

# Two Too Many: Third Party Beneficiaries of Warranties Under the Uniform Commercial Code

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## Recommended Citation

Camero, Jennifer (2012) "Two Too Many: Third Party Beneficiaries of Warranties Under the Uniform Commercial Code," *St. John's Law Review*: Vol. 86 : No. 1 , Article 1.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol86/iss1/1>

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**ARTICLES**

**TWO TOO MANY:  
THIRD PARTY BENEFICIARIES OF  
WARRANTIES UNDER THE UNIFORM  
COMMERCIAL CODE**

JENNIFER CAMERO<sup>†</sup>

INTRODUCTION

Toyota Motor Sales, Inc., traditionally known for its safe and reliable vehicles, recently shocked the world with multiple voluntary recalls, affecting an astonishing number of vehicles. In November 2009, Toyota recalled 3.8 million vehicles due to unintended acceleration<sup>1</sup> and, only a few months later, recalled an additional 2.3 million vehicles, also due to unintended acceleration.<sup>2</sup> Not even one year after the first recall, Toyota issued yet another recall of approximately 740,000 vehicles, this time due to leaking brake fluid.<sup>3</sup>

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<sup>1</sup> Marc Stern, *Toyota Recall: Toyota Broadens Recall to 3.8 Million Cars, Trucks; To Fix Gas Pedal, Rugs*, CAR NEWS BREAK (Nov. 25, 2009), [http://www.carnewsbreak.com/news/1039027\\_toyota-recall-toyota-broadens-recall-to-3-8-million-cars-trucks-to-fix-gas-pedal-rugs](http://www.carnewsbreak.com/news/1039027_toyota-recall-toyota-broadens-recall-to-3-8-million-cars-trucks-to-fix-gas-pedal-rugs).

<sup>2</sup> See Press Release, Toyota Motor Sales, Toyota Files Voluntary Safety Recall on Select Toyota Division Vehicles for Sticking Accelerator Pedal (Jan. 21, 2010), available at [http://pressroom.toyota.com/article\\_display.cfm?article\\_id=1844](http://pressroom.toyota.com/article_display.cfm?article_id=1844).

<sup>3</sup> Press Release, Toyota Motor Sales, Toyota Announces Intent To Voluntarily Recall Certain Toyota Avalon and Highlander, and Lexus GS300, IS250, and IS350 Vehicles To Replace a Brake Master Cylinder Seal (Oct. 20, 2010), available at [http://pressroom.toyota.com/article\\_display.cfm?article\\_id=2113](http://pressroom.toyota.com/article_display.cfm?article_id=2113); Nicole Wilson, *Toyota Recall October 2010–Potential Brake Fluid Leak Involves 740,000 Vehicles*, BEST SYNDICATION (Oct. 21, 2010, 1:13 PM), <http://www.bestsyndication.com/>

Given the significant number of affected vehicles, Toyota should expect to see numerous injuries and damages caused by such defects. In one case, a California Highway Patrol Officer was driving a Lexus, Toyota's luxury brand, with three passengers when the car began accelerating automatically.<sup>4</sup> The vehicle reached a speed of 120 miles per hour and then collided into another vehicle, killing all four passengers in the Lexus and severely damaging the other vehicle.<sup>5</sup>

Although the family of the deceased officer sued Toyota for negligence,<sup>6</sup> the family also could have sued under other product liability theories, specifically breach of warranty, as the car was not fit for its ordinary purpose.<sup>7</sup> In fact, thus far, most other suits filed against Toyota relating to the recalls allege both negligence and breach of warranty.<sup>8</sup> Ultimately, the legal claims were irrelevant to the family of the officer because Toyota quickly settled the matter for ten million dollars.<sup>9</sup> But what about the owner of the other vehicle involved in the collision? Does he have

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?q=20101021\_toyota\_recall\_october\_2010\_vehicle\_model\_year\_list\_announced\_brake\_repair\_needed.htm;

<sup>4</sup> See Stern, *supra* note 1.

<sup>5</sup> See *id.*

<sup>6</sup> See Complaint for Damages at 6–7, *Saylor v. Toyota Motor Corp.*, No. 37-2010-00086718-CU-PL-CTL, 2010 WL 732013 (Cal. Super. Ct. Mar. 2, 2010).

<sup>7</sup> Product liability is a blend of contract law and tort law concepts. See Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469, 477 (1997). In fact, product liability encompasses four different causes of actions: (i) negligence; (ii) strict liability; (iii) breach of contract; and (iv) breach of implied warranty. See Alex Devience, Jr., *The Developing Line Between Warranty and Tort Liability Under the Uniform Commercial Code: Does 2-318 Make a Difference?*, 2 DEPAUL BUS. L.J. 295, 295–96 (1990). Often, a plaintiff will sue on all four actions with the hope of recovering under at least one.

<sup>8</sup> See, e.g., Amended Economic Loss Master Consolidated Complaint at 219–26, *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145 (C.D. Cal. 2010) (No. 8:10ML2151 JVS), 2010 WL 4257075 (claiming breach of express warranty and breach of implied warranty of merchantability); Complaint at 10–12, *Welch v. Toyota Motor Sales, U.S.A., Inc.*, No. 010CV04276, 2010 WL 4222883 (D. Minn. Oct. 19, 2010) (claiming negligence, strict liability, and breach of warranty); Complaint for Damages at 39–44, *Hatzman v. Toyota Motor N. Am., Inc.*, No. 10CV06282, 2010 WL 3779523 (C.D. Cal. Aug. 23, 2010) (claiming negligence, strict products liability, and breach of implied warranties of merchantability and fitness for a particular purpose); Complaint for Damages 30–33, *Lebson v. Toyota Motor Sales USA, Inc.*, No. 10CV6081, 2010 WL 3299128 (S.D.N.Y. Aug. 13, 2010) (claiming strict product liability, breach of express and implied warranty, and negligence).

<sup>9</sup> See Martha Neil, *Judge Nixes Secrecy Pact in High-Profile Fatal Toyota Crash Settlement; Automaker Paid \$10M*, AM. BAR ASS'N JOURNAL (Dec. 23, 2010, 5:37 PM), [http://www.abajournal.com/ipad/article/judge\\_nixes\\_secrecy\\_pact\\_in\\_high-profile\\_toyota\\_crash\\_settlement\\_automaker/](http://www.abajournal.com/ipad/article/judge_nixes_secrecy_pact_in_high-profile_toyota_crash_settlement_automaker/).

the ability to sue Toyota for breach of warranty to recover the cost of the damage caused to his vehicle by the allegedly defective Lexus?

Historically, the answer to the preceding question was a resounding no. Common law traditionally required a contractual relationship between Toyota and the injured parties, allowing only the purchaser of the vehicle to sue a manufacturer for breach of warranty.<sup>10</sup> In the 1950s, due to a gradual shift in public policy aimed at protecting consumers, section 2-318 was added to the Uniform Commercial Code (“UCC”) to allow certain third parties to sue a manufacturer or other seller—such as a distributor or retailer—for breach of warranty despite the absence of a contractual relationship.<sup>11</sup>

Unlike the majority of the UCC, which provides one provision per section, the drafters of section 2-318 offer three alternatives from which states’ legislatures can choose to enact.<sup>12</sup> The alternatives cover a wide spectrum of third parties excluded from the privity requirement in breach of warranty suits. At one end of the spectrum, only the purchaser’s family members with personal injury can maintain a breach of warranty claim. At the other end, any reasonably foreseeable party with any reasonable damage can sue a manufacturer or other seller for breach of warranty.<sup>13</sup>

Not only do the three alternatives produce vastly different outcomes from each other, but the common law among the states that adopted the same alternative also vastly differs. These variations result in the same fact pattern often leading to different outcomes, depending on the applicable alternative and how the case law developed in that jurisdiction. The end result is a provision that not only defeats the UCC’s fundamental

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<sup>10</sup> 1 WILLIAM D. HAWKLAND & LINDA J. RUSCH, UNIFORM COMMERCIAL CODE SERIES § 2-318:1 (Frederick H. Miller ed., 2010); R. D. Hursh, Annotation, *Privity of Contract as Essential to Recovery in Action Based on Theory Other than Negligence, Against Manufacturer or Seller of Product Alleged To Have Caused Injury*, 75 A.L.R.2d 39, § 3 (1961) (citing *Collum v. Pope & Talbot, Inc.*, 288 P.2d 75 (Cal. Dist. Ct. App. 1955); *Tralli v. Triple X Stores, Inc.*, 112 A.2d 507, 509 (Conn. Super. Ct. 1954); *Howson v. Foster Beef Co.*, 177 A. 656, 659 (N.H. 1935)).

<sup>11</sup> 1 HAWKLAND & RUSCH, *supra* note 10.

<sup>12</sup> William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions that Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L. REV. 1215, 1229 (1993).

<sup>13</sup> U.C.C. § 2-318 (2010).

purposes of simplicity and uniformity, but also creates unpredictable seller liability and generates unnecessary battles over applicable state law.

