "exclusive control" is satisfied, thus suggesting utilization of the doctrine of *res ipsa loquitur*. *Id.* at —, 199 A.2d at 464.

70 111 Pa. L.J. 185 (Allegheny County Ct., Pa. 1963).

such a portable table reasonably should expect it to be the subject matter of a gift. Thus there would be no grounds to distinguish between an injury to the purchaser's guest and an injury to the donee's guest.

In *Miller v. Preitz*[71] recovery was sought under a breach of warranty theory for the death of a child caused by a defective vaporizer. The vaporizer was purchased by the child's aunt who lived next door but was being used in the house of the child's parents at the time of the injury. The trial court in denying recovery held that the child did not come within the aunt's "family or household" as required by 2-318. On appeal the Pennsylvania Supreme Court held that the child could qualify as a member of the purchaser-aunt's family so as to satisfy the requisites of 2-318.[72] The court declared:

> The statute provides no clear indication of the meaning to be given to the word "family," and we have found no case on the matter. In our opinion, considering the remedial nature of the provision and the natural connotations of the word, its meaning was not intended to be unduly restrictive. Accordingly, we hold that the word "family" as used in this statute includes the nephew of the purchaser. This interpretation of the word "family" is not too burdensome on the seller who makes the warranty because not only must the beneficiary be in the buyer's family but also it must be "reasonable to expect that such person may use, consume or be affected by the goods. . . ." Whether this member of the family was also within the latter clause is a factual and objective question and depends upon all the relevant circumstances, which may include such factors as the remoteness of the family relation, the geographical connection between the buyer and the member of his family, and the nature of the product.[73]

The court's reasoning process vividly reflects the weakness of the limited scope of section 2-318. If the child killed as a result of the defective vaporizer had been a neighbor's child, the "family" requisite of section 2-318 would not have been satisfied. Or if the nephew lived some distance from the purchaser, a court might decide that the "foreseeability" requisite of section 2-318 had not been met. The complete lack of logic to support such holdings is clearly reflected when one remembers that if the child had been brought to the vaporizer,

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71 14 Bucks County L. Rep. (Bucks County Ct., Pa. 1964).

72 422 Pa. 383, 221 A.2d 320 (1966).

73 *Id.* at —, 221 A.2d at 323-24.

instead of the vaporizer having been taken to the child, the requisites of section 2-318 would have been satisfied—the child being a guest in the household of the buyer. The outcome of such a case should not depend upon whether the child rather than the vaporizer was moved.

A further potential weakness of section 2-318 is reflected in *Duart v. Axton-Cross Co.*[74] where the plaintiff, a maid in a college kitchen, was injured when she placed her hands in defective dish washing soap. The plaintiff sued, under a pre-Code Connecticut statute worded very much like 2-318, for breach of the implied warranties of merchantability and fitness. The court held that the plaintiff was not "a member of the buyer's household" because she had neither lived at the college nor taken her meals there. The court declared: "While a servant may acquire the status of one constituting a member of the employer's household, it would seem that actually living in the house is a prime and necessary attribute to the acquirement of such status."[75] Reasoning such as that employed in *Duart* could ultimately lead to the following results: if a maid lives in her employer's house, she can recover for injury caused to her by a defective product purchased by her employer, but if she lives in an apartment over the employer's garage, she is not a member of the household and thus not entitled to warranty protection from defective goods purchased by her employer.

Essential to the success of any mature legal system is that like treatment be provided for like situated parties. Evidently from the cases discussed above, section 2-318 allows a court great leeway to provide quite different warranty protection for parties in essentially identical situations.

Recent Developments: Emergence of Strict Liability in Tort and Expansion of Warranty Concepts

Most jurisdictions are now going far beyond the limited relaxation of privity contained in 2-318. Those states which have already abolished the privity requirement in warranty or which have adopted a strict tort liability theory of products liability do not need the limited relaxation of privity contained in 2-318. For example, California which already had adopted a strict liability approach[76] omitted section 2-318 when adopting the Code and criticized that section as reflecting "a step back-

74 19 Conn. Supp. 188, 110 A.2d 647 (C.P. New London County 1965).

75 *Id.* at 190, 110 A.2d at 648.

