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N.Y.U.C.C. § 2-318: In an Action for Personal Injuries Based Upon Breach of an Implied Warranty of a Product Sold After 1975, Privity Between Plaintiff and a Third-Party Defendant-Manufacturer Is Not Required

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UNIFORM COMMERCIAL CODE

Article 2—Sales

N.Y.U.C.C. § 2-318: In an action for personal injuries based upon breach of an implied warranty of a product sold after 1975, privity between plaintiff and a third-party defendant-manufacturer is not required

Section 2-318 of the New York Uniform Commercial Code[93] (N.Y.U.C.C.) extends the protection of a seller's warranty of merchantability to "any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."[94] Despite the

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on the contrary, would cause delay by burdening the court with an extraneous claim.

[93] N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1982).

[94] *Id.*; *see* Cochran, *Emerging Products Liability under Section 2-318 of the Uniform Commercial Code: A Survey*, 29 BUS. LAW. 925, 939-45 (1974) (survey of section 2-318 as codified in all states except Louisiana and Utah). The Uniform Commercial Code (U.C.C.) was enacted in New York in 1962, ch. 553, [1962] N.Y. Laws 2580 (codified as amended at N.Y.U.C.C. §§ 1-101 to 13-105 (McKinney 1964 & Supp. 1982)), and became effective in 1964, N.Y.U.C.C. § 13-105 (McKinney Supp. 1982); *see* Memorandum of the Association of the Bar of the City of New York Committee on Uniform State Laws, *reprinted in* [1962] N.Y. LEGIS. ANN. 20-21; *see also* Governor's Memorandum on Approval of ch. 553, N.Y. Laws (Apr. 18, 1962), *reprinted in* [1962] N.Y. LEGIS. ANN. 352-54; Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992, 992-94 (1962) (listing modifications facilitating enactment of the U.C.C. in New York). Section 2-318 as originally enacted limited both implied and express warranty protection to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.

N.Y.U.C.C. § 2-318 (McKinney 1964). In 1966, the draftsmen of the U.C.C. provided two additional versions of section 2-318 for possible adoption by the states. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, 1 U.L.A. XXXIV (1976). *Compare* U.C.C. § 2-318 alternative A (1978) *with* N.Y.U.C.C. § 2-318 (McKinney 1964). Comment 3 to section 2-318 of the U.C.C. notes that alternative A "is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." U.C.C. § 2-318 comment 3 (1978).

In 1975, New York replaced alternative A with a slightly modified version of alternative B. Act of Aug. 9, 1975, ch. 774, § 1 [1975] N.Y. Laws 1208 (McKinney) (amending N.Y.U.C.C. § 2-318 (McKinney 1964)). *Compare* N.Y.U.C.C. § 2-318 (McKinney 1964) *with* N.Y.U.C.C. § 2-318 (McKinney Supp. 1982) *and* U.C.C. § 2-318 alternative B (1978). The amendment, intended for jurisdictions that do not permit strict products liability actions, U.C.C. § 2-318 comment 3 (1978), extended warranty protection beyond the household of the purchaser to any foreseeable user, *see* Memorandum of Assemblyman Leonard Silverman, *reprinted in* [1975] N.Y. LEGIS. ANN. 110. The protected class of beneficiaries now includes persons not in the distributive chain (horizontal protection), and purchasers remote from the manufacturer or distributor (vertical protection). Special Project, *Article*

apparent clarity of the statutory language, uncertainty exists as to when a cause of action for breach of warranty accrues[95] and whether privity is required between the manufacturer and the ultimate user.[96] Recently, in *Doyle v. Happy Tumbler Wash-O-Mat*,[97]

Two Warranties in Commercial Transactions, 64 CORNELL L. REV. 30, 259-60 (1978).

After the effective date of the 1975 amendment to section 2-318, a New York plaintiff injured by a defective product had three possible theories of liability upon which to sue: negligence, breach of warranty, and strict products liability. *See* Note, *Products Liability in New York: Section 2-318 of the U.C.C.—The Amendment Without a Cause*, 50 FORDHAM L. REV. 61, 61-64 (1981). The statute of limitations for a cause of action in strict products liability or negligence begins to run when the injury occurs and extends for three years. Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 399-400, 335 N.E.2d 275, 276, 373 N.Y.S.2d 39, 40 (1975); CPLR 214(5) (1972).

