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## Applicability of Strict Liability Warranty Theories to Service Transactions

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# SOUTH CAROLINA LAW REVIEW

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## APPLICABILITY OF STRICT LIABILITY WARRANTY THEORIES TO SERVICE TRANSACTIONS

*Ellen Taylor\**

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I. INTRODUCTION

Strict liability, or liability without fault, focuses on the consequences of a defendant’s act rather than the culpability of a defendant’s conduct. Courts consider causation rather than fault: whether the defendant caused harm, not whether the conduct was objectionable.<sup>1</sup> Strict liability theories apply in both contract and tort. In tort, strict liability has long been available in cases involving vicious animals, abnormally dangerous activities, trespass, and libel.<sup>2</sup> Over the past thirty-five years, strict liability has also become the rule in products liability cases, achieving a startlingly rapid overthrow of the previously prevailing negligence regime.<sup>3</sup> In contract suits, warranties dealing with the object of a contract<sup>4</sup> are traditionally tested under a strict liability theory: *whether* the warranty was breached, not *why*.

In the context of transactions in goods, both tort actions based on strict liability and contract actions based on warranty focus on the product (whether the product caused harm or failed to perform as promised) rather than on the defendant (whether the supplier or manufacturer was negligent or otherwise culpable). But although courts readily apply strict liability theories in suits

1. *E.g.*, Rylands v. Fletcher, 3 L.R.-E. & I. App. 330, 341 (1868) (“[T]he question in general is not whether the Defendant has acted with due care and caution, but whether his acts have occasioned the damage. . . . For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.”).

2. *See infra* notes 17-20.

3. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98 at 694 (5th ed. 1984).

The first case to apply a tort theory of strict liability generally was *Greenman v. Yuba Power Products, Inc.*, in California in 1963. That decision and the final acceptance of Section 402A of the Second Restatement of Torts by the American Law Institute in 1964 were immediately relied upon for the adoption of strict liability in tort throughout the country. Section 402A liability in tort swept the country, just as the expansion of warranty liability under *Henningsen* had done until at the present writing nearly all states have adopted some version of it.

*Id.* (citations omitted) (referring to *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

4. As distinguished from warranties relating to standards of performance or diligence, which are discussed *infra* Part II.D.

involving goods, they are less willing to do so in suits involving some combination of services and goods, and they are even more reluctant to do so in suits involving services alone. This article suggests that in the area of implied warranties, courts should apply strict liability to a broader range of transactions. The article also considers what characterizes transactions in which an expanded implied warranty standard would be reasonable.

This article first describes warranty law, with a focus on how it relates to and overlaps with tort law, particularly in the area of strict products liability. The article then discusses warranties applicable to transactions in goods as articulated in the Uniform Commercial Code (U.C.C.). Next it considers transactions that involve services, with examples of cases in which courts have concluded that strict liability was the appropriate standard. Finally, the article proposes a standard for determining when and how implied warranties might function in transactions without regard to whether the transactions are primarily for the supply of goods.

## II. WARRANTY

### A. Description

#### 1. Contract or Tort?

A warranty is a promise or representation that some fact or state of things is true.<sup>5</sup> Is breach of warranty a contract claim or a tort claim? Professors Harris and Squillante state that “[b]reach of warranty is derived from the tort of deceit.”<sup>6</sup> Although warranty is now commonly thought of as a contract doctrine, Dean Prosser referred to it in an oft-quoted phrase as “a freak hybrid born of the illicit intercourse of tort and contract,”<sup>7</sup> and noted that warranty has “always been recognized as bearing to some extent the aspects of a tort.”<sup>8</sup> Issues relevant to how warranty law fits into the overlapping spheres of tort and contract include privity, harm without breach, negligence versus strict liability, recoverable damages, and disclaimers.

*Privity.* Can a plaintiff who was not the direct recipient of a warranty maintain a suit for its breach? Actions for breach of contract traditionally may be brought only by parties to the contract, who are said to be “in privity.”

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5. BLACK'S LAW DICTIONARY 1586 (6th ed. 1990).

