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Economic Loss Due to Defective Product Design Held Sufficient to State a Cause of Action in Strict Products Liability Against Remote Manufacturer

Rosemary B. Boller

ness as a lending institution.[71] Thus, it is hoped that the judiciary will examine the *Kagan* court's decision and arrive at a more equitable interpretation of section 673.

John James Lynch

DEVELOPMENTS IN NEW YORK LAW

Economic loss due to defective product design held sufficient to state a cause of action in strict products liability against remote manufacturer

In the area of products liability, the requirement that the plaintiff have a direct contractual relationship with the manufacturer against whom it brings an action for damages traditionally had acted as a formidable barrier to the plaintiff's recovery.[72] This privity requirement gradually has eroded, however, and is now dependent upon two variables: the type of harm the plaintiff has incurred and the theory upon which the plaintiff's cause of action is premised.[73] Thus, in New York, a plaintiff who seeks to redress

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[71] Based on the holding in *Kagan*, bank officials, fearing disproportionate felony sanctions, may be reluctant to lend money when there is a mere possibility that the amount lent may exceed a regulatory limit, even if the transaction would be in the bank's best interest and there is no risk of loss. *See* Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 696 (1980).

[72] When there is a direct contractual relationship between the plaintiff and the defendant-manufacturer, the parties are said to be in "privity of contract." *See* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 9 (1980); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract*, 114 U. PA. L. REV. 539, 545 (1966) [hereinafter cited as *Tort or Contract*]. This privity requirement once effectively barred plaintiffs from recovering damages against remote manufacturers. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 373, 161 A.2d 69, 77 (1960) (manufacturers were able to achieve a "large measure of immunity for themselves"); Howard & Watkins, *Strict Products Liability in New York and the Merging of Contract and Tort*, 42 ALB. L. REV. 603, 603-04 (1978). For illustrations of the types of cases which were barred by the requirement of privity, see Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 343, 80 N.E. 482, 482 (1907) (remote manufacturer "ordinarily is not responsible . . . to those who may receive injuries caused by [a product's] defective construction"; negligence action barred); Turner v. Edison Storage Battery Co., 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928) ("[t]here can be no warranty [either express or implied] where there is no privity of contract"); Chysky v. Drake Bros. Co., 235 N.Y. 468, 472, 139 N.E. 576, 578 (1923) ("unless there be privity of contract, there can be no implied warranty").

[73] *See generally* Zammit, *Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?*, 20 N.Y.L.F. 81, 82, 87 (1974). The type of damages incurred by the plaintiff are characterized as economic or physical. *Id.* at 82. Economic damages include, *inter alia*, loss of bargain and cost of repairs. *Id.* Physical

personal injuries or property damages, and who brings a breach of express warranty,[74] breach of implied warranty,[75] negligence,[76] or strict products liability[77] cause of action need not be in privity with the remote manufacturer. When that same non-privity plain-

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damages are comprised of personal injuries and property damages. *Id.* The characterization of loss either as economic or physical, together with the plaintiff's election to state its cause of action in either negligence, breach of express warranty, breach of implied warranty, or strict products liability will be determinative of whether the non-privity plaintiff will be permitted to recover damages. *See generally id.* at 87.

[74] *See* N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1980-1981); Spiegel v. Saks 34th Street, 43 Misc. 2d 1065, 1072, 252 N.Y.S.2d 852, 858 (Sup. Ct. App. T. 2d Dep't 1964), *aff'd*, 26 App. Div. 2d 660, 272 N.Y.S.2d 972 (2d Dep't 1966). *But see* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589-90, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188 (1978), discussed in notes 80 and 111 *infra*. In *Spiegel*, the non-privity plaintiff was permitted to recover for injuries sustained through the use of the manufacturer's cosmetic cream on the theory of breach of the express warranty that the cream was safe. 43 Misc. 2d at 1073, 252 N.Y.S.2d at 859. The express warranty was in the form of a newspaper advertisement. *Id.* at 1066-67, 252 N.Y.S.2d at 853-54.