[95] The confusion surrounding the issue of when a cause of action in breach of warranty accrues was generated by the Court of Appeal's decision in Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978), which involved events occurring prior to the effective date of the 1975 amendment to section 2-318. *Id.* at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186. In *Martin*, the plaintiff, an employee of Western Electric, was injured in an accident in Virginia involving a defective forklift. *Id.* Raymond, a New York corporation, had manufactured the machine and sold it to Western Electric through the defendant-distributor. *Id.* The manufacture and sale of the defective forklift took place in New York. *Id.* The plaintiff instituted actions in New York based upon negligence and breach of warranty against both the manufacturer and the distributor. *Id.* Holding that Virginia's 2-year statute of limitations governed the plaintiff's cause of action, the Court of Appeals held that the plaintiff's breach of warranty claim was actually a cause of action in strict products liability. *Id.* at 589, 374 N.E.2d at 99, 403 N.Y.S.2d at 187. Thus, "assuming that plaintiff may sue in breach of warranty in contract, it still is true that his cause of action accrued only when he was injured in Virginia." *Id.* at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189. This language appears to contradict section 2-725 of the N.Y.U.C.C.:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .
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> (2) A cause of action accrues when the breach occurs. . . . A breach of warranty occurs when tender of delivery is made. . . .

N.Y.U.C.C. § 2-725(1), (2) (McKinney 1964). For other cases interpreting section 2-725, see Rockwell v. Ortho Pharmaceutical Co., 510 F. Supp. 266, 269 (N.D.N.Y. 1981); Doulman v. Sears Roebuck and Co., 85 App. Div. 2d 707, 707, 445 N.Y.S.2d 851, 852 (2d Dep't 1981); *see also* General State Auth. v. Sutter Corp., 44 Pa. Commw. 156, 403 A.2d 1022, 1028 (1979). Other jurisdictions equate "tender of delivery" with "retail sale." Note, *supra* note 94, at 81-82 & n.111.

[96] *Compare* Singer v. Federated Dep't Stores, Inc., 112 Misc. 2d 781, 784, 447 N.Y.S.2d 582, 584-85 (Sup. Ct. N.Y. County 1981) (privity between plaintiff consumer and third-party defendant-manufacturer not required) *and* Atkinson v. Ormont Mach. Co., Inc., 102 Misc. 2d 468, 471, 423 N.Y.S.2d 577, 580 (Sup. Ct. Kings County 1979) (privity not required between plaintiff-employee and defendant-manufacturer) *with* Titlebaum v. Loblaws, Inc., 64 App. Div. 2d 822, 822, 407 N.Y.S.2d 307, 308 (4th Dep't 1978) ("lack of privity . . . a legitimate defense to a products liability action based on breach of warranty") *and* Held v. 7-Eleven Food Store, 108 Misc. 2d 754, 758, 438 N.Y.S.2d 976, 979 (Sup. Ct. Erie County 1981) (dictum) ("lack of privity . . . a legitimate defense to a products liability action based on breach of warranty"). At the root of much of the confusion in the lower court decisions is the dictum in Martin v. Julius Dierck Equip. Co. stating that "a plaintiff who is not in privity with the seller of the product . . . possesses a cause of action in negligence or strict

the Appellate Division, Second Department, held that in a cause of action for breach of warranty accruing after September 1, 1975, privity is not required for a defendant to maintain an action for contribution against a third-party defendant-manufacturer.[98]

In *Doyle,* the plaintiff instituted a negligence action against Happy Tumbler Wash-O-Mat and the owner-lessor of the laundromat for personal injuries caused by an allegedly defective washing machine.[99] Prior to judgment, Happy Tumbler brought a third-party action for indemnification and contribution[100] against the manufacturer of the washing machine, Wascomat, based upon strict products liability, negligence and breach of implied warranty.[101] The Supreme Court, Special Term, denied the motion to dismiss Happy Tumbler's cause of action, reasoning that a tortfeasor may seek contribution from a third party who is liable for damages for the same injury under any concept of liability that