76 *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

wards."[77] Other states which adopted the official version of 2-318 later made the breakthrough in the products liability area through a judicially-developed strict tort liability approach.[78] Other jurisdictions utilized expansion of warranty liability rather than development of strict liability in tort as the means of achieving the desired consumer protection. Virginia took the lead in this approach by revising section 2-318 to read as follows:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller 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 or seller might reasonably have expected to use, consume, or be affected by the goods. . . .[79]

By 1966 several other states had amended 2-318 to relax further the privity requirement.[80]

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77 REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD OF THE UNIFORM COMMERCIAL CODE 39 (1965).

78 *See* Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Ford Motor Co. v. London, 217 Tenn. 400, 398 S.W.2d 240 (1966); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Shoshone Coca-Cola Bottling Co. v. Dolinski, 420 P.2d 855 (Nev. 1966) (mouse-in-beverage case, but opinion indicates doctrine of strict tort liability will not be restricted to food cases); Lewis v. Baker, 243 Ore. 317, 413 P.2d 400 (1966) (dictum); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965), *aff'd*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

79 VA. CODE § 8.2-318 (1965).

At this time it was clear that the compromise relaxation of the privity requirement contained in the 1958 official text of the Code was no longer adequate. In December of 1966 the Permanent Editorial Board of the Uniform Commercial Code offered two alternatives to section 2-318. Alternative B 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 in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

UNIFORM COMMERCIAL CODE § 2-318, Alternative B (1 UNIFORM LAWS ANN. 249 (1968)). Alternative C, on the other hand 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 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.

UNIFORM COMMERCIAL CODE § 2-318, Alternative C (1 UNIFORM LAWS ANN. 249 (1968)).

80 See statutes cited in 3 R. DUSENBERG & L. KING, SALES AND BULK TRANSFERS

The development of a strict liability theory in tort and the expansion of warranty concepts clearly are bringing about the demise of the privity requirement. Under both approaches a plaintiff must show that the good was in a defective condition at the time it left the possession of the seller-defendant.[81] The question of due care, or the lack of it, is not material under either approach.[82] While both approaches are aimed at providing the individual more protection for injuries resulting from defective products, they differ in many significant respects. These important distinctions should be considered carefully by any legislature or court deciding to extend the protection afforded the individual in the products liability area. If the change in law is made by the legislature, the theory upon which it is being made will be apparent. This has not always been true when the change is made judicially.[83] Because of the important distinctions between the two theories, a court must announce the theory under which it is proceed-

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UNDER U.C.C. 7.05(4), at nn.39-44 (1966) (Alabama, Arkansas, Colorado, Delaware, South Dakota, Vermont and Wyoming).

81 On proof of defect, see 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03(4) (1960); Emrock, *Pleading and Proof in a Strict Products Liability Case*, 1966 INS. L.J. 581. *See also* Freedman, *"Defect" In the Product: The Necessary Basis For Products Liability In Tort And In Warranty*, 33 TENN. L. REV. 323 (1966). It is often declared that *res ipsa loquitur* is not an available doctrine for proving the existence of the required defect. Freedman, *supra* at 326-27. Such a statement is deceptive, even though strictly true, because *res ipsa* is aimed at the establishment of negligence which is unnecessary in warranty and in strict liability. The correct relationship of the doctrine to the non-negligence products liability area is explained by the court in State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961). There the court declared: "The doctrine of res ipsa loquitur, frequently resorted to in negligence cases, is not applicable as such in the field of warranty, although the usual resort to circumstantial evidence in attempting to establish a breach of warranty [i.e., a defect] indicates some of the same thinking found in res ipsa loquitur cases." *Id.* at 1294-95, 110 N.W.2d at 452. In Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 399 P.2d 681 (1965), the court, after declaring *res ipsa loquitur* inapplicable to prove a defect in a non-negligence case, declared: "The rule of strict liability in breach of warranty cases . . . serves the same purpose as the rule of res ipsa loquitur in negligence cases. That is, it relieves the plaintiff of the necessity of proving matters peculiarly within the knowledge of defendant, if, indeed, they are known to anyone." *Id.* at 284, 399 P.2d at 684. This same approach though not defined is present in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In *Henningsen* the defect seems to have been established primarily on the basis of the plaintiff's testimony that she heard a loud noise "from the bottom, by the hood," which "felt as if something cracked." *Id.* at —, 161 A.2d at 75.

82 *See generally* Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26 (1965); Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675 (1963).

83 *See e.g.*, Manheim v. Ford Motor Co. 201 So.2d 440 (Fla. 1967).

ing. One key distinction between the two approaches is the difference between the applicable statutes of limitation.