This Article surveys and analyzes the current version of section 2-318 and suggests improvements so that section 2-318 produces more uniform and equitable results that better facilitate interstate commerce in today's complex commercial environment. Part I discusses the historical genesis of section 2-318, specifically the common law concept of privity and its progression to the current version of section 2-318. Part II expounds upon certain issues with section 2-318 as currently drafted, which include lack of uniformity and lack of remedy for a valid breach of warranty claim. Part III establishes how the courts have begun eroding the concept of privity in spite of the language of section 2-318, thus eliminating the need for alternatives. Part IV proposes improvements to section 2-318 in accordance with current case law and public policy aimed at protecting consumers. Finally, Part V demonstrates that the states would adopt the proposed provision given today's consumer-centric society.

## I. THE EVOLUTION OF UCC SECTION 2-318

Privity is the legal relationship between the parties to a contract or transaction.<sup>14</sup> Historically, a plaintiff needed to be in privity with the defendant in order to maintain a cause of action.<sup>15</sup> The 1842 English case of *Winterbottom v. Wright* is the first case to decide that lack of privity is a defense to a claim.<sup>16</sup> In *Winterbottom*, the Postmaster General had purchased mail coaches from one company, but then hired drivers for the coaches from another company. One such driver sued the supplier of the coaches for breach of contract for injuries caused by the tipping of the coach.<sup>17</sup> The court barred the claim because the driver was not a party to the contract between the Postmaster General and the supplier of the coach, reasoning that “[u]nless we confine the

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<sup>14</sup> *Hartley v. Phillips*, 47 A. 929, 935 (Pa. 1901).

<sup>15</sup> *Id.*

<sup>16</sup> Stallworth, *supra* note 12, at 1225.

<sup>17</sup> See *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Ex. Ct.).

operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.”<sup>18</sup>

After *Winterbottom*, American courts began to adopt the concept of privity, applying it to both tort law and contract law claims.<sup>19</sup> Over time, courts slowly eroded the need for privity with respect to common law tort claims,<sup>20</sup> leaving privity applicable only to contract law claims. Courts eventually began to recognize the need for exceptions to privity in the context of contract law claims in order to protect consumers from certain products. Initially, courts removed the need for privity in claims involving food and beverage, placing the public welfare above the legal necessity for privity.<sup>21</sup> Soon after, courts removed the need for privity in claims involving inherently dangerous products under a similar public policy rationale.<sup>22</sup> A few progressive

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<sup>18</sup> *Id.* at 406; William Prosser, noted torts scholar, suggested that the rationale for privity was to support the Industrial Revolution since less manufacturer liability encourages industry to further advance product technology. Steven Bonanno, *Privity, Products Liability, and UCC Warranties: A Retrospect of and Prospects for Illinois Commercial Code § 2-318*, 25 J. MARSHALL L. REV. 177, 178–79 (1991).

<sup>19</sup> 1 HAWKLAND & RUSCH, *supra* note 10.

<sup>20</sup> *Id.* The end of privity in tort cases culminated with Justice Cardozo’s famed opinion in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). In *MacPherson*, Buick sold an automobile to a dealer, who in turn sold it to Mr. MacPherson. *Id.* at 384. While driving the automobile, the car suddenly collapsed, throwing Mr. MacPherson from the car. *Id.* at 384–85. In ruling for MacPherson, Judge Cardozo stated that of “there is added knowledge that the thing will be used by persons other than the purchaser . . . irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.” *Id.* at 389. In this case, Buick sold it to a dealer, so Buick knew it would be sold to an end user. *Id.* at 391. Also, the car sat three people and not just one, indicating Buick was well aware that more than one person could be in the vehicle at any time. *Id.*

<sup>21</sup> *See, e.g.,* *Welter v. Bowman Dairy Co.*, 47 N.E.2d 739, 745 (Ill. App. Ct. 1943) (citing *Davis v. Van Camp Packing Co.*, 176 N.W. 382, 392 (Iowa 1920); *Boyd v. Coca Cola Bottling Works*, 177 S.W. 80, 81 (Tenn. 1915)); *Davis*, 176 N.W. at 392 (“We are of [the] opinion that the duty of a manufacturer to see to it that food products put out by him are wholesome, and the implied warranty that such products are fit for use runs with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer, and that the question of privity of contract in sales is not controlling, and does not apply in such a case.”); *Boyd*, 177 S.W. at 81 (“Upon whatever ground the liability of such a manufacturer to the ultimate consumer is placed, the result is eminently satisfactory, conducive to the public welfare, and one which we approve.”); *La Hue v. Coca-Cola Bottling, Inc.*, 314 P.2d 421, 422 (Wash. 1957) (explaining that liability of manufacturers for breach of warranties related to food and beverage is the exception to the general rule of privity).

<sup>22</sup> *See, e.g.,* *Lichina v. Futura Inc.*, 260 F. Supp. 252, 256 (D. Colo. 1966) (“[T]his Court recognize[s] the rapidly-expanding notion that privity of contract should not

courts took the exceptions one step further and even allowed a non-purchaser to maintain a cause of action where the individual was injured, regardless of the nature of the product; however, at that time, extending the exceptions to privity this far was unusual.<sup>23</sup> Ultimately, despite some relaxation by courts of the requirement of privity for contract law claims, the majority of courts still grasped onto the historical concept of privity: Only the purchaser of the product has privity and is therefore the only party able to sue a manufacturer or other seller for breach of warranty.<sup>24</sup>

The first codification of exceptions to the privity requirement for warranty claims appeared in section 43 of the Uniform Revised Sales Act,<sup>25</sup> which extended warranty protection to anyone that was reasonably expected to use or be affected by the

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be a condition of recovery on a breach of warranty theory, at least where the product causing the injury creates a high degree of hazard to third persons.”); *Chapman v. Brown*, 198 F. Supp. 78, 118 (D. Haw. 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (“This court can see no rational basis for distinguishing between a public policy which favors protection of consumers of unwholesome and dangerous food and one which favors protection of a consumer injured by dangerously flammable clothing.”); *Brewer v. Oriard Powder Co.*, 401 P.2d 844, 848 (Wash. 1965) (“[A] manufacturer of dynamite is liable to the ultimate user for breach of implied warranty of fitness without regard to privity of contract.”).

<sup>23</sup> *See, e.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 99–100 (N.J. 1960) (allowing the injured wife of the purchaser of a vehicle to sue the manufacturer for breach of warranty despite no privity of contract).

<sup>24</sup> In one example, a mother purchased a washing machine from Sears. *Dewar v. Sears Roebuck & Co.*, 49 N.Y.S.2d 654, 655 (Sup. Ct. Kings Cnty. 1944). Exposed moving parts of the washing machine severely injured her infant son. *Id.* The son sued Sears on a breach of warranty claim for his injuries, alleging that the employees of Sears represented that the washing machine had no defective parts and no unguarded moving parts. *Id.* He also sued Sears on a negligence claim, asserting that Sears negligently represented that the machine did not have any exposed moving parts. *Id.* The court dismissed the breach of warranty claim for lack of privity of contract with Sears because the son did not purchase the washing machine. *Id.* at 656. Sears’s only duty was to the purchaser of the washing machine, the mother. *See id.* The court also dismissed the negligence claim for insufficiency, leaving the injured infant without a cause of action against Sears. *Id.* at 656–57. The court dismissed the negligence claim for insufficiency because the complaint failed to allege that Sears owed a duty of care to the infant. *Id.* at 657.

<sup>25</sup> The Uniform Sales Act was drafted in 1906 and adopted by thirty-four states over the thirty-five years following its adoption. Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787, 787 (2001). After a failed attempt to federalize sales law, a Uniform Revised Sales Act was proposed to quiet critics of the Uniform Sales Act. *See id.* at 787–88.

product.<sup>26</sup> The drafters of section 43 desired not only to diminish the severe results that would occur due to the privity requirement but also to reflect the judicial erosion of the common law privity requirements.<sup>27</sup>

In the 1950s, Article 2 of the UCC replaced the proposed Uniform Revised Sales Act in order to modernize and streamline commercial law.<sup>28</sup> The original version of section 2-318, which replaced section 43, was more limited than section 43 with respect to third-party exclusions from the privity requirement.<sup>29</sup> Unlike the section it replaced, section 2-318 only extended warranty protection to an individual with personal injury who was in the family or household of the initial purchaser so long as it was reasonable to expect that the individual would use, consume, or be affected by the product.<sup>30</sup> Many states, however, chose not to adopt this provision because they disagreed on the amount of liability that should rest with a manufacturer or other seller for a breach of warranty claim by a non-purchaser.<sup>31</sup> The California legislature, for example, refused to adopt section 2-318, believing that it was “a step backward” from section 43.<sup>32</sup>

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<sup>26</sup> 1 HAWKLAND & RUSCH, *supra* note 10. Section 43 stated: “A warranty extends to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person or property by breach of the warranty.” *Id.*

<sup>27</sup> *Id.* (describing section 43 as reflecting hostility “to the concept of privity as a limitation on warranty relief” and “a sympathy for consumers and a feeling that the cost of product liability should be spread among all users of the product in the form of higher prices”); *cf.* Publisher’s Editorial Staff, Privity of Contract in UCC Warranty Cases, *THE LAWYER’S BRIEF*, Dec. 15, 2008, at 1 (underscoring the UCC drafters’ desire to create exceptions to the privity defense).