[75] N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1980-1981); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 595 (1963); Greenberg v. Lorenz, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 776, 213 N.Y.S.2d 39, 42 (1961); *accord*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 84 (1960). *But see* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589-90, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188 (1978), discussed in notes 80 and 111 *infra*. Dean Prosser was of the opinion that *Henningsen* marked the "fall of the citadel of privity." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791 (1966). *Henningsen* involved an action brought by the wife of the purchaser of a Chrysler automobile for injuries sustained while she was driving the automobile. 32 N.J. at 364, 161 A.2d at 73. The court held that the implied warranty of merchantability extended to the plaintiff, regardless of the absence of privity. 32 N.J. at 384, 161 A.2d at 84. Similarly, the New York Court of Appeals, in *Goldberg*, extended the implied warranty of the defendant airplane manufacturer to the non-privity plaintiff. 12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

[76] *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916), one of the landmark cases in this area. In *MacPherson*, Judge Cardozo allowed the plaintiff to recover under a negligence theory against the remote manufacturer of a defective wheel. *Id.* He stated that "[w]e are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow." *Id.*

[77] *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963); Codling v. Paglia, 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973). *Codling* held that "today the manufacturer of a defective product may be held liable to an innocent bystander, without proof of negligence, for damages sustained in consequence of the defect." *Id.* at 335, 298 N.E.2d at 624, 345 N.Y.S.2d at 463. The Court reasoned that due to the complex and sophisticated nature of the products being placed on the market, the manufacturer was in the best position to shoulder the responsibility for any problems which might arise from the use of these products. *See id.* at 342, 298 N.E.2d at 627, 345 N.Y.S.2d at 468. For illustrations of the application of this holding, see Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc., 57 App. Div. 2d 993, 994, 394 N.Y.S.2d 744, 745-46 (3d Dep't 1977); Infante v. Montgomery Ward & Co., 49 App. Div. 2d 72, 75, 371 N.Y.S.2d 500, 502 (3d Dep't 1975); Beyer v. Aquarium Supply Co., 94 Misc. 2d 336, 337, 404 N.Y.S.2d 778, 779 (Sup. Ct. Montgomery County 1977).

tiff seeks to redress economic losses, however, the cause of action selected is important. Although a plaintiff may recover economic losses from a remote manufacturer under a breach of express warranty cause of action,[78] he may not pursue such a remedy under negligence[79] or breach of implied warranty theories.[80] Moreover, it has been unclear whether a plaintiff may recover economic losses under a strict products liability cause of action.[81] Recently, in

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[78] *See, e.g.*, Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 16, 181 N.E.2d 399, 404, 226 N.Y.S.2d 363, 367 (1962). The plaintiff in *Randy Knitwear* sought damages incurred as a result of the shrinkage of a fabric manufactured by the defendant and advertised as shrinkproof. *Id.* at 9, 181 N.E.2d at 400, 226 N.Y.S.2d at 364. The Court, upon rejecting the defendant's argument that privity of contract was essential to the plaintiff's recovery of economic losses under an express warranty theory, held the manufacturer liable. *Id.* at 16, 181 N.E.2d at 404, 226 N.Y.S.2d at 367.

[79] *See, e.g.*, A. Ancelmo Trucking Co. v. Durkee, 11 App. Div. 2d 836, 837, 203 N.Y.S.2d 345, 348 (3d Dep't 1960); Snyder Plumbing & Heating Corp. v. Purcell, 9 App. Div. 2d 505, 508, 195 N.Y.S.2d 780, 783 (1st Dep't 1960); 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) (economic loss not the type of harm contemplated by negligence or strict products liability theories).

[80] *See* Mendelson v. General Motors Corp., 105 Misc. 2d 346, 348, 432 N.Y.S.2d 132, 134 (Sup. Ct. Nassau County 1980) (under implied warranty theory "privity is required where recovery solely for economic loss is sought."); Steckmar Nat'l Realty & Inv. Corp. v. J.I. Case Co., 99 Misc. 2d 212, 213, 415 N.Y.S.2d 946, 948 (Sup. Ct. N.Y. County 1979) (recovery of economic losses denied because there was "no contractual relationship between the parties [and therefore] no warranty either express or implied"). *See also* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d at 590, 374 N.E.2d at 100, 403 N.Y.S.2d at 189 (1978), wherein the Court of Appeals stated that since strict products liability "displaces the need for a 'warranty' action by third parties," the non-privity plaintiff could not state a cause of action in implied warranty against the manufacturer of a defective forklift. *Id.* at 589-90, 374 N.E.2d at 100, 403 N.Y.S.2d at 188-89; *see* note 111 *infra*.