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products liability as opposed to what has often been incorrectly labeled breach of warranty." 43 N.Y.2d at 589-90, 374 N.E.2d at 100, 403 N.Y.S.2d at 188 (1978); *see* Steckmar Nat'l Realty & Inv. Corp. v. J.I. Case Co., 99 Misc. 2d 212, 214, 415 N.Y.S.2d 946, 948 (Sup. Ct. N.Y. County 1979); Nickel v. Hyster Co., 97 Misc. 2d 770, 772-73, 412 N.Y.S.2d 273, 275 (Sup. Ct. Suffolk County 1978); Connar v. General Motors Corp., N.Y.L.J., July 12, 1978, at 14, col. 1. (Sup. Ct. Nassau County). One commentator has asserted that if the dictum in *Martin* is interpreted as precluding a breach of warranty action by a nonpurchasing plaintiff, "the decision is wise and in accord with other jurisdictions." Note, *supra* note 94, at 86.

[97] 90 App. Div. 2d 366, 457 N.Y.S.2d 85 (2d Dep't 1982).

[98] *Id.* at 371, 457 N.Y.S.2d at 88-89. Although the Appellate Division, Fourth Department previously had stated that privity is required in breach of warranty actions, *see* Titlebaum v. Loblaws, Inc., 64 App. Div. 2d 822, 822, 407 N.Y.S.2d 307, 308 (4th Dep't 1978), *Doyle* is the first appellate division decision to address the privity issue in a cause of action arising after the 1975 amendment to section 2-318. In *Fisher v. Graco, Inc.*, 81 App. Div. 2d 209, 440 N.Y.S.2d 380 (3d Dep't 1981) a third department decision, the plaintiff-employee was injured by a faulty spray gun shortly after the effective date of the 1975 amendment. *Id.* at 210, *Id.* at 381. The defendant-manufacturer, however, had sold the gun to the plaintiff's employer prior to the effective date. *Id.* at 209-10, 440 N.Y.S.2d at 381. The third department, applying section 2-318 in its amended form, reversed the lower court's denial of the defendant's motion for dismissal. *Id.* at 210-11, 440 N.Y.S.2d at 381-82. The court found that, under this version of the section, the plaintiff did not fall within the class of persons protected and lacked the requisite privity with the manufacturer for recovery of damages. *Id.* at 211, 440 N.Y.S.2d at 382; *see* Doulman v. Sears Roebuck and Co., 85 App. Div. 2d 707, 707, 445 N.Y.S.2d 851, 852 (2d Dep't 1981).

[99] 90 App. Div. 2d at 367, 457 N.Y.S.2d at 86.

[100] *See* CPLR 1401 (1972). Section 1401 provides that "two or more persons who are subject to liability for damages for the same personal injury . . . may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." *Id.*; *see also* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972).

[101] 90 App. Div. 2d at 367, 457 N.Y.S.2d at 86. The third-party action was also brought against the distributor, Super Equipment Corporation. *Id.*

the plaintiff could have utilized against the third party.[102]

On appeal, the Appellate Division, Second Department, affirmed, holding that maintenance of an action for contribution based upon breach of an implied warranty accruing after September 1, 1975, is not dependent upon the existence of privity between the manufacturer and the ultimate user, or between the manufacturer and the purchaser.[103] Justice Bracken, writing for a unanimous court,[104] emphasized that in an action for contribution, "the fact of liability to the same person for the same harm" was signifi-

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[102] *Id.*; *see* SIEGEL § 172, at 213. Professor Siegel posits that "[t]he contribution claim can thus be based on negligence, breach of warranty, breach of a statutory duty, strict products liability, or any other, as long as it contributed to the damages suffered by the person to whom the party seeking contribution has been found liable." Siegel § 172, at 213. In Zuckerman v. City of New York, 66 App. Div. 2d 248, 249, 413 N.Y.S.2d 657, 658 (1st Dep't 1979), *rev'd on other grounds*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980), the plaintiff was injured when she stumbled and fell on a broken sidewalk near a bus stop. *Id.* The plaintiff sued the City of New York, the New York City Transit Authority, and the owner and tenant of the abutting building for negligently failing to keep the sidewalk in good repair and for failing to notify pedestrians of its dangerous condition. *Id.* The defendants interposed cross-claims against each other and, in addition, the New York City Transit Authority moved for summary judgment to dismiss the complaint against it on the ground that it had no duty to repair city sidewalks. *Id.* After special term granted summary judgment for the Transit Authority, *id.*, 413 N.Y.S.2d at 658-59, the Authority moved to dismiss the cross-claims, alleging that such claims involved the same legal question already decided in the dismissal of the complaint. *Id.* at 250, 413 N.Y.S.2d at 659. Special term denied the motion, and the appellate division affirmed. *Id.* at 250, 251-52, 413 N.Y.S.2d at 659-60. The court noted:

> The decisive circumstance here is that the cross claims, unlike the dismissed complaint, do not depend on the supposed duty of the Authority to maintain the sidewalk. The Authority's moving papers proceed entirely on the erroneous assumption that the issue presented is identical with that determined on its successful motion to dismiss the complaint, and offer nothing in addition that would support summary judgment.

Id., 413 N.Y.S.2d at 659. In a concurring opinion, Justice Lupiano observed that "although the cross claim under *Dole* may be derived from the main claim in the complaint, it is not merely restricted to that main claim and may fairly embrace theories of liability different from that asserted in the plaintiff's claim." *Id.* at 253, 413 N.Y.S.2d at 661 (Lupiano, J., concurring); *see* CPLR 3019, commentary at 52 (McKinney Supp. 1982-1983).

[103] 90 App. Div. 2d at 368, 457 N.Y.S.2d at 87. The court noted that except insofar as a warranty action is subject to a different statute of limitations, the theory of strict products liability has superseded that of breach of warranty. *Id.* The court also observed that any foreseeable user may sue under both a strict products liability theory and section 2-318 if the action is brought within the applicable statute of limitations. *Id.* at 369-70, 457 N.Y.S.2d at 88; *see* Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 App. Div. 2d 55, 61, 427 N.Y.S.2d 1009, 1013 (4th Dep't 1980); Cerrato v. R.H. Crown Co., 58 App. Div. 2d 721, 721, 396 N.Y.S.2d 716, 717 (3d Dep't 1977) (dictum); Ribley v. Harsco Corp., 57 App. Div. 2d 234, 235-36, 394 N.Y.S.2d 741, 743 (3d Dep't 1977).

[104] Justice Bracken was joined in the opinion by Presiding Justice Titone and Justices Mangano and Boyers.

cant, not the theory of liability upon which the plaintiff's claim rested.[105] Thus, the court rejected Wascomat's argument that Happy Tumbler's claim was for economic loss rather than personal injury, holding instead that such claim was for contribution,[106] and that no privity between the plaintiff and the third-party defendant-manufacturer was required to state a valid cause of action for breach of implied warranty under the amended version of section 2-318 of the N.Y.U.C.C.[107] Finally, applying N.Y.U.C.C. section 2-

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[105] 90 App. Div. 2d at 368, 457 N.Y.S.2d at 87; *see* Doundoulakis v. Town of Hempstead, 42 N.Y.2d 440, 451, 368 N.E.2d 24, 29, 398 N.Y.S.2d 401, 406 (1977); Nassau Roofing & Sheet Metal Co. v. Celotex Corp., 74 App. Div. 2d 679, 681, 424 N.Y.S.2d 786, 788 (3d Dep't 1980). In *Doundoulakis*, the Court of Appeals upheld the right of joint tortfeasors, found strictly liable for property damage incurred in a dredging operation, to cross-claim for an apportionment of fault. 42 N.Y.2d at 451, 368 N.E.2d at 29, 398 N.Y.S.2d at 406. The Court determined that, under CPLR 1401, "[n]owhere is it required that the liability be predicated upon negligence. . . ." *Id.*; *see* CPLR 1401 (1972). In *Nassau Roofing & Sheet Metal*, the defendant-contractor cross-claimed against the defendant-manufacturer for breach of warranty in the sale of defective roofing insulation. 74 App. Div. 2d at 680, 424 N.Y.S.2d at 787. In upholding the denial of the manufacturer's motion to dismiss, the third department concluded that "the parties in a cause of action for contribution must be liable, not on the same theory, but rather for the same injury, and the liability may be contractual or arise from a breach of warranty and need not arise from tort. . . ." *Id.* at 681, 424 N.Y.S.2d at 788; *see* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972); Farrell, *Civil Practice, 1977 Survey of New York Law*, 29 SYRACUSE L. REV. 449, 491 (1978).