If the warranty approach is adopted, section 2-725(1) of the Code provides the applicable rule of proscription. That section states: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." As to the time a cause of action accrues, section 2-725(2) provides:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

The thrust of these two sections is that the statute of limitations begins to run in the ordinary breach of warranty case when the seller tenders delivery; and if a personal injury occurs or the action for such injury is commenced more than four years later, the action cannot be successfully maintained.

If the strict liability in tort is adopted, a shorter period of limitation is controlling. In Georgia actions for personal injury must be brought within two years after the cause of action accrues.[84] Although the tort limitation period is shorter, it may still be an advantage to the injured party, since under a strict tort liability approach a court probably will adopt the rule that the action accrues at the time of the accident or injury.[85] For example, if a good is delivered on January 1, 1968, but an injury did not occur until February 1, 1972, the Code statute of limitations would bar an action under section 2-725(1), whereas under the "shorter" tort statute of limitations the injured party would have two years from February 1, 1972, to bring his action.

A second fundamental difference in the two approaches is the matter

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84 GA. CODE ANN. § 3-1004 (1962).

85 *See* 2 L. FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16a(5)(g) at 3-222-23 (1960). For examples of products liability cases holding that the cause of action accrues at the time of injury, see Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 37 Cal. Rptr. 646 (1964); Rosenau v. New Brunswick, 93 N.J. Super. 49, 224 A.2d 689 (App. Div. 1966).

of required notice to the defendant. In strict liability tort cases, there is no notice requirement.[86] If a warranty theory is adopted, however, the plaintiff must notify the defendant of the alleged breach of warranty as a prerequisite to a breach of warranty action. Section 2-607(3)(a) declares: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . . ." This notice requirement apparently is intended to apply to all breach of warranty cases, including ones arising from the sale of consumer goods. This is reflected by Comment 4 to section 2-607 which explains: " 'A reasonable time' for notification from a retail consumer is to be judged by different standards [from those to be applied to commercial buyers] so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." The parties by agreement may determine what is a reasonable time. Such an agreement will be upheld so long as it is not manifestly unreasonable.[87] The drafters also contemplated notification of a claimed breach of warranty to be given by a non-purchaser beneficiary of warranty protection. Comment 5 explains:

> Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a benficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, *the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.*[88]

Even though the drafters may have contemplated notice of an alleged breach by an affected non-purchaser, one court has held that such notice is not necessary.[89] The reasoning was that 2-607 addresses itself

86 *See, e.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

87 *See* Q. Vandenberg & Sons v. Siter, 204 Pa. Super, 392, 204 A.2d 494 (1964); UNIFORM COMMERCIAL CODE § 1-204.

88 UNIFORM COMMERCIAL CODE § 2-607, Comment 5 (emphasis added).

89 Tomczuk v. Town of Cheshire, 26 Conn. Supp. 219, 217 A.2d 71 (Super. Ct. 1965).

only to buyers; therefore, it has no applicability to a non-buyer beneficiary of warranty protection.[90] Generally, the reasons for requiring notice are to allow maximum opportunity for settlement and to give the seller an opportunity to stop selling defective goods at an early date, thereby mitigating his exposure. In the non-purchaser beneficiary situation the harm occurs when the breach is discovered. The reasoning behind the justifications for the notice requirement leaves one with the difficult question of determining whether the potential good to be gained from requiring notice by the non-purchaser beneficiary outweighs the harm which may be done to an unwary injured party. Regarding the form of notification contemplated, Comment 4 explains:

> The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach and thus opens the way for normal settlement through negotiation.[91]

Another perhaps more important distinction between the two theories is the effect accorded contractual disclaimers of liability. The seller may disclaim both express and implied warranties as long as the disclaimer is made in a conscionable manner. To be conscionable the warranty must be conspicuous and fairly apprise the buyer of the limitation being placed on the seller's liability.[92] One troublesome problem in the disclaimer area is their effect in cases where personal injury results from a breach of warranty. Section 2-719 contains the Code's provisions on the right of the parties to modify or limit regular Article 2 remedies. Section 2-719(3) provides that a "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. . . ." While such a limitation is unconscionable, the seller apparently can disclaim all warranty liability, including liability for personal injuries, without acting in an unconscionable manner.[93]

Although disclaimer raises serious problems in the warranty area, it does not create a corresponding problem in the area of strict liability in

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90 *See id.* at ———, 217 A.2d at 73.

91 UNIFORM COMMERCIAL CODE § 2-607, Comment 4.

92 *See* UNIFORM COMMERCIAL CODE §§ 2-302, 9-302, 2-316(2)-(3).