[81] *See generally* John R. Dudley Constr., Inc. v. Drott Mfg. Co., 66 App. Div. 2d 368, 372-74, 412 N.Y.S.2d 512, 514-16 (4th Dep't 1979); Mendelson v. General Motors Corp., 105 Misc. 2d at 348-49, 432 N.Y.S.2d at 134-35. The plaintiff in *Dudley*, who had purchased a defective crane manufactured by the defendant, was permitted to recover under a strict products liability theory, although the physical damages were limited to the crane itself. 66 App. Div. 2d at 372, 412 N.Y.S.2d at 514. Despite this extension of strict products liability, the court indicated that it would not be willing to include "benefit of bargain" losses within the sphere of recoverable damages. *Id.* at 372, 412 N.Y.S.2d at 514. In *Mendelson*, although the plaintiff's complaint did not set forth a cause of action in strict products liability, the court indicated that even under this theory, the plaintiff's economic losses would not be recoverable. 105 Misc. 2d at 349, 432 N.Y.S.2d at 134.

The issue has generated considerable controversy among various jurisdictions. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 15-18, 403 P.2d 145, 149-50, 45 Cal. Rptr. 17, 22-23 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 59-63, 207 A.2d 305, 308-10 (1965). In *Santor*, the court held that the plaintiff could sue the manufacturer of defective carpeting on an implied warranty theory. *Id.* at 63, 207 A.2d at 310. The court also indicated that the facts were sufficient to maintain an action in strict products liability. *Id.* The measure of the plaintiff's damages would be the loss in value of the carpeting. *Id.* at 68-69, 207 A.2d at 313. The court reasoned that the obligation of the manufacturer of a defective product should be one of an "enterprise liability, and one which should not depend upon the intrica-

Schiavone Construction Co. v. Elgood Mayo Corp.,[82] the Appellate Division, First Department, held that economic losses are recoverable against a remote manufacturer under a strict products liability cause of action.[83]

In *Schiavone*, the plaintiff had purchased a truck hoist from the defendant Elgood, who in turn contracted with the defendant Timberland for the manufacture of the hoist.[84] The hoist delivered to the plaintiff was inoperable,[85] however, and to redress its ensuant economic losses,[86] the plaintiff brought an action against both Elgood and the remote manufacturer, Timberland.[87] Upon motioning to attach the assets of Timberland,[88] however, the plaintiff's causes of action in breach of implied warranty and negligence were dismissed.[89] Nonetheless, special term permitted the plaintiff to amend its complaint to state a cause of action in strict products

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cies of the law of sales." *Id.* at 65, 207 A.2d at 312. The *Seely* court criticized the *Santor* decision and its extension of strict products liability. The plaintiff in *Seely* sustained damages to his truck when it overturned due to certain defects. Although the plaintiff recovered on a warranty theory, Chief Justice Traynor, in dictum, stated that the plaintiff's economic losses were not recoverable on a strict products liability theory. 63 Cal. 2d at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22. For an analysis of the two approaches taken by these courts, see Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME LAW. 118 (1978).

[82] 81 App. Div. 2d 221, 439 N.Y.S.2d 933 (1st Dep't 1981).

[83] *Id.* at 227, 439 N.Y.S.2d at 937.

[84] *Id.* at 222, 439 N.Y.S.2d at 934. Timberland manufactured the truck hoist according to contract specifications provided by Elgood. *Id.* There was no contractual relationship between Schiavone and Timberland, as evidenced by the absence of the manufacturer's name on either the equipment or on the plaintiff's bills. *Id.* The plaintiff required the hoist for construction work in New York City's East 63rd Street tunnel. *Id.*

[85] *Id.* According to the plaintiff's complaint, the hoist failed to operate "because, among other things, the shaft was improper in design and in its fit to the drum, and the cable equalizer did not and could not fulfill the function for which it was intended." *Id.*

[86] *Id.* at 227-28, 439 N.Y.S.2d at 937 (Silverman, J., dissenting). In addition to recouping the cost of repairs and loss of production, the plaintiff sought to redress its cost of equipment rentals and additional labor incurred. *Id.*

[87] N.Y.L.J., Sept. 19, 1980, at 6, col. 3 (Sup. Ct. N.Y. County 1980).