In McDermott v. City of New York, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980), the plaintiff was injured by an allegedly defective hopper mechanism on a sanitation truck. *Id.* at 215, 406 N.E.2d at 461, 428 N.Y.S.2d at 645. The defendant City of New York brought a third-party action for indemnification against the manufacturer of the truck hopper. *Id.* In holding that the statute of limitations for an indemnity action begins to run on the date of payment of damages to the injured party rather than on the date of tender of delivery, the Court of Appeals determined that a cause of action for indemnity is "independent of the underlying wrong." *Id.* at 217-18, 406 N.E.2d at 462-63, 428 N.Y.S.2d at 646-47. Thus, explained the Court, "the city does not seek to recover in its own right for products liability; rather it asserts that Heil breached a duty to the injured sanitation worker and is therefore responsible for damages the city had to pay on account of the breach of duty." *Id.* at 218 n.5, 406 N.E.2d at 463 n.5, 428 N.Y.S.2d at 647 n.5.

[106] 90 App. Div. 2d at 368, 457 N.Y.S.2d at 87; *see* Schiavone Constr. Co. v. Elgood Mayo Corp., 81 App. Div. 2d 221, 229, 439 N.Y.S.2d 933, 938 (1st Dep't 1981) (Silverman, J., dissenting), *rev'd*, 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720 (1982); Case Note, *Products Liability—Manufacturer is Liable to Remote Purchaser Under Strict Liability for Economic Losses Incurred Due to Failure of Custom-Built Equipment to Accomplish Purpose for Which it was Built*—Schiavone Construction Co. v. Elgood Mayo Corp. (N.Y. Div. 1981), 31 DRAKE L. REV. 927, 933-34 (1981-82); *The Survey*, 56 ST. JOHN'S L. REV. 186, 190-94 (1981).

[107] 90 App. Div. 2d at 371, 457 N.Y.S.2d at 88-89; *see supra* note 95. The third-party defendant had also argued that the failure to allege privity between the third-party plaintiff and the third-party defendant barred an action for contribution and indemnification. 90 App. Div. 2d at 367, 457 N.Y.S.2d at 86.

725, Justice Bracken concluded that a cause of action for breach of an implied warranty arises upon the sale of the defective product.[108]

This rejection of the privity requirement stands in contrast to the ambiguous language of *Martin v. Julius Dierck Equipment Co.*,[109] and the decisions of the fourth department and several lower courts.[110] In light of the unambiguous language of the amended section 2-318, it is submitted that the *Doyle* court properly declined to reinstate privity as an essential element of the breach of implied warranty cause of action.[111] This unequivocal de-

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[108] 90 App. Div. 2d at 370, 457 N.Y.S.2d at 88; *see supra* note 95. The court held that a cause of action in breach of warranty accrues upon "tender of delivery." 90 App. Div. 2d at 370, 457 N.Y.S.2d at 88. The injuries were sustained on September 28, 1978, and the action was commenced in or about January, 1979. *Id.* at 367, 457 N.Y.S.2d at 86. Since the record did not indicate the date of delivery of the washing machine from Wascomat to the distributor, Super Equipment Corporation, the appellate division could not ascertain when the cause of action first accrued. *Id.* at 370-71, 457 N.Y.S.2d at 88. The *Doyle* court interpreted Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 590, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 189 (1978), as requiring privity between the plaintiff and Wascomat only if the sale took place prior to September 1, 1975, the effective date of the amendment to section 2-318. 90 App. Div. 2d at 371, 457 N.Y.S.2d at 88. If, however, the sale took place after September 1, 1975, no privity would be required. *Id.*; *see* Ramos v. Gulf & W. Indus., Inc., N.Y.L.J., July 3, 1979, at 11, col. 1 (Sup. Ct. Bronx County); *see also supra* note 103 (breach of warranty theory replaced by strict liability regarding statute of limitations).