93 *See* UNIFORM COMMERCIAL CODE § 2-719, Comment 3, which provides "[the] seller in all cases is free to disclaim warranties in the manner provided in Section 2-316." The language of 2-316 also suggests that all warranty liability may be effectively disclaimed. *See generally* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 80-85 (1964).

tort which cannot be disclaimed.[94] It has been suggested, however, that when a buyer is aware of a disclaimer of warranty an assumption of risk defense may be created.[95]

Warranty and strict liability in tort differ little, if at all, on the applicability and effect of contributory negligence. In both areas certain types of negligence on the part of the plaintiff will bar recovery; other types of negligence do not. One well-recognized defense in both areas arises when the plaintiff, knowing of the defect and its potential consequence, continues to use the product.[96] Another type of negligence by plaintiff which will prevent recovery in both instances is the abnormal use of the property.[97]

One type of contributory negligence on the part of the plaintiff, however, seems to have no effect in warranty or in tort strict liability cases. This negligence is that of not discovering the defect[98] and carelessly putting the product to an unusual test of quality involving what amounts to negligent conduct, but a test which is still within the realm of foreseeable use of the product. In *Brown v. Chapman*[99] the court declared:

> The facts upon which appellants rely to constitute contributory

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94 *See, e.g.*, Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *m* at 9-10 (Tent. Draft No. 10, 1964).

95 W. PROSSER, *supra* note 1, at 539.

96 *See, e.g.*, Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965); Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, 127 N.W.2d 557 (1964); Tex-Tube, Inc. v. Rockwall Corp., 379 S.W.2d 405 (Tex. Civ. App. 1964). On the effect of contributory negligence on strict liability in tort, RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* declares:

> On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section 23 in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

As to the effect of this type of contributory negligence on warranty liability, UNIFORM COMMERCIAL CODE § 2-314, Comment 13 explains:

> Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

97 *See, e.g.*, Maiorina v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965) (tort); Adams v. Scheib, 408 Pa. 452, 184 A.2d 700 (1962) (warranty); Nelson v. Union Wire Rope Corp., 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963) (warranty); Robert H. Carr & Sons, Inc. v. Yearsley, 31 Pa. D. & C.2d 262 (Chester County Ct. 1963) (warranty).

98 *See* Cedar Rapids & I.C. Ry. & Light Co. v. Sprague Elec. Co., 280 Ill. 286, 117 N.E. 461 (1917).

99 304 F.2d 149 (9th Cir. 1962).

> negligence are: that the skirt was too large and too long for Carol and had to be pinned in place, and, when she was seated, draped upon the floor; that she had worn it to a party where over two hundred persons, including Carol and her escort, were dancing, drinking and smoking, where ashtrays had not been provided and cigarette butts lay strewn about the floor, including the area where Carol was seated.
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> In our view, the better rule is that contributory negligence is not a defense to breach of warranty *where it serves simply to put the warranty to the test. . . .*
>
> One may well rely upon a warranty as protection against aggravation of the consequences of one's own carelessness. Anticipating that one may, negligently, drop tobacco ash upon one's clothing, one may well rely upon a warranty that such clothing is made from suitable fabric which does not possess extraordinary characteristics of flammability and, accordingly, which will not burst into flame as the result of such an act of carelessness.[100]

The same principle is applied in cases decided on the basis of strict liability in tort rather than warranty.[101] However, a limit beyond which a user cannot test the product seems to be developing. In *Schemel v. General Motors Corp.*,[102] the court affirmed a lower court decision that driving an automobile at the speed of 115 miles per hour was an unforeseeable misuse of the automobile, and thereby prevented recovery by the plaintiff.

Recent Statutory Development in Georgia

In its 1968 session, the Georgia legislature considered various aspects of products liability. Competing bills were introduced in the House and Senate. The House bill, patterned from the Virginia modification of section 2-318, expanded manufacturer's and seller's liability through an extention of warranty liability and provided:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase

100 *Id.* at 152-53 (emphasis added). *Accord*, Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (Dist. App. Ct. 1963).

101 *See* W. Prosser, *supra* note 1, at 538-40.

102 384 F.2d 802 (7th Cir. 1967).