[88] 81 App. Div. 2d at 227, 439 N.Y.S.2d at 933; *see* CPLR 6201(1) (1980). Pending its suit brought for alleged breach of implied warranty and negligence, the plaintiff sought and was granted an order of attachment of the defendant's assets, pursuant to CPLR 6201(1). Prior to the issuance of such an order, a plaintiff must show that there is a cause of action and that it is probable that he will succeed on the merits. CPLR 6212 (1980); *see, e.g.*, Shearson Hayden Stone, Inc. v. Scrivener, 480 F. Supp. 256, 259 (S.D.N.Y. 1979); Swiss Bank Corp. v. Eatessami, 26 App. Div. 2d 287, 289, 273 N.Y.S.2d 935, 938 (1st Dep't 1966).

[89] N.Y.L.J., Sept. 19, 1980, at 6, col. 3 (Sup. Ct. N.Y. County 1980). The court dismissed the plaintiff's breach of implied warranty cause of action because of lack of privity between the parties. *Id.* The plaintiff's negligence cause of action was dismissed due to the non-physical nature of the plaintiff's damages. *Id.*

liability, and approved the plaintiff's attachment motion on this theory.[90]

On appeal, a divided appellate division affirmed the lower court's grant of attachment.[91] Writing for the majority,[92] Justice Fein rejected the traditional view that because economic losses sound in contract they may only be recouped through a breach of warranty cause of action, wherein privity of contract is mandated.[93] Notwithstanding that the court attacked the necessity for privity in the breach of warranty context on grounds that the requirement presupposed "dubious" economic principles[94] and engendered circuitous actions,[95] it thereafter neglected this line of reasoning. Indeed, Justice Fein opted instead to circumvent the "citadel of privity" by holding that economic losses may be recovered under a cause of action having no privity defense—strict products liability.[96] Conceding that such causes of action generally have been confined by courts outside of New York to claims sounding in tort, *viz.*, injuries to the person, Justice Fein stated that New York case law could be interpreted as sanctioning the use of a strict products liability cause of action to recover economic losses.[97]

Dissenting, Justice Silverman stressed that New York case law did not support the use of a strict products liability cause of action to redress economic losses.[98] The dissent further argued that the

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[90] *Id.*

[91] 81 App. Div. 2d at 227, 439 N.Y.S.2d at 937.

[92] Justices Ross and Markewich joined in Justice Fein's majority opinion. Justice Silverman filed a dissenting opinion in which Presiding Justice Sullivan concurred.

[93] 81 App. Div. 2d at 223-24, 439 N.Y.S.2d at 934-35. Justice Fein criticized the view that a strict products liability cause of action should apply only to physical damages, thus leaving the commercial aspects of a transaction to be covered by warranty provisions. *Id.* at 224, 439 N.Y.S.2d at 935.

[94] *Id.* at 225, 439 N.Y.S.2d at 935. The majority criticized the argument that the ability of a purchaser and seller to bargain for warranty or disclaimer provisions in their contract is a sufficient means of apportioning losses. *Id.*; *see* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 287-89 (3d Cir. 1980).

[95] 81 App. Div. 2d at 225, 439 N.Y.S.2d at 935.

[96] *Id.* at 227, 439 N.Y.S.2d at 936.

[97] *Id.* at 225, 439 N.Y.S.2d at 935 (citing John R. Dudley Constr., Inc. v. Drott Mfg. Co., 66 App. Div. 2d 368, 372, 412 N.Y.S.2d 512, 514 (4th Dep't 1979)); *see* note 81 *supra*. The majority stated that "[t]here is no reason why New York need follow either California or the Federal courts in attempting to bar liability on the theory that strict liability is grounded in tort and not in warranty." 81 App. Div. 2d at 225, 439 N.Y.S.2d at 935. The majority relied heavily upon *Dudley's* extension of strict products liability to include property damage to the product itself. *Id.* at 223, 439 N.Y.S.2d at 934. *But see* note 98 *infra*.