<sup>28</sup> Imad D. Abyad, Note, *Commercial Reasonableness in Karl Llewellyn’s Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 436 (1997) (“The codification of commercial law sprung out of dissatisfaction with the uniform statutes of the previous fifty years.”); Arthur Linton Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 834–35 (1950) (“But after the 50 years through which we have just lived, the old rules need some replacement, the old words need changing, the analysis and organization can be improved, the remedies can be made more effective.”).

<sup>29</sup> 1 HAWKLAND & RUSCH, *supra* note 10.

<sup>30</sup> U.C.C. § 2-318 (2010).

<sup>31</sup> Arlie R. Nogay, Comment, *Enforcing the Rights of Remote Sellers Under the UCC: Warranty Disclaimers, the Implied Warranty of Fitness for a Particular Purpose and the Notice Requirement in the Nonprivity Context*, 47 U. PITT. L. REV. 873, 884 (1986).

<sup>32</sup> 1 HAWKLAND & RUSCH, *supra* note 10, at § 2-318.



Overall, the success of the original section 2-318 is questionable, as ten states chose not to adopt it and many other states had proposals for amendments.<sup>33</sup>

As a result of this schism, the drafters of the UCC added two alternatives to the section in 1966<sup>34</sup> “to allow the individual states . . . to reflect the philosophies in the treatment of ‘warranty’ protections which may be thought ‘proper.’”<sup>35</sup> The drafters reasoned that providing a limited number of options to the states could limit the number of variations among the states.<sup>36</sup>

Section 2-318 has not changed much since the revision in 1966. The current version of section 2-318 retains the three alternatives, with Alternative A<sup>37</sup> being the 1962 version and Alternatives B and C being the alternatives that the drafters added in 1966.<sup>38</sup> At first glance, the language of each alternative

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<sup>33</sup> *Id.*

<sup>34</sup> Lukwinski v. Stone Container Corp., 726 N.E.2d 665, 670 (Ill. App. Ct. 2000).

<sup>35</sup> McNally v. Nicholson Mfg. Co., 313 A.2d 913, 921 (Me. 1973).

<sup>36</sup> John L. Amabile & John C. Amabile, *Warranties*, in AM. BAR ASS'N, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 101:57 (Robert L. Haig ed., 3d ed. 2011).

<sup>37</sup> For a detailed discussion on Alternative A, see Stallworth, *supra* note 12, at 1229–30.

<sup>38</sup> Alternative A to subsection (2). A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B *extends to any individual who is in the family or household of the immediate buyer or the remote purchaser or who is a guest in the home of either if it is reasonable to expect that the person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty*, remedial promise, or obligation. A seller may not exclude or limit the operation of this section.

Alternative B to subsection (2). A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B *extends to any individual 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*, remedial promise, or obligation. A seller may not exclude or limit the operation of this section.

Alternative C to subsection (2). A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B *extends to any person that may reasonably be expected to use, consume, or be affected by the goods and that is injured by breach of the warranty*, remedial promise, or obligation. A seller may not exclude or limit the operation of this section with respect to injury to the

appears similar, but the results of each alternative are not. Who is excluded from the privity requirement and what type of damages that party can seek from a manufacturer or other seller vary dramatically among the three alternatives, as demonstrated by the following chart.

<b>Alternative</b>	<b>Parties Excluded from the Privity Requirement</b>	<b>Damages Recoverable</b>
A	Family member, household member or guest in the home of the original purchaser	Personal Injury
B	Anyone reasonably expected to use, consume or be affected by the product	Personal Injury
C	Anyone reasonably expected to use, consume or be affected by the product	Personal Injury or Property Damage

Comparing the three alternatives, Alternative A is the most limited in terms of who is excluded from the privity requirement for a breach of warranty claim. Specifically, it only exempts individuals who are household or family members of the purchaser or who are household guests.<sup>39</sup> Alternative A is also the most limited in terms of what damages a plaintiff can seek for breach of warranty because it requires that a plaintiff suffer personal injury.<sup>40</sup> Alternative B expands coverage of Alternative

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person of an individual to whom the warranty, remedial promise, or obligation extends.

U.C.C. § 2-318 (2010) (emphasis added).

<sup>39</sup> *Id.*

<sup>40</sup> In one example of Alternative A, an individual in Illinois purchased a Toyota from a dealer. *Allstate Ins. Co. v. Toyota Motor Mfg. N. Am., Inc.*, No. 09 C 1517, 2009 WL 3147315, at \*1 (N.D. Ill. Sept. 28, 2009). The car ignited while parked in the garage with the engine off, demolishing itself and another car and causing \$600,000 in damages to the individual's residence. *Id.* The individual had homeowner's insurance with Allstate, which reimbursed him for the loss and then sued Toyota for breach of warranty. *Id.* The court dismissed the case because Allstate did not meet the requirements of Alternative A—adopted by Illinois—as

A to include any party reasonably expected to use, consume, or be affected by the good.<sup>41</sup> While Alternative B expands the class of people who can sue for breach of warranty beyond the narrow category recognized in Alternative A, it retains Alternative A's requirement of personal injury.<sup>42</sup> Alternative C maintains Alternative B's plaintiff pool, but it expands the types of damages recoverable for breach of warranty to all damages, including property and economic damage.<sup>43</sup> The policy behind providing such a broad exception to the privity requirement is to prohibit manufacturers from binding consumers to contracts to which they are not parties.<sup>44</sup>

Unexpectedly,<sup>45</sup> the distribution of the alternatives among the states is uneven—with a majority of states adopting Alternative A,<sup>46</sup> six states adopting Alternative B,<sup>47</sup> and eight states adopting Alternative C.<sup>48</sup> Even with three alternatives

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Allstate was not a family member and did not seek damages for personal injury. *Id.* at \*2.

<sup>41</sup> U.C.C. § 2-318.

<sup>42</sup> In one example of Alternative B, a machine crushed the foot of a man while at work, so he sued the manufacturer of the machine for breach of warranty. *Cereo v. Takigawa Kogyo Co., Ltd.*, 252 A.D.2d 963, 963, 676 N.Y.S.2d 364, 365 (4th Dep't 1998). The court allowed the claim under New York law—Alternative B—as employees are specifically part of the plaintiff class covered by Alternative B, and the employee had a personal injury. *Id.* at 964, 676 N.Y.S.2d at 365.

<sup>43</sup> In one case, an aerial photography business sued the maker of a remanufactured aircraft engine for breach of warranty. *Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771, 774 (D.S.D. 1982), *rev'd on other grounds*, 714 F.2d 862 (8th Cir. 1983). The plaintiff sought only economic losses, including labor costs to troubleshoot and repair the engine, costs to purchase and install a replacement engine, and lost profits. *Id.* at 775–76. The manufacturer sought dismissal of the claim for lack of privity because the plaintiff purchased the engine through a distributor. *Id.* at 777. The court refused to dismiss the claim on the grounds that the plaintiff was a reasonably foreseeable user, and the language of the statute specifically allows purely economic losses. *Id.* at 778.

<sup>44</sup> *GKW Elecs., Inc. v. Zenith Elecs. Corp.*, No. 91-15791, 1992 U.S. App. LEXIS 16238, at \*5–6 (9th Cir. July 8, 1992).

<sup>45</sup> If the states were truly divided over the appropriate exceptions to privity, the number of states adopting each alternative should be more evenly divided.

<sup>46</sup> Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin. Shawn M. Bates & Deborah J. Karakowsky, *U.C.C. Section 2-318: The ABCs of Defense*, COM. & BUS. LITIG., Summer 2009, at 1, 17.

<sup>47</sup> Alabama, Delaware, Kansas, New York, South Carolina, and Vermont. *Id.*

<sup>48</sup> Colorado, Hawaii, Iowa, Minnesota, North Dakota, South Dakota, Utah, and Wyoming. *Id.*

from which to choose, eight states decided not to enact any of the three alternatives.<sup>49</sup> Out of those eight states, California, Louisiana, and Texas chose not to adopt any statute regarding privity.<sup>50</sup> The remaining five states—Maine, Massachusetts, New Hampshire, Rhode Island, and Virginia—adopted similar provisions.<sup>51</sup> Like Alternative C, these states allow a party to sue despite no privity of contract as long as the plaintiff was a person who may reasonably be expected to use, consume, or be affected by the goods, regardless of whether the damages were personal injury or economic loss.<sup>52</sup> The laws in these states differ from Alternative C in that their statutes explicitly allow a purchaser to sue any seller in the distribution chain whereas Alternative C remains silent on that issue.<sup>53</sup> Because courts in almost every state have developed the common law to permit the purchaser to

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<sup>49</sup> California, Louisiana, Maine, Massachusetts, New Hampshire, Rhode Island, Texas, and Virginia. *Id.* Louisiana has adopted every article of the UCC except Articles 2 and 2A of the UCC. Henry D. Gabriel, *The Revisions of the Uniform Commercial Code—Process and Politics*, 19 J.L. & COM. 125, 125 n.1 (1999); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1032 n.76 (2002).

<sup>50</sup> CAL. COM. CODE § 2318 (West 2011); TEX. BUS. & COM. CODE ANN. § 2.318 (West 2011).

<sup>51</sup> Bates & Karakowsky, *supra* note 46.