> the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods and was injured by breach of the warranty. A seller or manufacturer may not exclude or limit the operation of this section.[103]

The Senate bill, which ultimately passed, was in the form of an amendment to section 105-106 of the Code of Georgia of 1933 and attempted to expand consumer protection through a broadening of tort liability. By basing the liability upon tort law, the problems of disclaimers and notice are avoided, thereby affording the individual more adequate protection in cases of injury caused by defectively manufactured or produced goods. Unfortunately, when the Senate bill was drafted no model, such as section 402A of the *Restatement (Second) of Torts*, was relied upon. The bill as enacted may fail to effect the broadened consumer legal protection which is desirable in the products liability area. Section 105-106 of the Georgia Code, as amended by the 1968 Senate bill, with the newly added portion italicized, now reads as follows:

> No privity is necessary to support an action for tort; but if the tort results from the violation of a duty, itself the consequences [*sic*] of a contract, the right of action is confined to the parties and privies to that contract, except in cases where the party would have a right of action for the injury done independently of the contract *and except as provided in Code Section 109A-2-318. However, the manufacturer of any personal property sold as new property, either directly or through a dealer or any other person, shall be liable in tort, irrespective of privity, to any natural person who may use, consume or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended and its condition when sold is the proximate cause of the injury sustained; a manufacturer may not exclude or limit the operation hereof.*[104]

The statute's weaknesses in drafting and coverage are numerous. While abolishing the privity requirement, it does not expressly do away

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103 Bill on file at *Georgia Law Review*. For a good discussion of the products liability area and particularly the Virginia statute, see Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965).

104 [1968] GA. LAWS, 166-67.

with the requirement of negligence. As previously stated,[105] lack of privity for many years has not been fatal to a tort action by a consumer against a product's manufacturer. On the other hand, under traditional tort principles, a failure to show negligence has been fatal. If the major innovation intended by the legislative action was the adoption of a strict liability theory of manufacturer's liability, then it is strange that a statement was included to make clear that lack of privity—which has not been a real problem in the tort area for many years—is no bar to recovery, while no mention is made that a showing of negligence will not be required. Certainly, it seems implicit in the section that negligence need no longer be shown as a requisite to recovery in tort. However, it is not unforeseeable that a court could interpret section 105-106 as abolishing the privity requirement yet at the same time providing that the consumer can maintain a tort action only after showing negligence. Such an interpretation, while contrary to the apparent intent of the draftsmen, is supportable not only by the literal language of the section but is also further reinforced by the heading of the section—"Privity to Support Action"— which was not altered by the amendment. To eliminate the possibility of ambiguity the amendment should clearly state that a showing of negligence is not mandatory.

A second example of weakness in the drafting is contained in the amendment's description of beneficiaries of the new tort action against the manufacturer of defective goods. The amendment extends coverage to "any natural person who may use, consume or reasonably be affected by the property. . . ." A person, to use the wording of the section, who may "reasonably be affected by the property" would seem to have no possible basis for recovery. A reasonable effect seems to preclude necessarily the suffering of personal injury or property damage which is the next requisite for recovery under the section. What the draftsmen apparently intended was to extend the protection of the amendment to those who could be "reasonably foreseen to be affected by the property." In other words, the protection of the section is intended to include the casual bystander whose injury is proximately caused by a good which leaves the manufacturer in a defective condition.

The inadequate drafting is not as serious as the major substantive weaknesses of the amendment's provisions. The first of these weaknesses is the section's limitation of liability to manufacturers, rather than extending liability to all sellers including the retailer and middleman. The privity requirement appertaining to the retailer's warranty liability

105 See note 48 and accompanying text *supra*.

has already been extended 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. . . ."[106] There is no justification for limiting the liability of a retailer to a smaller group than that of the manufacturer. As a practical matter this is particularly true in a time when the small shopkeeper enterprise is being replaced by the chain store. The manufacturer is in the better position to prevent the defect. However, strict tort liability does not rest upon a showing of negligence, and thus this distinction between manufacturer and retailer ceases to be of any significance. Professors Harper and James in their treatise on the Law of Torts urge that the retailer be made subject to the same strict liability as the manufacturer:

> The retailer should bear this as one of the risks of his enterprise. He profits from the transaction and is in a fairly strategic position to promote safety through pressure on his supplier. Also, he is known to his customers and subject to their suits, while the maker is often unknown and may well be beyond the process of any court convenient to the customer. Moreover, the retailer is in a good position to pass the loss back to his supplier, either through negotiation or through legal proceedings. Many suppliers voluntarily undertake to defend and indemnify their dealers. Products liability insurance obtained by suppliers is written with an agreement to cover dealers who are sued. Where such protection is absent the dealer may often either vouch in or implead his supplier and thus protect his claim for indemnity. And since the dealer is in privity with his supplier (who is often also the maker), recovery of indemnity may be based on warranty without regard to negligence. These pragmatic considerations, it is submitted, supply a reason for accepting the prevailing rule which will be overwhelming in the eyes of those who would stress either the compensatory or the admonitory function of tort law. Further, they show that the hardship upon the retailer will generally boil down in practice to the inconvenience of acting as a conduit for spreading losses which are engendered by the enterprise in which he plays a part. While these arguments are perhaps particularly potent where the dealer is one of the ever-multiplying chain stores, they seem fully applicable to all retailers.[107]

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106 GA. CODE ANN. § 109A-2-318 (1962).

107 2 F. HARPER & F. JAMES, *supra* note 25, § 28.30, at 1600-01.

This view is also shared by an overwhelming majority of legal scholars[108] and a majority of jurisdictions which have been faced with the question.[109]

A second category of potential defendants excluded from the coverage of 105-106 is the middleman. While there has been some disagreement,[110] the general consensus has been that the middleman should be subject to the same degree of liability as the manufacturer and retailer. Professors Harper and James urge:

> For the most part the same considerations that call for strict liability of the retailer also support strict liability of the wholesaler to the victim. Surely if the retailer is to be held in warranty, he should be able to look to his supplier on a similar warranty; and if that is true, no social good comes from the circuity of action which would result from a rule requiring separate actions by the victim and by the retailer. Direct liability, moreover, will afford greater assurance of compensation to the victim and will obviate a possible difficulty in finding a convenient forum (as where the retailer is judgment-proof and the maker is unknown or beyond the local court's jurisdiction).[111]

Professor Prosser agrees:

> Surely all of the valid arguments supporting strict liability—the public interest in the utmost safety of products, the demand for the maximum protection of the consumer, the implied assurance in placing the goods upon the market for human use, the consumer's reliance upon the apparent safety of a thing that he finds upon the market because the defendant has put it there, the fact that the consumer is the seller's ultimate objective, the desirability

108 *See, e.g.*, 2 F. HARPER & F. JAMES, *supra* note 25; PROSSER, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 814-817 (1966). *See also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

109 *See, e.g.*, Browne v. Fenestra, Inc., 375 Mich. 556, 134 N.W.2d 730 (1965); Vandermark v. Ford Motor Co., 61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); Williams v. Union Carbide Corp., 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (2d Dep't 1962); Thomas v. Leary, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (4th Dep't 1962); Tiffin v. Great Atl. & Pac. Tea Co., 20 Ill. App. 2d 421, 156 N.E.2d 249 (1959); Simpson v. Powered Prods, Inc., 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963).

110 *See* Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W. 2d 153 (1952) (5-4 decision); Elmore v. Grenada Grocery Co., 189 Miss. 370, 197 So. 761 (1940); DeGouveia v. H.D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936).

111 2 F. HARPER & F. JAMES, *supra* note 25, § 28.32, at 1602.

> of avoiding circuity of action and allowing recovery directly against earlier sellers—all of these apply with no less force against the wholesaler.[112]

Of those cases which do exempt middlemen from strict tort liability, Prosser says: "The decisions would appear to be mere temporary aberrations, which in the long run will not be followed."[113]

A majority of the cases on point, particularly the recent ones, have held the middleman subject to the same liability as the manufacturer and retailer.[114] In fact a recent California case, *Canifax v. Hercules Powder, Co.*,[115] extended strict liability in tort to include a dynamite wholesaler who never had possession of the fuse, having merely relayed the customer's order to the manufacturer who shipped directly to the customer.

The justification for imposing strict liability on the retailer and the wholesaler is apparent when the theoretical basis for imposition of strict liability on the manufacturer is understood. By imposing strict liability on the manufacturer, the law is not providing a means of compensation for negligently caused injury. With the requirement of a showing of negligence omitted, the clear basis for liability is simply one of proper allocation of risk. This basis applies just as equally to the wholesaler and retailer as it does to the manufacturer. All three profit from an enterprise which eventually leads to a sale to the consumer. By purchasing insurance and shifting this cost, through the pricing mechanism, to society as a whole, each is better able to bear the risk of loss better than the customer.