6. 1 ORA F. HARRIS, JR. & ALPHONSE M. SQUILLANTE, WARRANTY LAW IN TORT AND CONTRACT ACTIONS § 2.5 (1989). Harris and Squillante note the overlap between tort and contract theories: “In spite of the fact that breach of warranty may have originally sounded in tort, the act of creating the warranty itself, unlike the tort, is consensual in nature.” *Id.*

7. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966).

8. *Id.*

Therefore, to the extent warranty is a contract doctrine, potential plaintiffs may be limited to those in privity with the defendant. For instance, under traditional privity principles, a purchaser could hold a seller strictly liable for the seller's breach of warranty. But if someone other than the purchaser were harmed by the breach, the seller could be held liable only under a tort theory, which until recently would have required proof of negligence. This seems particularly harsh if the seller knew that persons other than the purchaser would come in contact with the product. Courts have struggled with cases in which they believed the privity doctrine would prevent a just outcome and have dealt with this issue both through the development of strict products liability law<sup>9</sup> and through the weakening or abolition of privity restraints.

At one time, privity was a significant obstacle to plaintiffs injured by products. In the seminal case of *Winterbottom v. Wright*,<sup>10</sup> the plaintiff was a mailcoach driver who was injured when a latent defect in the coach caused him to be thrown to the ground. The coach had been supplied by the defendant to the Postmaster General under a contract requiring the defendant to keep it "in a fit, proper, safe, and secure state."<sup>11</sup> The plaintiff claimed that the defect in the coach violated the contractual duty of care that the defendant had assumed in its contract with the Postmaster. But the court held that the plaintiff could not maintain the action because he lacked privity—he was not a party to the contract between the defendant and the Postmaster.<sup>12</sup>

*Winterbottom* was not destined to be the final word on privity, however. *MacPherson v. Buick Motor Co.*<sup>13</sup> involved a factually similar situation: Donald MacPherson was thrown out of his new Buick and injured when a faulty wooden spoked wheel collapsed. Instead of suing the dealer, with whom he had contractual privity, MacPherson sued the manufacturer. Writing for the New York Court of Appeals majority, Justice Cardozo allowed the suit, finding that the manufacturer owed and breached a duty to the plaintiff:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.<sup>14</sup>

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9. *See id.* at 800-05.

10. 152 Eng. Rep. 402 (1842).

11. *Id.* at 402-03.

12. *Id.* at 404.

13. 111 N.E. 1050 (N.Y. 1916).

14. *Id.* at 1053.

The court was able to reach this result by locating the manufacturer's duty outside of the contract between the manufacturer and the dealer (who had purchased the car from Buick and therefore was in privity with Buick). Cardozo noted:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.<sup>15</sup>

*Harm without breach.* Viewing warranty as a contract doctrine presents one inherent limitation: a product may cause harm even though it conforms to the contract. Warranty actions historically require a plaintiff to prove that (1) the plaintiff suffered harm; (2) the harm was caused by a breach of warranty; and (3) the plaintiff was in privity with the defendant. In *MacPherson*, lack of privity was the problem. A different situation occurs when privity and harm exist, but the harm is not caused by the defendant's failure to live up to the terms of the contract.

For example, a plaintiff may contract to purchase a printing press with contractual specifications relating to speed, quality, and reliability. When delivered, the press may lack safety guards, so users risk crushing their fingers, but the press may still operate perfectly as a printing press. If the plaintiff's hand gets caught in the press, the supplier can avoid liability for breach of warranty even though the plaintiff is in privity with the supplier, unless safety guards were an express or implied contractual obligation. The plaintiff may be limited to a tort action based on the supplier's breach of a legal duty to avoid subjecting people to unnecessary danger.

*Negligence v. Strict Liability.* Although the *MacPherson* court resolved the privity question in favor of the plaintiff, it spoke in terms of negligence. Only later did American courts adopt the concept of strict liability in tort in suits involving dangerous or defective products.<sup>16</sup> Strict liability is compensatory rather than punitive, in that it focuses on the plaintiff's injury rather than on the defendant's conduct. The plaintiff is not required to prove that the defendant acted negligently or intentionally, just that the defendant's actions caused the harm.