<sup>52</sup> ME. REV. STAT. ANN. tit. 11, § 2-318 (2011) (“Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods [to recover damages] for breach of warranty . . . if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods.”); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 2011) (“Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty . . . if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods.”); N.H. REV. STAT. ANN. § 382-A:2-318 (2011) (“Lack of privity shall not be a defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty . . . if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods.”); R.I. GEN. LAWS ANN. § 6A-2-318 (West 2010) (“A seller’s or a manufacturer’s or a packer’s warranty . . . 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.”); VA. CODE ANN. § 8.2-318 (West 2011) (“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 . . . if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods . . .”).

<sup>53</sup> *E.g.*, ME. REV. STAT. ANN. tit. 11, § 2-318 (2011); R.I. GEN. LAWS ANN. § 6A-2-318 (West 2010); VA. CODE ANN. § 8.2-318 (West 2011).

sue any party in the distribution chain,<sup>54</sup> a breach of warranty claim by a third party litigated in these five states generally will have the same outcome as if the matter had been litigated in a state that adopted Alternative C. Therefore, for purposes of this article, these five states are grouped together with Alternative C states.

## II. THE PROBLEMS WITH UCC SECTION 2-318

As currently drafted, section 2-318 creates two fundamental problems. First, section 2-318 produces a lack of uniformity among the states that defeats the UCC's purpose, generates unpredictable seller liability, and creates unnecessary disputes over applicable law. Second, section 2-318 removes remedies for injured plaintiffs that otherwise are available under the UCC.

### A. *Non-Uniformity*

Because of the choice of three alternatives, a lack of uniformity exists among the states. For example, in *Allstate Insurance v. Toyota Motor Manufacturing North America, Inc.*, discussed above, Allstate was the insurer of a home in Illinois that burned down due to a car fire in the garage.<sup>55</sup> Allstate sued the manufacturer of the car for breach of warranty to recover the insurance proceeds that it paid to the insured.<sup>56</sup> The court dismissed Allstate's breach of warranty claim: Illinois is an Alternative A state and Allstate was neither a family member of the purchaser nor did it suffer any personal injuries.<sup>57</sup> In that case, Allstate's sole damage was monetary loss due to the property damage caused by the fire.<sup>58</sup> Assuming Illinois had instead adopted Alternative B, the results would have been the same. However, if Illinois had adopted Alternative C, Allstate

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<sup>54</sup> See, e.g., *Bishop v. Faroy Sales*, 336 So. 2d 1340, 1344–45 (Ala. 1976); *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 958–59 (Ind. 2005); *Groppel Co. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 58 (Mo. Ct. App. 1981); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 663 (N.J. 1985).

<sup>55</sup> *Allstate Ins. Co. v. Toyota Motor Mfg. N. Am., Inc.*, No. 09 C 1517, 2009 WL 3147315, at \*1 (N.D. Ill. Sept. 28, 2009).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at \*2.

<sup>58</sup> *Id.* at \*1–2.

could have maintained the suit because an insurance company would be a reasonably foreseeable plaintiff and having a personal injury would not be a necessary requirement.<sup>59</sup>

In the end, the result of a case depends upon the alternative that the applicable state chose to enact. This inconsistency: (1) defeats the purpose of the UCC; (2) creates unpredictable liability for manufacturers; and (3) generates unnecessary battles over applicable state law.

First, the UCC clearly and conspicuously sets forth its purpose and policy, which is “to simplify, clarify, and modernize the law governing commercial transactions . . . [and] to make uniform the law among the various jurisdictions.”<sup>60</sup> The underlying objective of this purpose is to facilitate and streamline interstate commerce by minimizing uncertainty and unpredictability in commercial transactions.<sup>61</sup>

Overall, UCC Article 2 has made vast improvements in the efficiency and outcome of commercial transactions. However, section 2-318 is an exception to that accomplishment. Not only are the states divided among the three alternatives, but the states that have adopted the same alternative often interpret that alternative differently.<sup>62</sup> Conceivably, every state could have a different outcome on the same fact pattern. The result is a section of the UCC that is complex, inconsistent, and hinders the ease of interstate commerce.

Second, the variation in the outcome of the alternatives and the discrepancy in the common law interpretation of the alternatives prevent a manufacturer from accurately estimating its liability for warranty and warranty-related claims. A

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<sup>59</sup> See, e.g., *Milbank Mut. Ins. Co. v. Proksch*, 244 N.W.2d 105, 107–08 (Minn. 1976).

<sup>60</sup> U.C.C. § 1-103(a)(1), (3) (2010); see U.C.C. General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute (“Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction.”).

<sup>61</sup> See Dom Calabrese et al., *Karl Llewellyn’s Letters to Emma Cortsvet Llewellyn from the Fall 1941 Meeting of the National Conference of Commissioners on Uniform State Laws*, 27 CONN. L. REV. 523, 526–27 (1995) (noting that the UCC helped to alleviate the “uncertainty that might have impeded the post-World War II economic upswing” at a time when interstate commerce was growing rapidly); see also Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 546–47 (2000).

<sup>62</sup> See *infra* notes 111–18 and accompanying text.

manufacturer uses its estimate of warranty liability to determine the type and amount of insurance it holds and the amount it spends on product safety.<sup>63</sup> An inaccurate estimate leads to overspending or underspending on insurance and product safety measures, which result in economic inefficiency through the failure to maximize profits.

Because a certain amount of uncertainty always exists with product liability, manufacturers utilize insurance as a risk-management technique to minimize or eliminate that uncertainty.<sup>64</sup> If a manufacturer cannot accurately estimate its liability, it will purchase either too much or too little insurance.<sup>65</sup> Too much insurance results in a waste of resources that could be better spent elsewhere, such as research and development or product safety. Too little insurance may not only be illegal<sup>66</sup> but may also require the manufacturer to dip into cash reserves to compensate injured plaintiffs. If the manufacturer does not have enough cash reserves to cover the judgment, the injured plaintiffs may go uncompensated and the manufacturer may need to declare bankruptcy in order to cope with the liability.<sup>67</sup>

Additionally, a manufacturer determines how much money it spends on product safety by comparing two costs: (1) the actual cost to make the product safer through the design and manufacturing processes; and (2) the implicit price of damages the product causes to consumers and property.<sup>68</sup> To maximize its

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<sup>63</sup> See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 3 (6th ed. 2012).

<sup>64</sup> See *id.* at 51.

<sup>65</sup> See *id.*

<sup>66</sup> Most states require a corporation to maintain adequate capitalization, meaning that the corporation must have enough assets to cover the liabilities of the corporation. Too little insurance is one way a corporation could be inadequately capitalized. See, e.g., David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 374–75 (1981); William P. Hackney & Tracey G. Benson, *Shareholder Liability for Inadequate Capital*, 43 U. PITT. L. REV. 837, 868–69 (1982).

<sup>67</sup> See, e.g., John Seewer, *Owens Corning Files for Bankruptcy*, WASH. POST, Oct. 5, 2000, [http://www.washingtonpost.com/wp-srv/aponline/20001005/aponline124417\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20001005/aponline124417_000.htm) (“Owens Corning filed for bankruptcy protection . . . to help it cope with asbestos-related lawsuits that could eventually cost the company \$7 billion.”); Tom Hals, *Asbestos Claims Lead RPM Int’l Units to Bankruptcy*, REUTERS, June 1, 2010, <http://www.reuters.com/article/idUSN0112012320100601> (“Two subsidiaries of RPM International . . . filed for bankruptcy . . . to resolve thousands of asbestos-related lawsuits . . .”).

<sup>68</sup> COOTER & ULEN, *supra* note 63.

profits, which is the ultimate goal of any for-profit corporation,<sup>69</sup> a manufacturer will invest in safety precautions only until the cost of additional precautions equals the cost of additional accidents.<sup>70</sup> In other words, a manufacturer will balance its expected gains and expected losses.<sup>71</sup> If the estimate of additional accidents—which includes the estimate of warranty liability—is incorrect, then a manufacturer’s expected loss will be incorrect. Consequently, the manufacturer either will overspend or underspend on safety precautions, resulting in the failure to maximize profits.

The third result of the inconsistency among jurisdictions is battles over applicable law, which leads to a waste of judicial resources.<sup>72</sup> Because of the varying outcomes of each alternative, it often is beneficial for a litigant to apply certain states’ section 2-318 over other states’ provision. This result incentivizes the parties to fight over the applicable law.

To further complicate this issue, the UCC requires “appropriate relations” with the state in order to apply a specific state’s law.<sup>73</sup> Not only does the UCC fail to define “appropriate relations,” it explicitly states that courts should determine the meaning.<sup>74</sup> Not surprisingly, not all courts define “appropriate relations” the same way.

The most common interpretation—referred to by a variety of names such as “center of gravity,” “interest analysis,” and “most significant relationship,”—interprets “appropriate relations” to require a significant relationship between the state and the warranty claim.<sup>75</sup> Unfortunately, courts assign varying definitions to “significant relationship.” Some courts determine significant relationship to mean where the product was sold,

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<sup>69</sup> *Id.* at 12. One of the main assumptions of economics is that corporations act rationally. *Id.* Because “rationality requires maximization,” a rationale corporation, therefore, would act to maximize profits. *Id.*

<sup>70</sup> *Id.* at 3.