[98] 81 App. Div. 2d at 228-29, 439 N.Y.S.2d at 937-38 (Silverman, J., dissenting). In its

"economic ramifications" of permitting economic losses to be recouped through a strict products liability cause of action evinced the necessity for legislative rather than judicial reform in this area.[99] As further support for renouncing a judicial initiative, the dissent contended that a manufacturer's duty to distribute safe products is distinct from its duty to distribute operable products, and that economic losses incurred by a consumer in the latter situation are not actionable unless a manufacturer fails to meet an agreed upon performance standard.[100] The dissent concluded that since such an agreement sounds in contract, it properly should be enforced through a breach of warranty and not a strict products liability cause of action.[101]

It is submitted that the *Schiavone* court improperly fashioned a tort remedy for what are essentially contract damages.[102] None-

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criticism of the majority's decision, the dissent quoted extensively from Chief Judge Traynor's opinion in Seely v. White Motor Co., 63 Cal. 2d 9, 17-19, 403 P.2d 145, 149-50, 45 Cal. Rptr. 17, 21-23 (1965); *see* note 81 *supra*, and the opinion in Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 287-89 (3d Cir. 1980); *see* note 94 *supra*. 81 App. Div. 2d at 230-32, 439 N.Y.S.2d at 938-40 (Silverman, J., dissenting). The dissent disputed the majority's reliance on John R. Dudley Constr., Inc. v. Drott Mfg. Co., 66 App. Div. 2d 368, 412 N.Y.S.2d 512 (4th Dep't 1979); *see* note 81 *supra*. 81 App. Div. 2d at 232-34, 439 N.Y.S.2d at 940-41 (Silverman, J., dissenting). The dissent contended that the *Dudley* court clearly had refused to adopt the *Santor* application of strict products liability to economic loss, and stated that the *Dudley* holding was "consistent with the more restrictive and, we think, the better view of the California court in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965)." 81 App. Div. 2d at 233-34, 439 N.Y.S.2d at 940 (Silverman, J., dissenting) (quoting John R. Dudley Constr., Inc. v. Drott Mfg. Co., 66 App. Div. 2d at 374, 412 N.Y.S.2d at 516).

[99] 81 App. Div. 2d at 229, 439 N.Y.S.2d at 938 (Silverman, J., dissenting). The dissent expressed the concern that the economic consequences of the majority's decision would be "so extensive and unforeseeable that it [would be] better for the courts not to extend strict products liability to this area, leaving the owner of the product to its remedy based on its contract with the seller." *Id.* (Silverman, J., dissenting).

[100] *Id.* at 230-31, 439 N.Y.S.2d at 939 (Silverman, J., dissenting) (citing Seely v. White Motor Co., 63 Cal. 2d at 16, 18, 403 P.2d at 149, 150, 45 Cal. Rptr. at 21-23; *see* note 81 *supra*).

[101] 81 App. Div. 2d at 234, 439 N.Y.S.2d at 941 (Silverman, J., dissenting).

[102] Although the distinction between physical and non-physical damages seems arbitrary, *see, e.g.*, Moorman Mfg. Co. v. National Tank Co., 92 Ill. App. 3d 136, 414 N.E.2d 1302, 47 Ill. Dec. 186 (App. Ct. 1980); Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 MERCER L. REV. 493, 499 (1978), the characterization of recovery for economic loss as a contract remedy appears to be necessary. *See generally* Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 318 (1973); Comment, *The Last Vestige of the Citadel*, 2 HOFSTRA L. REV. 721, 730 (1974). Contract law is viewed as the proper framework in which to seek recovery against a seller of defective merchandise. Strict products liability was developed to deal with physical damages incurred by the consumer. *See Tort or Contract, supra* note 72, at 548-49.

theless, it appears that the court's objective, to prevent the "vestiges of the citadel of privity"[103] from barring the plaintiff's claim, was commendable. Indeed, the *Schiavone* court recognized the fact that New York courts generally have been "astute" in finding a remedy against remote manufacturers[104] and that the placement of responsibility for a defective product at the top of the distribution chain is a desirable aim.[105] It is suggested, however, that an extension of the breach of implied warranty cause of action to include foreseeable remote users who are injured, whether physically *or* economically, would better implement these policies and not obfuscate the fact that economic losses sound in contract, not in tort.[106]

Indeed, it is suggested that New York should join those states which have abolished the privity requirement in breach of implied warranty causes of action brought to recoup economic losses.[107] Of

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[103] 81 App. Div. 2d at 227, 439 N.Y.S.2d at 936.