For effective consumer protection an injured party should have available an action against any one of the three. A tort action against the manufacturer and the ordinary warranty action against the retailer may prove insufficient. This is particularly true when the manufacturer is not subject to jurisdiction in Georgia, when the injured party is not within the group protected by 109A-2-318, or when the retailer has become insolvent or otherwise judgment proof.[116]

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112 Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1141 (1960).

113 *Id.* at 1142.

114 *E.g.*, Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P.2d 413 (1954); Nicholas v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P.2d 76 (1940). *See also* Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); Davis v. Radford, 223 N.C. 283, 63 S.E.2d 822 (1951); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (Dist. Ct. App. 1954).

115 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (Dist. Ct. App. 1965).

116 *See, e.g.*, Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385 (1932).

A second substantive weakness of the section is that its applicability is limited to a defendant who was the "manufacturer of . . . personal property sold as new property. . . ." Why limit the extension of consumer protection to new property sales? Does the mere fact that a good is used put the reasonable man on notice that the good may have been defectively designed or built and that it might cause him personal injury or property damage? Certainly there is a substantial possibility that defects in used goods resulted from prior use rather than from construction or design. Even though this possibility exists, the fact that the good is used should not automatically relieve the manufacturer of liability. Whether or not the used product was defectively designed or built should be handled simply as a problem of proof. Certainly with the number of trade-ins and used good sales, virtually any manufacturer of a nonconsumable product should reasonably foresee the possibility of the manufactured item becoming the subject matter of a second-hand sale. There is no logic in protecting the manufacturer of the defective product simply because the defective good passed into the hands of a second consumer owner before causing injury.

A third substantive weakness of the amendment is the type of defective product required before liability occurs. The amendment requires that the "property when sold by the manufacturer was not merchantable and reasonably suited to the use intended. . . ." As a requisite of liability the section is not requiring a defect which amounts to a simple breach of warranty but instead a defect of such nature as to amount to a breach of the two standard implied warranties, the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Even though warranty is not the statute's theory of liability, the statute adopts the applicable concepts for determining a breach of the warranty of fitness and the warranty of merchantability as the standard for determining the type of defect necessary to make 105-106 applicable.

Though often similar, the two warranties are quite distinct and separate. Section 109A-2-314 defines the warranty of merchantability, whereas section 109A-2-315 defines the warranty of fitness for a particular purpose.[117] Section 109A-2-314, as a requisite to the warranty of merchantability, requires that the seller be "a merchant with respect to goods of that kind." "Merchant" is given a broad definition by section 109A-2-104(1) which provides:

"Merchant" means a person who deals in goods of the kind or

[117] GA. CODE ANN. §§ 109A-2-314, -2-315 (1962).

> otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Because of the connection between merchantable and a merchant seller, use of the term "merchantable" by 105-106 is unfortunate. In order for the goods not to be merchantable it is arguable that the seller must be a merchant. While most manufacturers are merchants as to their products, it is not completely unforeseeable that a situation could arise where a manufacturer would participate in a new endeavor in which he would not qualify as a "merchant."

On the other hand, it is equally arguable that 105-106 does not require a breach of the warranty of merchantability but rather that the good sold be merchantable regardless of the categorization applicable to the manufacturer. "Merchantable" is given a broad definition by 109A-2-314(2) which requires that the goods be at least such as

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

Section 109A-2-315 defines the warranty of fitness for a particular purpose in such a manner as to make it totally exclusive of the warranty of merchantability. As used by the Uniform Commercial Code the warranty of fitness arises whenever "the seller at the time of contracting has reason to know" the buyer's special intended purpose for the good and "at the time of contracting has reason to know . . . that the buyer is relying on the seller's skill or judgment to select or furnish suitable

goods . . . ."[118] Official Comment 2 explains the distinction between the two warranties. It declares:

> A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability; and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.[119]

The difference between the Code's warranty of fitness and the fitness element in 105-106's standard for determining the type defect is an omission in 105-106 of the Code's knowledge requirement. All that 105-106 requires in connection with fitness for a particular purpose is that the good not be "reasonably suited to the use intended . . . ." The manufacturer need not know or have reason to know the "use intended."