<sup>71</sup> *Id.* at 250.

<sup>72</sup> For a general discussion on conflict of laws, see generally WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS (LexisNexis 3d ed. 2002). For a bibliography of various conflict of laws articles, see Symeon C. Symeonides, *Conflict of Laws Bibliography: U.S. Sources, 2006–2007*, 56 AM. J. COMP. L. 321 (2008).

<sup>73</sup> U.C.C. § 1-301 cmt. 3 (2010).

<sup>74</sup> *Id.* § 1-301.

<sup>75</sup> See *Compliance Marine, Inc. v. Campbell (In re Merritt Dredging Co.)*, 839 F.2d 203, 206–07 (4th Cir. 1988).



others determine it to mean where the product was manufactured, while still others determine it to be where the product caused damage.<sup>76</sup> Given today's complex commercial environment and the pervasiveness of internet commerce, determining the appropriate state's law to apply under this approach can be difficult in warranty cases because a product can be manufactured in one state, sold in a second state, and give rise to damage in a third state.

Consequently, the various outcomes under the alternatives of section 2-318 coupled with the ambiguous test provided in the UCC encourages disputes over the applicable state law that waste time, money, and court resources.<sup>77</sup> For example, in *Mann v. Weyerhaeuser Co.*, the case turned upon which state's exceptions to privity applied.<sup>78</sup> The plaintiffs, comprised of eight fruit growers, sued the manufacturer of fruit boxes that failed to hold the promised weight.<sup>79</sup> The district court, applying Nebraska law (Alternative A), dismissed the breach of warranty claim for lack of privity, as the plaintiffs did not purchase the boxes directly from the manufacturer.<sup>80</sup> The plaintiffs appealed, claiming that the district court should have applied Iowa law (Alternative C), which would have permitted their claim.<sup>81</sup> Although the distributor of the boxes placed the orders in Iowa and the plaintiffs used the boxes in Iowa, the distributor and manufacturer entered into the contract in Nebraska, the manufacturer manufactured the boxes in Nebraska, and the manufacturer would pay any judgment from funds from Nebraska.<sup>82</sup> Using the most significant contacts approach, the court held that Nebraska law should apply and therefore dismissed the breach of warranty claim for lack of privity.<sup>83</sup>

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<sup>76</sup> *Thornton v. Cessna Aircraft Co.*, 886 F.2d 85, 90 (4th Cir. 1989).

<sup>77</sup> *See, e.g.*, *Uppgren v. Exec. Aviation Servs., Inc.*, 326 F. Supp. 709 (D. Md. 1971); *Myers v. Council Mfg. Corp.*, 276 F. Supp. 541 (W.D. Ark. 1967); *Hardman v. Helene Curtis Indus., Inc.*, 198 N.E.2d 681 (Ill. App. Ct. 1964); *Hill v. Clark Equip. Co.*, 202 N.W.2d 530 (Mich. Ct. App. 1972).

<sup>78</sup> 703 F.2d 272, 274 (8th Cir. 1983).

<sup>79</sup> *Id.* at 273.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 274.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

If the alternatives and the common law produced more consistent results, plaintiffs and defendants would not need to fight over the applicable state law as they did in *Mann*. With over nineteen million incoming civil cases in state courts each year, seventy percent of which relate to contract claims, courts struggle to manage their caseloads.<sup>84</sup> Eliminating this unnecessary debate could save time, money, and other court resources, as well as lead to more efficient dispute resolution for the parties.

Ultimately, the inconsistencies created by section 2-318's alternatives and the diverging common law not only defeat the purpose of the UCC, but also create economic inefficiency and provide an incentive for parties to fight over which state's law applies to the transaction. The result is a provision that hinders interstate commerce by weaving uncertainty, complexity, and added expense into commercial transactions.

### *B. Lack of Remedy*

In certain circumstances, breach of warranty is the appropriate mechanism for recovery of damages rather than negligence or strict liability. However, section 2-318, with its limitations on the type of damage recoverable by third parties, removes certain remedies under a warranty claim that are otherwise available to those parties under the UCC.

Often, a plaintiff cannot prove that the manufacturer breached its duty of care or that the product was unreasonably unsafe and therefore cannot recover damages caused by a defective product under a negligence or strict liability theory. Nevertheless, that plaintiff may still have a valid breach of warranty claim.

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<sup>84</sup> NAT'L CTR. FOR STATE COURTS, CIVIL AND CRIMINAL – NATIONAL CASELOADS, 2009, *available at* [http://www.ncsconline.org/D\\_Research/csp/2007\\_files/StateCourtCaseloadStatisticsFINAL.pdf](http://www.ncsconline.org/D_Research/csp/2007_files/StateCourtCaseloadStatisticsFINAL.pdf). Federal courts are not immune from the problem either. On average, parties waited as much as 25.3 months from the date of filing until the claim went to trial in federal district courts, and the median wait time in 2011 was 24.8 months. *Federal Court Management Statistics: District Courts—September 2011*, UNITED STATES COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2011/District%20FCMS%20Profiles%20September%202011.pdf&page=1> (last visited Mar. 8, 2012).

For example, a plaintiff injured her arm when she rolled her Ford SUV in an attempt to avoid a deer in the road.<sup>85</sup> She sued under theories of strict liability—alleging the SUV was not reasonably safe—and breach of implied warranty of merchantability—alleging that, due to its high rollover risk, the SUV was not fit for its ordinary purpose of driving.<sup>86</sup> The jury decided that the plaintiff could not maintain a product liability claim as the car was not unreasonably unsafe but that Ford breached its warranty of merchantability.<sup>87</sup>

Ford appealed, arguing that if the SUV was not defective under tort law, then Ford could not have breached its warranty of merchantability.<sup>88</sup> The appellate court upheld the jury's verdict, stating that it is possible for a warranty claim to survive even when the tort claim failed.<sup>89</sup> First, the court reasoned that the two claims are independent of each other.<sup>90</sup> Ruling them codependent would result in abolishing the warranty of merchantability.<sup>91</sup> If the legislature had intended to abolish warranty of merchantability, it would not have adopted UCC § 2-314, which creates the implied warranty that goods are “fit for the ordinary purposes for which goods of that description are used.”<sup>92</sup> Second, the court reasoned that the two claims rest upon different meanings of the word “defect.”<sup>93</sup> In breach of warranty of merchantability, the SUV would be defective if it was not fit for its ordinary purpose of driving, whereas in tort, the SUV would be defective if it was unreasonably dangerous.<sup>94</sup>

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<sup>85</sup> *Denny v. Ford Motor Co.*, 42 F.3d 106, 108 (2d Cir. 1994), *certifying questions to* 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995).

<sup>86</sup> *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 251–54, 662 N.E.2d 730, 731–33, 639 N.Y.S.2d 250, 251–53 (N.Y. 1995).

<sup>87</sup> *Denny*, 42 F.3d at 110.

<sup>88</sup> *Denny*, 87 N.Y.2d at 254–55, 662 N.E.2d at 733, 639 N.Y.S.2d at 253.

<sup>89</sup> *Id.* at 254, 662 N.E.2d at 733, 639 N.Y.S.2d at 253. Interestingly, comment 7 of UCC section 2-314 states that a product that is merchantable under the UCC cannot be defective under tort law: “[I]f goods are merchantable under warranty law, can they still be defective under tort law, and if goods are not defective under tort law, can they be unmerchantable under warranty law? The answer to both questions should be no . . . .” U.C.C. § 2-314 cmt. 7 (2010).

<sup>90</sup> *Denny*, 87 N.Y.2d at 255–56, 662 N.E.2d at 733–34, 639 N.Y.S.2d at 253–54.

<sup>91</sup> *Id.* at 254–56, 662 N.E.2d at 733–34, 639 N.Y.S.2d at 253–54.

<sup>92</sup> *Id.* at 255–56, 662 N.E.2d at 733–34, 639 N.Y.S.2d at 253–54; U.C.C. § 2-314(2)(c) (2010).

<sup>93</sup> *Denny*, 87 N.Y.2d at 256–57, 662 N.E.2d at 734–35, 639 N.Y.S.2d at 254–55.

<sup>94</sup> *Id.* at 258, 662 N.E.2d at 736, 639 N.Y.S.2d at 256.

Accordingly, a plaintiff may have a viable breach of warranty claim without a valid tort or strict liability claim. Nevertheless, section 2-318—specifically Alternative A—often results in the dismissal of that claim when the plaintiff is not the purchaser of the product. In one instance, an employee became pinned between a crane and a stone while working in a stone yard attaching stones to a crane.<sup>95</sup> He sued under both a negligence theory—alleging restricted visibility and lack of warning device—and a breach of warranty theory for his injuries.<sup>96</sup> The negligence theory failed, as the plaintiff was unable to prove that the defendant breached its duty of care.<sup>97</sup> The court held that the restricted visibility of the crane was not a concealed danger, and therefore the manufacturer had no duty to add a safety device.<sup>98</sup> Despite the fact that the defendant did indeed breach its warranty, the warranty claim also failed for lack of privity.<sup>99</sup> Because the plaintiff was merely an employee of the purchaser and did not purchase the crane, the employee had no privity to the defendant.<sup>100</sup> In the end, the plaintiff was uncompensated for his injuries because all of his claims failed.