[104] *Id.*; *see, e.g.*, Codling v. Paglia, 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 16, 181 N.E.2d 399, 404, 226 N.Y.S.2d 363, 367 (1962). The erosion of the "citadel of privity" in New York indicates the desire on the part of New York courts to place responsibility for a defective product on the manufacturer. *See* Codling v. Paglia, 32 N.Y.2d at 338-39, 298 N.E.2d at 626, 345 N.Y.S.2d at 466-67. The *Codling* Court, in adopting strict products liability in New York, stated that "the time has now come when our court, instead of rationalizing broken field running, should lay down a broad principle, eschewing the temptation to devise more proliferating exceptions." *Id.* at 339, 298 N.E.2d at 626, 345 N.Y.S.2d at 467 (citation omitted).

[105] 81 App. Div. 2d at 225, 439 N.Y.S.2d at 935 (quoting Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d at 13, 181 N.E.2d at 403, 226 N.Y.S.2d at 368); *see* note 78 *supra*. The majority noted that the Court of Appeals, in *Randy Knitwear*, desired to force the manufacturer to "shoulder the responsibility" for placing a defective product on the market. 81 App. Div. 2d at 225, 439 N.Y.S.2d at 935. Indeed, "[h]aving invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user." Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d at 13, 181 N.E.2d at 403, 226 N.Y.S.2d at 368.

[106] *See* Note, *Torts—Products Liability—Strict Liability and Warranty in Products Liability Action*, 63 MARQ. L. REV. 678, 706 (1980). The theories of strict tort liability and breach of implied warranty are distinct. "Different facts must be proven to establish liability under the two claims and each potentially could permit recovery where the other would not." *Id. But see Tort or Contract*, *supra* note 72, at 549, wherein the author, although supporting the view that an action for economic loss should be brought under a contract theory, nevertheless believes that "the results under the two doctrines may not turn out to be significantly different." *Id.*

[107] *See* Industrial Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793, 804 (D. Minn. 1980); Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 58 (Mo. Ct. App. 1981) (court "convinced that sound policy considerations support the extension of implied warranties to a remote purchaser and that economic loss should be compensable"); JKT Co. v. Hardwick,

course, section 2-318 of the New York Uniform Commercial Code does permit persons not in privity with a manufacturer to recover damages under a breach of warranty cause of action.[108] The statute, however, is restricted to "injuries to the person."[109] Hence, it is suggested that the legislature should adopt alternative "C" of section 2-318 of the Uniform Commercial Code, which extends the section's coverage to all injuries.[110] Moreover, given the refusal of the Court of Appeals to abandon outright the doctrine of privity of contract,[111] it is urged that the legislature follow the lead of other

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274 S.C. 413, 265 S.E.2d 510, 512 (1980) ("South Carolina is in the vanguard in permitting a plaintiff to recover economic loss [regardless of lack of privity]"); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 81 (1977); Dawson v. Canteen Corp., 212 S.E.2d 82, 82-83 (W. Va. 1975) (requirement of privity of contract in warranty actions abolished). The court, in *Nobility Homes*, reasoned that "[t]o hold otherwise, would encourage manufacturers to use thinly capitalized 'collapsible corporations' to sell their commercially inferior products leaving no one for the buyer to sue for his economic loss." 557 S.W.2d at 81-82 (citations omitted).

[108] N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1980-1981). Section 2-318 of the New York Uniform Commercial Code is entitled "Third Party Beneficiaries of Warranties Express or Implied," and provides:

> A seller's warranty whether express or implied extends 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. A seller may not exclude or limit the operation of this section.

N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1980). *But see* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589-90, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188 (1978), wherein the Court questioned whether section 2-318 mooted the privity requirement; note 111 *infra*.

[109] *See* note 108 *supra*.

[110] *Compare* U.C.C. § 2-318, Alternative C (1978 version) *with* N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1980-1981). In 1975, New York had amended section 2-318 so as to include as a potential plaintiff in a warranty action any natural person reasonably expected to use, consume, or be affected by the seller's product "and who *is injured in person* by breach of the warranty." N.Y.U.C.C. § 2-318 (emphasis added). The U.C.C.'s Alternative C, on the other hand, does not expressly limit the coverage of the action to personal injuries. Rather, any person "who *is injured* by breach of the warranty" may maintain an action against the seller who impliedly or expressly warrants his product. U.C.C. § 2-318, Alternative C (1978 version) (emphasis added). Alternative C, however, as written, does leave open the possibility that the seller may exclude or limit such a warranty with respect to nonphysical injuries. *Id.* Alternative C has been adopted in substance by several states. *See, e.g.*, COLO. REV. STAT. § 4-2-318 (1973) (does not leave open the possibility of seller's exclusion or limitation of section for non-personal damages); DEL. CODE ANN. tit. 6, § 2-318 (1975); R.I. GEN. LAWS § 6A-2-318 (Supp. 1981).