Although strict liability for product defects is a relatively recent arrival, strict liability has been the rule for many years in a variety of tort actions, including cases concerning vicious animals,<sup>17</sup> abnormally dangerous activ-

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15. *Id.*

16. *E.g.*, *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1962).

17. *E.g.*, *Baker v. Snell*, 2 K.B. 825, 829 (1908) (“[W]hoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any

ities,<sup>18</sup> trespass,<sup>19</sup> and libel.<sup>20</sup> Strict liability began to make inroads into products lawsuits involving drugs<sup>21</sup> and food prepared for human consumption,<sup>22</sup> and then expanded to include products associated with the body,

avertment of negligence or default in the securing or taking care of it.”) (quoting *May v. Burdett*, 115 Eng. Rep. 1213, 1217 (Q.B. 1846)).

18. *E.g.*, *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948) (finding defendant who used hydrocyanic gas to exterminate roaches strictly liable for plaintiff’s poisoning). The seminal case in this area is *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (1868).

19. *E.g.*, *Newsom v. Anderson*, 24 N.C. (2 Ired.) 33 (1841).

If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured thereby, . . . it is immaterial whether the injury be *wilful or not*. . . . Where a master ordered his servant to lay down a quantity of rubbish near his neighbor’s wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran from the pile against the wall, it was held that the master was liable in trespass.

*Id.* at 34 (citations omitted).

20. *E.g.*, *E. Hulton & Co. v. Jones*, 1910 App. Cas. 20 (1909). Lord Loreburn L.C. argued for the plaintiff:

A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention.

*Id.* at 23-24. The court agreed, finding the appropriate standard for liability depended on how the writer’s words would be reasonably understood by readers, not how they were intended by the writer. *See id.* at 26.

21. *E.g.*, *Blood Balm Co. v. Cooper*, 10 S.E. 118 (Ga. 1889). The plaintiff sued the proprietor of a patent medicine for injuries caused by taking the drug in the dosage indicated on the label. The plaintiff had bought the medicine from a druggist, but the proprietor had bottled the medicine and affixed the label. The court noted that the ingredients of patent medicines were secret, so there was no way for the plaintiff to protect himself by inspecting the medicine. Therefore, the court held that proprietors of patent medicines were “liable for all injuries sustained by any one who takes their medicine in such quantities as may be prescribed by them.” *Id.* at 119.

22. *E.g.*, *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913). In *Mazetti*, the plaintiffs purchased a carton of Armour’s cooked tongue for their restaurant from the Seattle Grocery Co. The tongue was represented to be ready for use with no further preparation. After eating the tongue, a customer became ill, and the plaintiffs sued Armour. *Id.* at 633-34. The court noted that although caveat emptor would normally be the rule in sales cases, the doctrine was inappropriate here because the package of tongue was sealed, so the plaintiffs could not examine the goods. *Id.* at 634. The court ultimately held that, “in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.” *Id.* at 636; *See also* RESTATEMENT (SECOND) OF TORTS, § 402A cmt. b (1964).

such as cosmetics.<sup>23</sup> Although most cases up until about 1960 spoke in terms of warranty, rather than tort, at least one California jurist foresaw the utility of straightforward strict liability in tort.

In *Escola v. Coca Cola Bottling Co.*,<sup>24</sup> plaintiff Gladys Escola was injured when a bottle exploded in her hand. It was not clear whether the explosion occurred because the bottle itself was defective or because the bottling company had overcharged it with gas. A majority of the California Supreme Court affirmed a jury verdict for the plaintiff, approving the use of *res ipsa loquitur* under a negligence theory.<sup>25</sup> But in a concurring opinion, Justice Roger Traynor announced his readiness to move beyond negligence: "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."<sup>26</sup> Traynor based his opinion on several factors regarding manufacturers: they should be deterred from distributing defective products; they are in a better position than consumers to detect and avoid defects; they are better able to bear and distribute the risk by including it in the price of their products; and they should pay for the harm they cause.<sup>27</sup>