[109] 43 N.Y.2d 583, 589-90, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188 (1978); *see supra* note 95. The *Martin* Court stated that "a plaintiff who is not in privity with the seller of the product which is alleged to have caused his injury possesses a cause of action in negligence or strict products liability as opposed to what has often been incorrectly labeled breach of warranty." 43 N.Y.2d at 589-90, 374 N.E.2d at 100, 403 N.Y.S. 2d at 188. However, the Court further stated that "[t]he effect of . . . the analysis in this case is not to raise again the 'citadel of privity.'" *Id.* at 590, 374 N.E.2d at 100, 403 N.Y.S.2d at 188. Interpreting the majority's dicta, Judge Gabrielli, in dissent, remarked:

> Today this court in effect holds that no cause of action for breach of warranty can lie in favor of a person not in privity with the seller. Implicit in this holding is the rationale that since such a person may now have a cause of action for strict products liability it is no longer necessary to afford him an action for breach of warranty as well.

Id. at 593, 374 N.E.2d at 102, 403 N.Y.S.2d at 190-91 (1978) (Gabrielli, J., dissenting); *see* Julien, *Breach of Warranty Actions Still Alive*, N.Y.L.J., Feb. 28, 1978, at 32, col. 1. At least one court has cited the *Martin* dissent in interpreting section 2-318. *See* Martin v. Drackett Products Co., 100 Misc. 2d 728, 730, 420 N.Y.S.2d 147, 149 (Sup. Ct. Erie County 1979).

[110] *See supra* note 96.

[111] 90 App. Div. 2d at 370, 457 N.Y.S.2d at 88. In Atkinson v. Ormont Mach. Co., 102 Misc. 2d 468, 423 N.Y.S.2d 577 (Sup. Ct. Kings County 1979), Justice Leone declared that the Supreme Court, Kings County, would "not annul a statute that has not been declared unconstitutional nor assume that the Court of Appeals intended to usurp the function of the legislature by withdrawing the statutory remedy and substituting in its place one of judicial creation, of a new concept, namely, 'strict products liability.'" *Id.* at 469, 423 N.Y.S.2d at

cision should reduce the confusion existing in jury charges[112] and simplify products liability litigation in general.[113] Moreover, it is

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579; *see* Village of Old Field v. Introne, 104 Misc. 2d 122, 124, 430 N.Y.S.2d 192, 194 (Sup. Ct. Suffolk County 1980); Gold v. Gartenstein, 100 Misc. 2d 253, 256, 418 N.Y.S.2d 852, 855 (Sup. Ct. Kings County 1979). Justice Leone admonished two other courts for misconstruing *Martin* as reinstating the privity requirement. 102 Misc. 2d at 469, 423 N.Y.S.2d at 579 (citing Ramos v. Gulf & W. Indus., Inc., N.Y.L.J., July 3, 1979, at 11, col. 1 (Sup. Ct. Bronx County); Connar v. General Motors Corp., N.Y.L.J., July 12, 1978, at 14, col. 1. (Sup. Ct. Nassau County)).

Professor Shanker, who opposes the substitution of strict products liability for relevant Code provisions, urges judicial restraint in interpreting section 2-318, alternative A:

> One may not like a particular statute. However, so long as it is constitutionally enacted, there is no license for a court to ignore it. There is even less for the court to eclipse it by replacing it with what the court considers to be a superior brand of judicial justice. This, I submit, is not the function of the courts. Rather, it is a misuse of the judicial function, an imposing by the judiciary of its personal views of what is good social policy rather than deferring to those social policies which have been validly enacted by the legislature.

Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697, 709 (1978). In his analysis of the *Martin* decision, another critic observes that, "[s]ince breach of warranty is now established by U.C.C. 2-318, it would be difficult to see how any Court of Appeals ruling could attempt to repeal a so clearly enunciated statutory mandate." Julien, *supra* note 109, at 32, col. 2.