Even assuming the plaintiff could prove all of the elements of negligence or strict liability, the economic loss doctrine may act as a barrier to a claim for economic losses, leaving a plaintiff with breach of warranty as the only viable claim. The economic loss doctrine provides that a plaintiff cannot maintain a products liability claim when the only damage is economic loss.<sup>101</sup> Examples of economic loss include: (1) loss of product value; (2) incidental damages such as inspection, transportation, and storage costs incurred to replace the defective good; and

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<sup>95</sup> *McCollum v. Grove Mfg. Co.*, 293 S.E.2d 632, 634 (N.C. Ct. App. 1982), *aff'd*, 300 S.E.2d 374 (N.C. 1983).

<sup>96</sup> *Id.* at 635–38.

<sup>97</sup> *Id.* at 635.

<sup>98</sup> *Id.* at 635–36.

<sup>99</sup> *Id.* at 638.

<sup>100</sup> *Id.*

<sup>101</sup> *E.g.*, *Vt. Plastics, Inc. v. Brine, Inc.*, 824 F. Supp. 444, 449 (D. Vt. 1993), *aff'd*, 79 F.3d 272 (2d Cir. 1996). For a discussion on whether the economic loss doctrine should be abolished altogether, see generally Edward T. O'Donnell et al., *On the Differences Between Blood and Red Ink: A Second Look at the Policy Arguments for the Abrogation of the Economic Loss Rule in Consumer Litigation*, 19 NOVA L. REV. 923 (1995).

(3) consequential damages such as lost profits.<sup>102</sup> The theory behind the economic loss doctrine is that contract law is better suited to handle economic loss claims.<sup>103</sup>

Section 2-318 as currently drafted, however, fails to embrace economic loss claims. Under Alternatives A and B, a court will dismiss a breach of warranty claim by a third party when the claim is only for economic loss, even if the end result is that the plaintiff is barred from recovering damages.<sup>104</sup> For instance, in *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, a company sued the manufacturer of rock crushing machines purchased through a distributor.<sup>105</sup> The machines repeatedly broke down over a two-year period, allegedly causing over \$400,000 in lost revenues and other damages.<sup>106</sup> The court denied the tort claim due to the economic loss theory and the warranty claims due to lack of privity.<sup>107</sup> Despite motions from the plaintiff requesting that the court allow the warranty claims to proceed regardless of privity so that the plaintiff had some cause of action, the court refused to ignore the privity requirement.<sup>108</sup>

In the end, the unfortunate result of section 2-318 for plaintiffs is that the section often prevents an injured plaintiff who possesses a valid breach of warranty claim from recovering against a manufacturer when the plaintiff is not the purchaser or when the plaintiff claims only economic loss.

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<sup>102</sup> *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 845 (Wis. 1998). For a discussion of the differences between economic losses and non-economic losses, see Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1083 (2008).

<sup>103</sup> See, e.g., *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 11 (Utah 2003) (“Originating in products liability cases, the economic loss doctrine requires that contract law define the remedy when the loss is strictly economic, i.e., when no damage occurs to persons or property other than the product in question. . . . The authorities recognize that the law of contracts is far better suited to deal with the dissatisfaction on the part of a purchaser under such circumstances.”) (quoting *Cont'l Ins. v. Page Eng'g Co.*, 783 P.2d 641, 647 (Wyo. 1989)); *Daanen*, 573 N.W.2d at 846.

<sup>104</sup> *Adirondack Combustion Techs., Inc. v. Unicontrol, Inc.*, 17 A.D.3d 825, 827, 793 N.Y.S.2d 576, 579 (3d Dep't 2005); *Daanen*, 573 N.W.2d at 847.

<sup>105</sup> *Daanen*, 573 N.W.2d at 843–44.

<sup>106</sup> *Id.* at 844.

<sup>107</sup> *Id.* at 847, 850.

<sup>108</sup> *Id.* at 850.

## III. SIGNS OF CHANGE

Courts are seemingly dissatisfied with the current state of section 2-318. Over the many years since the adoption of alternatives in section 2-318, the case law interpreting and applying section 2-318 has changed dramatically. Many courts are expanding section 2-318 beyond its plain language and the legislative intent in order to achieve fairness and to reflect the current public policy attitude toward consumer protection. These courts justify the expansion by relying on a phrase in the comments to section 2-318: “[T]he section in this form is neutral and is not intended to enlarge or restrict the developing case law . . . .”<sup>109</sup> Citing this language, one New York appellate court stated that “[t]he Uniform Commercial Code has left the door open to courts to extend the protection of warranty to greater numbers of plaintiffs.”<sup>110</sup>

To illustrate the expansion of section 2-318 by courts, case law varies as to whether a purchaser’s employee can sue for breach of warranty. The word “employee” is excluded from the language of Alternative A; therefore, many courts bar employees in Alternative A jurisdictions from maintaining a breach of warranty claim.<sup>111</sup> Some courts, nonetheless, have extended Alternative A to include employees of purchasers. The Supreme Court of Maine, for instance, interpreted Alternative A to permit a purchaser’s employee who was injured by a chipping machine

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<sup>109</sup> U.C.C. § 2-318 cmt. 3 (2010).

<sup>110</sup> Ciampichini v. Ring Bros., 40 A.D.2d 289, 292, 339 N.Y.S.2d 716, 719–20 (4th Dep’t 1973).

<sup>111</sup> See, e.g., Cowens v. Siemens-Elema AB, 837 F.2d 817, 822–23 (8th Cir. 1988); Halderman v. Sanderson Forklifts Co., 818 S.W.2d 270, 273 (Ky. Ct. App. 1991); Bruns v. Cooper Indus., Inc., 605 N.E.2d 395, 432 (Ohio Ct. App. 1992). For a detailed discussion of privity in relation to a purchaser’s employees, see Lauren Fallick, Note, *Are Employees “A” O.K.?: An Analysis of Jurisdictions Extending or Denying Warranty Coverage to a Purchaser’s Employees Under Uniform Commercial Code Section 2-318, Alternative A*, 29 NOVA L. REV. 721 (2005). Interestingly, the proposed final draft of the original 1950 Uniform Commercial Code, which contained only Alternative A, included language in its official comments specifically stating that employees are covered under Alternative A; however, this language never made it into the final version. U.C.C. § 2-318 cmt. 3 (proposed final draft 1950) (“[E]mployees of an industrial consumer are covered and the policy of this Article intends that neither the privity concept . . . nor any technical constructions of ‘employment’ shall defeat adequate protection under this section.”).

to sue the seller of the machine for breach of warranty.<sup>112</sup> The court determined that an employee constitutes a family member of a corporation and is therefore contemplated by Alternative A:

Indeed, in the present circumstances, it takes only the attribution of a figurative bent to the word 'family' to bring plaintiff, as an employee of a corporate 'buyer', within the policy scope of Section 2-318 since plaintiff may be regarded as a member of such 'family' as a corporation may reasonably be said to have.<sup>113</sup>

The Supreme Court of Pennsylvania also came to the conclusion that employees fall under Alternative A, but under a public policy rationale.<sup>114</sup> Rather than read "employee" into Alternative A, the court held that the employee could maintain a breach of warranty claim because it is against public policy to "permit[ ] the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect."<sup>115</sup>

In another example of the judicial expansion of section 2-318, some courts in Alternative A states have expanded the plaintiff pool even further to include bystanders. To illustrate, in one case a truck pulling a trailer was travelling down a road when the hook attaching the trailer to the truck detached, causing the trailer to collide with an oncoming car.<sup>116</sup> The plaintiff, a

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<sup>112</sup> *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 921 (Me. 1973). Note that in 1963, Maine adopted Alternative A of section 2-318. It was not until after this case that Maine adopted its own version of section 2-318 rather than choose from one of the alternatives. *Id.* at 921 n.9.

<sup>113</sup> *Id.* This interpretation of Alternative A demonstrates how dissatisfied some courts are with the limitations of the provision—so much so that they must stretch the definition of "family member" to include employees.

<sup>114</sup> *Salvador v. Atl. Steel Boiler Co.*, 319 A.2d 903, 907–08 (Pa. 1974).

<sup>115</sup> *Id.* at 907. The Superior Court of Pennsylvania also relied on public policy in the lower court decision: "To apply the strict rule of privity against such an employee as here, would mean that if the purchaser . . . had been a corporation then there would never have been anyone to sue on the breach of warranty for personal injuries because a corporation could hardly have a burned arm or a burned leg. . . . The doctrine of privity should not be a shield against a breach of warranty action in a case like the one here . . ." *Salvador v. I.H. English of Phila., Inc.*, 307 A.2d 398, 402–03 (Pa. Super. Ct. 1973) (quoting *Delta Oxygen Co. v. Scott*, 383 S.W.2d 885, 893 (Ark. 1964)) (internal quotation marks omitted), *aff'd sub nom.* *Salvador v. Atl. Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974).