Still the coupling of the merchantability and fitness for a particular purpose warranties in 105-106 is unfortunate. It is quite possible to have a merchantable product not fit for the intended use. Even knowledge by the manufacturer of the intended use and unfitness of the good for the use intended will not give rise to liability under the literal language of 105-106 if the good satisfies the minimum requirements of merchantability. Section 105-106 provides as requisites of liability that the property "when sold by the manufacturer was not merchantable *and* reasonably suited to the use intended. . . ."[120] There is no logic in withholding liability if the manufacturer knew or had reason to know the good's intended use and its inadequacy for that purpose. The source of this burdensome requirement may well have been former Georgia Code section 96-307, which provided in part:

> The manufacturer of any personal property sold as new property . . . shall warrant . . . to the ultimate consumer . . . : The article sold is merchantable and reasonably suited to the uses intended.[121]

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118 GA. CODE ANN. § 109A-2-315 (1962).

119 UNIFORM COMMERCIAL CODE § 2-315, Comment 2.

120 GA. CODE ANN. § 105-106 (1956), *as amended* [1968] GA. LAWS, 166-67 (*emphasis added*).

121 No. 342, [1957] GA. LAWS 405 (repealed 1962).

The sentence structure used in 96-307, while inadequate can be reasonably interpreted to make a breach of either warranty actionable against the manufacturer. When the language of 96-307 was used in the new amendment to 105-106, it was inserted in such a way as to require the presence of both types of defect rather than making each a separate basis for manufacturer's liability as was true under the more reasonable interpretation of 96-307.

CONCLUSION

While the legislature made a good choice in selecting a tort basis rather than contract for the new manufacturer's liability in the recent amendment to 105-106, there are several basic flaws in the amendment. In fact, in light of these weaknesses, the legislature probably should have enacted the competing House bill which would have been workable even though based upon the less desirable warranty theory. The amendment to 105-106 has the following weaknesses which should be remedied. (1) By including it in the privity section without explicitly providing that negligence need not be shown, the amendment possibly will not achieve the basic result intended—the creation of strict liability against a manufacturer of defective goods. (2) The amendment also unreasonably restricts the newly created liability to manufacturers rather than extending it to retailers and middlemen. (3) The amendment does not apply in cases where property has been sold in used form, even though there was a defect present when the goods left the possession of the manufacturer. (4) The amendment is phrased so as to require what amounts to a breach of both the warranty of merchantability and the warranty of fitness before liability against the manufacturer arises.

Hopefully, the amended version of 105-106 will be modified before confused and unsatisfactory interpretations result. Because the Georgia courts have failed to implement through the judicial process a strict liability in tort theory of products liability, an approach of many other state courts, legislative action must be taken. If the more desirable tort basis for products liability is continued in a new enactment, the proper approach seems to require reliance upon some of the suggestions that have been made and already utilized in statutory enactments applicable to products liability. One possible approach is to continue to include the statute in the tort title of the Georgia Code. If this approach is adopted, a modified version of *Restatement of Torts*

(Second) § 402A could be relied upon. Such a statute could be drafted to read as follows:

(1) A merchant who sells any product in a defective condition, making the product not merchantable, not reasonably suited for the foreseeable uses for which it is intended or unreasonably dangerous to the person or property of the user, consumer or a person whom the seller might reasonably have expected to be affected by the product, is subject to liability for physical harm proximately caused the user, consumer or affected person, or to his property.

(2) Subsection (1) applies even though (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user, consumer or affected person has not bought the product from or entered into any contractual relation with the seller.

The second and perhaps better approach would be to utilize alternative C to section 2-318 of the Uniform Commercial Code. Although the section is framed in warranty language, it clearly rests upon a tort theory basis similar to that of *Restatement of Torts (Second)* § 402A and its effect is basically the same as adoption of a tort statute covering the products liability area. That section 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 of the person of an individual to whom the warranty extends.[122]

By prohibiting disclaimer, the section would leave only the different statute of limitations and the warranty notice requirement as distinctions between what would be called warranty liability and actual tort liability. The longer statute of limitations applicable to warranty actions seems advisable; however, imposition of the notice requirement on nonpurchaser beneficiaries of the Code's warranty protection might not be desired. If not desired, an appropriate provision could be added to the newly enacted section 109A-2-318. The addition could provide: "No notice of breach of warranty as required by 109A-2-607(3) need be given by a nonpurchaser beneficiary of the warranty coverage provided by this section."

One further decision would need to be made regarding either of the

122 UNIFORM COMMERCIAL CODE § 2-318, Alternative C (1 UNIFORM LAWS ANN. 249 (1968)).

two above proposed statutes. Both the present version of 109A-2-318 and 105-106 extend their protection only to "natural persons" and thus deny protection to corporate beneficiaries. If a decision is made to continue to withhold protection from corporate entities, an appropriate modification would need to be made to either of the two above suggested statutes.

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