[112] *See* Note, *supra* note 94, at 85; *cf.* Special Project, *Recent Developments in Commercial Law*, 11 RUT.-CAM. L. REV. 527, 605 (1980) ("not reasonably fit, suitable and safe" standard adopted by New Jersey courts to avoid befuddling the jury with the "unreasonably dangerous" standard). In Hughes v. Ataka Am., Inc., 48 App. Div. 2d 808, 369 N.Y.S.2d 723 (1st Dep't 1975), the plaintiff was injured by a defective nail that fractured and flew into his eye while it was being hammered into a batten. *Id.* at 809, 369 N.Y.S.2d at 724. The plaintiff sued the immediate seller, the supplier, the importer, and the subsidiary of a foreign exporter for negligence and breach of implied warranty. *Id.* The judge's charge to the jury on the theory of breach of implied warranty limited the jury to finding against either the immediate seller, the supplier, or the subsidiary, but not against more than one of these parties, resulting in a "highly confusing" instruction. *Id.* On appeal, the Appellate Division, First Department, ordered a new trial, holding that "[t]he defect having been concealed and being a substantial factor in the injury, and the product having been used for the purpose sold, it would have been possible to hold more than one defendant liable." *Id.* Also cited as error was the trial court's rejection of a *Dole* charge based upon its impropriety in a warranty case. *Id.*, 369 N.Y.S.2d at 724-25. The court noted that Noble v. Desco Shoe Corp., 41 App. Div. 2d 908, 909-10, 343 N.Y.S.2d 134, 136 (1st Dep't 1973), "expressly held to the contrary." 48 App. Div. 2d at 809, 369 N.Y.S.2d at 725; *see also* Owens v. Palm Tree Nursing Home, Inc., 89 App. Div. 2d 619, 620, 452 N.Y.S.2d 670, 672-73 (2d Dep't 1982) (jury confusion as to definition of "strict liability in tort").

[113] One commentator notes that, in addition to the differing statutes of limitations, the disparity in the level of defectiveness that the claimant is required to show in strict liability and breach of warranty actions may be outcome-determinative. Note, *supra* note 94, at 75. In a breach of warranty action, the plaintiff must prove that the product is "unmerchantable." *Id.* at 76; *see* N.Y.U.C.C. § 2-314(2)(C) (McKinney 1964); *see also* United States Leasing Corp. v. Comerald Assocs., Inc., 101 Misc. 2d 773, 777, 421 N.Y.S.2d 1003, 1005 (N.Y.C. Civ. Ct. N.Y. County 1979). In a strict products liability action, the plaintiff also must show that the product is defective, and, in some courts, that the product is unreasona-

hoped that the decision will have a positive impact on product safety by strengthening manufacturers' incentives to improve quality-control measures.[114]

It is further submitted that the second department correctly interpreted N.Y.U.C.C. section 2-725 in fixing the accrual date of a breach of warranty action as the date of the "tender of delivery" rather than the date of injury.[115] Although the tender of delivery accrual date has been criticized because of the possibility that the statute of limitations would run before the injury occurs,[116] a New York plaintiff's cause of action in strict products liability does not accrue until the injury has occurred.[117] Thus, this decision maintains one of the few distinctions remaining between strict products liability claims and breach of warranty claims after the elimination of privity as a requirement for the latter cause of action.[118] Although the desirability of continuing such distinctions between strict products liability and breach of warranty may be questioned,[119] the *Doyle* court properly deferred to the legislature in

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bly dangerous. Note, *supra* note 94, at 77-78; *see* RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* Wolfgruber v. Upjohn Co., 72 App. Div. 2d 59, 62, 423 N.Y.S.2d 95, 97 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 768, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980).

[114] In a 1978 survey of California manufacturers designed to ascertain the impact of products liability law on the manufacturing sector, it was found that 36% of small firms and 55% of large firms instituted claims-prevention procedures, including quality control. McInturff, *Products Liability: The Impact on California Manufacturers*, 19 AM. BUS. L.J. 343, 357 (1981). The conductor of the survey opined that it was possible to conclude that the theory of products liability as applied by the court "affects the manufacturer's decisional procedures by increasing the incentive for product testing and quality control." *Id.* at 358.

[115] *See* N.Y.U.C.C. § 2-725(2) (McKinney 1964); *supra* notes 95 & 108.

[116] *See* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 345-46, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 494-95 (1969), *overruled in* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 400, 335 N.E.2d 275, 276, 373 N.Y.S.2d 39, 40 (1975); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1123-24 (1960).

[117] *See supra* note 94.

[118] *See* Note, *supra* note 94, at 75-80; *supra* note 113.

[119] *See* Epstein, *Products Liability: The Search For the Middle Ground*, 56 N.C. L. REV. 643, 647 (1978); Note, *supra* note 94, at 96-103 (advocating retention of only strict products liability cause of action for product-related injuries); *see generally* Atkenson & Neidich, *A Status Report on Proposals for a Federal Product Liability Act*, 38 BUS. LAW. 623, 626-30 (1983) (proposed uniform and federal products liability acts); Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 FORUM 251, 269-85 (1978) (state product liability legislation). To implement an exclusive remedy of strict products liability, one commentator would

> (i) eliminate from the Code section 2-715(2)(b), which states that personal injury and property damage are consequential damages, and section 2-318, thereby eliminating breach of warranty as a remedy for personal injury; (ii) amend the tort statute of limitations to run four years from the date of the harm in the case of product-caused injuries; and (iii) codify *Codling*, absent any reference to a re-

refusing to contradict the plain language of the statute.