<sup>116</sup> *Ciampichini v. Ring Bros.*, 40 A.D.2d 289, 290, 339 N.Y.S.2d 716, 717 (4th Dep't 1973).

passenger in that car, brought a breach of warranty claim for personal injuries against the seller of the hook.<sup>117</sup> The court concluded:

It is both reasonable and just to extend to bystanders the protection against a defective manufactured article. To restrict recovery to those who are users is unrealistic in view of the fact that bystanders have less opportunity to detect any defect than either purchasers or users. Our decision is one of policy but is mandated by both justice and common sense.<sup>118</sup>

Courts are even expanding Alternatives A and B to cover economic losses in circumstances where no other recovery theories are available. For instance, in a federal court case in Connecticut, a company sued the manufacturer and distributor of an oil finish product for both property damage and lost profits.<sup>119</sup> After using the finish, an employee for the company followed the instructions on the label of the finish, which stated that any rags used to apply the finish should be soaked with water and placed outside to avoid spontaneous combustion.<sup>120</sup> Despite the fact that the employee followed the instructions, the plaintiff claimed that the rags spontaneously combusted and caused a fire that burned down a nearby building.<sup>121</sup> The company was precluded from bringing a product liability claim under the economic loss doctrine, so it sought relief under the UCC.<sup>122</sup> Although the company had suffered only commercial losses, the court permitted the warranty claims because the company's "only recourse [was] warranty under the UCC. If in fact the plaintiff [had] suffered a loss redressable in warranty, it should [have been] able to proceed under that theory absent another available cause of action, despite the lack of privity with the defendants."<sup>123</sup>

Ultimately, this shift in case law signals that a change is needed in the underlying code to achieve fairness and align section 2-318 with current public policy.

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<sup>117</sup> *Id.* at 290, 339 N.Y.S.2d at 717–18.

<sup>118</sup> *Id.* at 293, 339 N.Y.S.2d at 720.

<sup>119</sup> *Utica Mut. Ins. Co. v. Denwat Corp.*, 778 F. Supp. 592, 593 (D. Conn. 1991).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 595.

<sup>123</sup> *Id.* at 596.



## IV. AN ALTERNATIVE TO THE ALTERNATIVES

In order to mitigate the problems caused by the current version of section 2-318 and to align the provision with the common law, the drafters of the UCC should make two revisions to section 2-318. First, the drafters should remove certain language from comment 3 of section 2-318 to prevent courts from relying on this language to expand section 2-318 beyond its language and intent. While the drafters of the UCC intended for courts to supplement its provisions, the drafters did not intend for courts to supplant its provisions.<sup>124</sup> Although courts are moving in right direction—toward Alternative C—even this shift technically was not within the drafters' intent. Courts have been expanding section 2-318 beyond the legislative intent by justifying their actions with a phrase in comment 3 that reads: "[T]he section in this form is neutral and is not intended to enlarge or restrict the developing case law . . . ."<sup>125</sup> The drafters intended comment 3 to discuss section 2-318's neutrality with respect to the ability of a purchaser to sue any party in the distribution chain and nothing more.<sup>126</sup> When that often-cited phrase is read with the rest of the sentence, this intent is apparent: "Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, *extend to other persons in the distributive chain.*"<sup>127</sup> The emphasized language highlights the drafters' intent to allow judicial expansion only with respect to a purchaser making a breach of warranty claim within the distribution chain. Therefore, courts erroneously use comment 3 to expand section 2-318 when the claim involves a party outside of the distribution chain. In order to avoid confusion and prevent the unintended expansion of section 2-318, the drafters should revise the comment to clarify that section 2-318 only applies to a purchaser suing the manufacturer or other seller in the distribution chain of the purchased product.

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<sup>124</sup> U.C.C. § 1-103 cmt. 2 (2010) ("Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect . . . .").

<sup>125</sup> *Id.* § 2-318 cmt. 3; see *supra* notes 109–10 and accompanying text.

<sup>126</sup> See *Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760, 766 (Ill. 1986).

<sup>127</sup> § 2-318 cmt. 3 (emphasis added).

Second, while some courts have expanded Alternatives A and B to closely resemble Alternative C, a divide among the states exists that still needs correcting. Accordingly, the drafters of section 2-318 should adopt only one provision rather than offer three alternatives. The provision should resemble Alternative C and extend a product's warranty to any party reasonably expected to use, consume, or be affected by the product for any reasonably foreseeable damage without distinguishing between personal injury, property damage, or economic loss. The provision should read as follows:

A seller's warranty to an immediate buyer, whether express or implied, a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section 2-313A or 2-313B extends to any person or entity that may reasonably be expected to use, consume, or be affected by the goods and that is injured in person, property, or otherwise by the breach of the warranty, remedial promise, or obligation. 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, remedial promise, or obligation extends.

By adopting a provision reflective of current case law, section 2-318 would create more uniformity and predictability, minimize disputes over which state's law should apply to the transaction,<sup>128</sup> and provide plaintiffs with a channel to bring lawsuits even when no personal injury occurred.<sup>129</sup> A single provision, as opposed to three alternatives, reduces variations among the states simply because there is only one provision—regardless of its content. Moreover, because the provision would permit the recovery of economic losses, it would repair the current gap between tort law and contract law.

## V. ALL ABOARD

A majority of states, if not all, likely would adopt the proposed provision as part of their commercial code with little to no variation. The original need for alternatives created by the

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<sup>128</sup> The author acknowledges that there will always be battles over which state's law to apply to the transaction and that the proposal in this Article only addresses conflicts of law caused by the non-uniformity of section 2-318.

<sup>129</sup> *W. Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810 (Wyo. 1980) (“We therefore hold that a remote purchaser . . . is not foreclosed from bringing an action to recover an economic loss . . . from a manufacturer . . . because of lack of privity.”).

differing views of liability is waning, as indicated by the current case law. Courts, through their broad interpretation of the alternatives in favor of plaintiffs, are signaling that the schism among the states from fifty years ago does not exist any longer.<sup>130</sup>

Furthermore, the proposed provision provides greater protection to consumers, which would be enticing to states in today's consumer-centric commercial society. Many consumer-protection laws exist at both the federal and state levels that aim to shield consumers from unfair trade practices and unsafe products.<sup>131</sup> The proposal would similarly protect consumers from manufacturers in three particular ways.

First, the provision would place the risk of loss on the manufacturer, as the manufacturer is in a better position than the consumer to absorb that risk. The Model of Precaution, developed by Professor Robert Cooter, addresses the correlation between compensating injured parties and minimizing social costs by analyzing the relationship between "the direct cost of harm and the cost of precautions against it."<sup>132</sup> According to the Model of Precaution, the law should assign the risk to the party who can: (1) bear the risk at a lower cost, or (2) take the best precaution to lower the risk.<sup>133</sup> In breach of warranty situations, the manufacturer can bear the risk at the lowest cost and take the best precautions to lower the risk, making it the appropriate party to address the risks. As the producer of the product, the manufacturer has a better understanding of the risk profile of the product, its potential for defect, and the extent of damage it can cause.<sup>134</sup> This knowledge allows the manufacturer to more efficiently protect itself through insurance and other risk-management options. Also, the manufacturer has the lower cost of bearing the risk, as it can spread the risk among the cost

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<sup>130</sup> See *supra* notes 109–23 and accompanying text.

<sup>131</sup> See, e.g., Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006); Clayton Act, 15 U.S.C. §§ 12–27 (2006); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–12 (2006); New Vehicle Buyer Protection Act, 815 ILL. COMP. STAT. ANN. 380/1–8 (West 2011); N.J. STAT. ANN. § 17:18–19 (West 2011); Consumer Sales Practices Act, OHIO ADMIN. CODE 109:4-3-01 (2011).

<sup>132</sup> Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 2 (1985). While the primary goal of the UCC is to make the aggrieved party whole, many of the recent revisions to the UCC also grant remedies to injured parties in order to encourage or discourage certain behaviors. Maggs, *supra* note 61, at 582.

<sup>133</sup> Cooter, *supra* note 132, at 38.

<sup>134</sup> See *id.* at 41, 43.

of its product through cost accounting measures.<sup>135</sup> Indeed, the manufacturer's experience and knowledge regarding the potential risk of the product and its capability to bear the risk at the lowest cost make the manufacturer the most logical party to absorb the risk.

Second, placing the responsibility on the manufacturer incentivizes it to produce a higher quality and safer product, lessening the chance of a defect<sup>136</sup> by encouraging caution, testing, and quality control.<sup>137</sup> Placing the risk of loss with the manufacturer creates "incentives for efficient precaution."<sup>138</sup> In other words, if the law places the risk with the manufacturer and the precautionary measures are less expensive than paying damages, then the manufacturer will take precautionary measures to make a better quality product that has a lesser chance of defect.<sup>139</sup>

Generally, it is more cost efficient to take precautionary measures than to compensate for damages, as manufacturing one defective product is equal to losing three defect-free products.<sup>140</sup> Moreover, statistics bearing on six sigma<sup>141</sup> effectiveness estimate that the return on investment is anywhere from two to five fold.<sup>142</sup> Accordingly, placing the risk of loss on the manufacturer should result in the manufacturer taking precautionary measures to minimize damage caused by a defective product.

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<sup>135</sup> *Id.* at 38.

<sup>136</sup> Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 13 (1987).

<sup>137</sup> See *Seely v. White Motor Co.*, 403 P.2d 145, 157 & n.6 (Cal. 1965) (Peters, J., concurring in part and dissenting in part).