[111] *See generally* Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 589-90, 374 N.E.2d 97, 100, 403 N.Y.S.2d 185, 188 (1978). The Court of Appeals, in *Martin*, stated that a plaintiff who is not in privity with the seller of an allegedly defective product may maintain an action only in negligence or strict products liability against the seller. *Id.* The Court did not apply the newly amended U.C.C. section 2-318, which would have covered the plaintiff's action for implied warranty, because the operative facts of the case occurred prior to the amendment. *Id.* at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189. The Court left open the

states which have reworded section 2-318 to expressly abolish the defense of privity in breach of warranty causes of action.[112] Such legislation would foster the equitable result strived for by the *Schiavone* court without requiring the courts to "astutely" stretch tort causes of action to redress contract damages.

Rosemary B. Boller

Party to contract may not offer evidence of other party's prior contradictory agreement with third party

The parol evidence rule prohibits parties to an integrated contract from contradicting the terms of the writing with their prior or contemporaneous agreements.[113] To avoid the harsh results of in-

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effect of the amendment, while "not[ing] the likelihood of disagreement as to its effect should a case arise in which its applicability may properly be considered." *Id.* As predicted by the Court, there is disagreement as to the amendment's effect in light of *Martin*, with some courts disregarding *Martin*, *see, e.g.*, Atkinson v. Ormont Mach. Co., 102 Misc. 2d 468, 469, 423 N.Y.S.2d 577, 579 (Sup. Ct. Kings County 1979); Martin v. Drackett Prods. Co., 100 Misc. 2d 728, 733, 420 N.Y.S.2d 147, 150 (Sup. Ct. Erie County 1979), and others viewing the Court of Appeal's decision as retaining the defense of privity in implied warranty actions. *See, e.g.*, Held v. 7-Eleven Food Stores, 438 N.Y.S.2d 976, 979 (Sup. Ct. Erie County 1981) (dictum).

[112] *See, e.g.*, ME. REV. STAT. ANN. tit. 11, § 2-318 (Supp. 1981-1982); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1981); N.H. REV. STAT. ANN. § 382-A: 2-318 (Supp. 1979); VA. CODE § 8.2-318 (1965). Through amendments to section 2-318 of the U.C.C., several states have expressly abolished the defense of lack of privity in products liability cases. The Massachusetts provision, for example, states that "[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods . . . [provided the plaintiff was a foreseeable user or consumer of the goods]." MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1981); *see* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-3, at 404 n.20 (2d ed. 1980).

[113] *See* Loch Sheldrake Assocs. v. Evans, 306 N.Y. 297, 305, 118 N.E.2d 444, 447 (1954); Heller v. Pope, 250 N.Y. 132, 135, 164 N.E. 881, 882 (1928); Allen v. Oneida, 210 N.Y. 496, 503, 104 N.E. 920, 922 (1914); Thomas v. Scutt, 127 N.Y. 133, 137 (1891). The parol evidence rule has been well established in New York since the 19th century. *See, e.g.*, Hutchins v. Hebbard, 34 N.Y. 24, 26 (1865); Barry v. Ransom, 12 N.Y. 462, 464 (1855). Judge Pound stated that "[p]arol evidence may not be received to vary the clear and unambiguous terms of a solemn written agreement as between the parties . . . ." Newburger v. American Sur. Co., 242 N.Y. 134, 142, 151 N.E. 155, 157 (1926). The rule has been used repeatedly by the New York courts in determining whether to admit evidence of terms other than those embodied in the language of a written contract. *See* Sabo v. Delman, 3 N.Y.2d 155, 161, 143 N.E.2d 906, 908, 164 N.Y.S.2d 714, 717 (1957); Smith v. Dotterweich, 200 N.Y. 299, 305, 93 N.E. 985, 987 (1911); Aratari v. Chrysler Corp., 35 App. Div. 2d 1077, 1077, 316 N.Y.S.2d 680, 681 (4th Dep't 1970).

The parol evidence rule was created to prevent fraud, avoid the danger of memory lapses, and minimize the effect of the death of key witnesses. Less v. Lamprecht, 196 N.Y.