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Article 3—Commercial Paper

N.Y.U.C.C. § 3-206(3): Depositary bank prohibited from attaining holder in due course status when it pays inconsistently with a restrictive indorsement the bank itself supplied

Under the Uniform Commercial Code (UCC),[120] a depositary bank[121] may acquire holder in due course status[122] if it establishes:

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quirement of showing 'unreasonable danger.'

Note, *supra* note 94, at 101-02 (footnotes omitted).

[120] The UCC was promulgated for the purpose of providing a uniform system of law, and as a means of "simplify[ing], clarify[ing], and modern[izing]" commercial transactions. N.Y.U.C.C. § 1-102(2)(a), (c) (McKinney 1964). New York was the 16th state to enact the UCC. *See* N.Y. Gov. Mess. of Approval of ch. 553, N.Y. Laws (Apr. 18, 1962), *reprinted in* [1962] N.Y. Laws 3638 (McKinney) [hereinafter cited as N.Y. Gov. Mess.]. The UCC was passed by the New York Legislature in 1962, but did not become effective until September 27, 1964. N.Y.U.C.C. § 13-05 (McKinney Supp. 1981-1982). In New York, the UCC superseded the uniform laws concerning "negotiable instruments, sales, warehouse receipts, bills of lading, stock transfers, conditional sales, and trust receipts," as well as New York laws regarding "bank collections, bulk sales, chattel mortgages, and factor's liens." *See* N.Y. Gov. Mess., *supra*, at 3638.

[121] *See* N.Y.U.C.C. § 4-105(a) (McKinney 1964). A depositary bank is "the first bank to which an item is transferred for collection even though it is also the payor bank." *Id.*

[122] *See id.* § 3-302(1). To be considered a holder in due course, a transferee must demonstrate his status as a holder, *see, e.g.*, United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 602 (D. Md. 1973); National Bank of N. Am. v. Flushing Nat'l Bank, 72 App. Div. 2d 538, 538, 421 N.Y.S.2d 65, 66 (1st Dep't 1979), and that the instrument was a negotiable one, *see, e.g.*, Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 772, 182 S.E.2d 521, 523 (1971); N.Y.U.C.C. § 3-102(1)(e) (McKinney 1964). In addition, the transferee must establish that he took the instrument: "for value; and . . . in good faith; and . . . without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." N.Y.U.C.C. § 3-302(1)(a)-(c).

Identification as a holder in due course has been characterized as a question of "status." 2 F. HART & W. WILLIER, COMMERCIAL PAPER UNDER THE UNIFORM COMMERCIAL CODE § 11.01, at 11.4 (1982). The legal ramifications of holder in due course status are well established by the UCC. *See id.* Section 3-305 of the UCC provides that a holder in due course is insulated from "all claims" to the instrument by other persons and is not bound by defenses tendered by parties to the instrument with whom the holder has not dealt. N.Y.U.C.C. § 3-305(1)-(2) (McKinney 1964). Thus, a holder in due course takes free from "personal" defenses, *see* H. BAILEY, BRADY ON BANK CHECKS § 9.13, at 6 (5th ed. Supp. 1983), such as failure of consideration, *see, e.g.*, Chemical Bank v. Haskell, 51 N.Y.2d 85, 91, 411 N.E.2d 1339, 1341, 432 N.Y.S.2d 478, 480 (1980), fraud in the inducement, *see, e.g.*, Federal Deposit Ins. Corp. v. Kassel, 72 App. Div. 2d 787, 788, 421 N.Y.S.2d 609, 610-11 (2d Dep't 1979), conditional delivery, *see, e.g.*, Worthey v. First State Bank, 573 S.W.2d 279, 281 (Tex. Civ. App. 1978), and breach of fiduciary duty, *see, e.g., Chemical Bank*, 51 N.Y.2d at 91, 411