<sup>138</sup> COOTER & ULEN, *supra* note 63, at 203 (emphasis omitted).

<sup>139</sup> See *id.* at 50. Recall that economics assumes that corporations act to maximize profits. *Id.* at 12; see also *id.* at 4.

<sup>140</sup> Vijay Kumar, *Use the 5V Approach To Increase Plant Efficiency*, ISIXSIGMA, [http://www.isixsigma.com/index.php?option=com\\_k2&view=item&id=1581:use-the-5v-approach-to-increase-plant-efficiency&Itemid=156](http://www.isixsigma.com/index.php?option=com_k2&view=item&id=1581:use-the-5v-approach-to-increase-plant-efficiency&Itemid=156) (last visited Mar. 11, 2012).

<sup>141</sup> Six sigma is a widely-used methodology developed by Motorola to improve quality and prevent defects. See T.N. Goh, *Six Triumphs and Six Tragedies of Six Sigma*, 22 *Quality Engineering* 299, 302 (2010). Six sigma is a five-step process whereby a company: (i) defines the problem; (ii) measures the extent of the problem; (iii) analyzes the problem to determine the root cause(s); (iv) improves the problem by creating solutions to the cause(s); and (v) controls the implementation to ensure effectiveness in solving the problem. Jason Mark Anderman, *The Future of Contracts Seen Through Six Sigma*, 25 ASS'N OF CORP. COUNS. DOCKET 40, 42 (2007).

<sup>142</sup> Press Release, iSixSigma, ROI on Six Sigma Programs Directly Related to Investment Size, Survey Shows (Nov. 2, 2005), <http://www.isixsigma.com/press-releases/roi-six-sigma-programs-directly-related-investment-size-survey-shows/>.

Third, the provision allows plaintiffs to recover all reasonable damages that they suffer. A provision that allows recovery based upon the type of damage suffered by the plaintiff defeats the underlying purpose of remedies under the UCC. Remedies under the UCC aim to make the aggrieved party whole; in other words, to put the plaintiff in the same position that plaintiff would have been if the product had not been defective and caused damage.<sup>143</sup> The purpose of a remedy should not change depending upon the type of damages a plaintiff sustains; it should simply compensate a plaintiff with money to make the plaintiff as whole as possible. To allow recovery under the UCC but not grant all of the damages typically available to a plaintiff under the UCC is an inconsistency that should be removed from section 2-318.

Moreover, distinguishing between personal injury and economic loss is arbitrary and unjust. An economic loss can be just as damaging, if not more damaging, than a personal injury.<sup>144</sup> As the District Court of Minnesota noted, it is simply unjust “to allow a plaintiff who sustains personal injuries to recover from a remote defendant while not allowing recovery to those who suffer only economic loss” as “economic loss can be as devastating as injury to one’s person.”<sup>145</sup> In one example of this injustice, a daughter purchased a Christmas tree that she placed in her father’s home.<sup>146</sup> At the time of purchase, an employee represented that the tree was fire-retardant; however, the tree

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<sup>143</sup> Maggs, *supra* note 61, at 578 (noting that the “father of the UCC”, Karl Llewellyn, specifically created provisions “that would focus on making the injured party whole”); *see also* U.C.C. § 1-305(a) (2010). For cases discussing this purpose with respect to contract law in general, *see In re Witte*, 841 F.2d 804, 807 (7th Cir. 1988); *First Nat’l State Bank of N.J. v. Commonwealth Fed. Sav. & Loan Ass’n of Norristown*, 610 F.2d 164 (3d Cir. 1979); *Altrutech, Inc. v. Hooper Holmes, Inc.*, 6 F. Supp. 2d 1269, 1273 (D. Kan. 1998); *Martin v. Stiers*, 165 F. Supp. 163, 167 (M.D.N.C. 1958) (“The general rule is that a party to a contract, who has been injured by the breach, is entitled as compensation therefor to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed, and where the breach of contract consists in preventing its performance, the party injured, on proper proof, may recover the profits he would have realized had the contract not been breached.”) (quoting *Chesson v. Kieckhefer Container Co.*, 1 S.E.2d 357, 358–59 (N.C. 1939)) (internal quotation marks omitted), *aff’d*, 264 F.2d 795 (4th Cir. 1959).

<sup>144</sup> *Seely v. White Motor Co.*, 403 P.2d 145, 153–56 (Cal. 1965) (Peters, J., concurring in part and dissenting in part).

<sup>145</sup> *Indus. Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 804 (D. Minn. 1980).

<sup>146</sup> *Milbank Mut. Ins. Co. v. Proksch*, 244 N.W.2d 105, 106 (Minn. 1976).

rapidly caught fire and caused significant damage to her father's house.<sup>147</sup> The court permitted the recovery of the economic loss despite lack of privity because “[t]he destruction of a home and physical damage to personal property is no less an injury to one who sustains them than a bodily injury.”<sup>148</sup>

Although this proposed revision expands both the plaintiff pool and the types of damages recoverable under a breach of warranty claim, both the provision and the UCC contain limitations that provide safeguards for manufacturers against unlimited and unforeseeable liability. First, the language of the proposed provision only permits recovery of a plaintiff's loss if that plaintiff can be reasonably anticipated.<sup>149</sup> Thus, the proposal creates boundaries to the potential pool of plaintiffs to whom the manufacturer would be liable. Second, as the manufacturer is generally the designer and the producer of the product, it understands the potential for defect and damage in its products. This manufacturing expertise creates predictability of the potential for loss caused by product defect.<sup>150</sup> Finally, the UCC itself provides mechanisms that allow a manufacturer to protect itself from loss.<sup>151</sup> Section 2-316 allows sellers not only to modify implied warranties, but to exclude them altogether.<sup>152</sup> Even when implied warranties are mandatory under the

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<sup>147</sup> *Id.* at 107.

<sup>148</sup> *Id.* at 110.

<sup>149</sup> *E.g.*, *Rynders v. E.I. du Pont, de Nemours & Co.*, 21 F.3d 835, 839 (8th Cir. 1994).

<sup>150</sup> *See* COOTER & ULEN, *supra* note 63, at 252.

<sup>151</sup> *Indus. Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793, 804 (D. Minn. 1980). The manufacturer is usually the party who ultimately pays in a breach of warranty claim. Not only are manufacturers sued under the “deep pockets” theory, manufacturers often have indemnification obligations to their distributors and retailers.

<sup>152</sup> U.C.C. § 2-316(2) (2010). While manufacturers have the option to exclude certain warranties, customers may refuse to buy a product without a warranty. In the end, manufacturers need to conduct a risk-benefit analysis in choosing whether to exclude a warranty to avoid liability. Karl Llewellyn believed that offering a warranty is in the best interest of a seller: “[R]epeat orders are what a seller needs; to stand behind words, and even behind wares-without-words, is good business for the seller . . .” K. N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 721 (1936). Indeed, over eighty years after Llewellyn's article, companies still recognize that it is good business to offer warranties. Toyota, for example, is looking to add additional warranties to improve its image after the rash of recent recalls. *Toyota May Increase Incentives, Warranty To Improve Image*, MERINEWS (Feb. 15, 2010, 1:30), <http://www.merineews.com/article/toyota-may-increase-incentives-warranty-to-improve-image/15798078.html> (citizen journal).

Magnuson-Moss Act, a federal warranty law, the seller nonetheless can limit the duration of those warranties.<sup>153</sup> A party—whether the purchaser or a third party—can claim breach of warranty only to the extent that the warranty is offered by the manufacturer and is still valid.<sup>154</sup> As stated by one court, “[i]t is axiomatic that a remote plaintiff, or any plaintiff for that matter, cannot enforce a nonexistent warranty.”<sup>155</sup>

### CONCLUSION

The drafters of the UCC should replace the alternatives of section 2-318 with one provision that excludes all reasonably foreseeable parties from the privity requirement for all reasonable damages in order to harmonize the section with both jurisprudence and the current trends in consumer protection. This revision eliminates the problems with current section 2-318 by creating more uniformity and predictability, avoiding battles over applicable state law, and providing plaintiffs a cause of action under which to sue when no personal injury had occurred. Furthermore, the replacement of the alternatives with a provision similar to Alternative C is appropriate, as it allocates risk of loss to the party best able to minimize that risk and provides all remedies typically available under the UCC, while providing manufacturers and other sellers protection against unforeseen and unpredictable liability.

In the end, if the goal of the UCC truly is “to simplify, clarify, and modernize the law governing commercial transactions . . . [and] to make uniform the law,”<sup>156</sup> then the drafters of the UCC should replace section 2-318 with one provision in line with the well-developed common law.

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<sup>153</sup> 15 U.S.C. § 2308 (2006); *id.* § 2308(a) (requiring the seller of consumer products to provide implied warranties if the seller chooses to provide a written warranty).

<sup>154</sup> *See Rynders*, 21 F.3d at 839 (“They are mistaken, however, in their contention that the modification or exclusion of warranties between the buyer and the seller has no effect on third-party beneficiaries to the contract.”); *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 774 N.W.2d 332, 343 (Mich. Ct. App. 2009).

<sup>155</sup> *Heritage*, 774 N.W.2d at 343.

<sup>156</sup> U.C.C. § 1-103(a).