In 1962, the California Supreme Court adopted Justice Traynor's position in *Escola* when it decided *Greenman v. Yuba Power Products*<sup>28</sup> under a strict products liability theory. In *Greenman*, the plaintiff was injured by a piece of wood that flew out of a power tool given to him by his wife. Writing for a unanimous court, Justice Traynor stated the rule:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but

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23. *E.g.*, *Graham v. Bottenfield's, Inc.*, 269 P.2d 413 (Kan. 1954). The plaintiff sued Clairol, Inc., the manufacturer, and Bottenfield's, the distributor, for the harm to her hair and scalp suffered when her hairdresser applied "Miss Clairol" hair dye. Analogizing to previous Kansas cases involving food, the court found an implied warranty that the dye was "suited and fit for use as a hair preparation which contains no deleterious or harmful substances making it unwholesome or injurious to such customers when so used . . ." *Id.* at 418. The court also found that "privity of contract . . . is not required in order to establish liability where the source of the obligation (implied warranty) is imposed by the law on the basis of public policy." *Id.*

24. 150 P.2d 436 (Cal. 1944).

25. *Id.* at 440.

26. *Id.* at 440 (Traynor, J., concurring).

27. *Id.* at 440-41.

28. 377 P.2d 897 (Cal. 1962).

imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.<sup>29</sup>

Other jurisdictions quickly agreed with the California Supreme Court that strict liability in tort should apply to injuries from products.<sup>30</sup> In 1964 the American Law Institute recognized this trend by including in the Restatement (Second) of Torts a new section that provided for strict products liability.<sup>31</sup>

Almost all states now recognize strict products liability under section 402A.<sup>32</sup> Courts employ strict products liability in three types of fact situations: defective design, defective manufacture or construction, and failure to warn. Defective design cases allege that a whole product line is defective or unreasonably dangerous<sup>33</sup> because of its design. Defective construction

29. *Id.* at 900-01 (citations omitted). Justice Traynor's words in *Greenman* echo those of Justice Cardozo in *MacPherson* nearly fifty years earlier. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916); see *supra* text accompanying notes 13-15. Cardozo also noted that privity of contract was not necessary, because the "source of the obligation" was imposed by law rather than agreed to by contract. *Macpherson*, 111 N.E. at 1053.

30. For a list of cases decided after *Greenman* but before adoption of section 402A, see Prosser, *supra* note 7 at 804 n.80.

31. § 402A. SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER

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

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

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

RESTATEMENT (SECOND) OF TORTS, § 402A (1964).

32. In fact, some courts began citing section 402A as authority even before it was officially adopted. See, e.g., *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 25-26 (5th Cir.), cert. denied, 375 U.S. 865 (1963); *Singer v. Walker*, 250 N.Y.S.2d 216, 220 (App. Div. 1964).

33. Although the Restatement language is "defective condition unreasonably dangerous," at least in California, the plaintiff need not prove that the product was *both* defective *and* unreasonably dangerous. See *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972) (manufacturing defect); *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 450 (Cal. 1978) (design defect).

[O]ne of the bases for our rejection of the "unreasonably dangerous" criterion in *Cronin* was our concern that such language was susceptible to an interpretation which would place a *dual burden* on an injured plaintiff to prove, first, that a product was defective and, second, that it was additionally unreasonably dangerous.

*Id.* at 450.

cases allege that a particular product, not necessarily the entire line, was constructed in such a way as to be defective or unreasonably dangerous.<sup>34</sup> And failure to warn cases allege that the supplier of the product knew or should have known that a product was dangerous in a way that the consumer would not reasonably expect, yet the supplier failed to warn the consumer of the danger.<sup>35</sup>

How strict is this strict liability? Although products liability law has moved toward strict liability, some vestiges of negligence remain, particularly in the failure to warn cases. By its very terminology, failure to warn refers to the conduct of the defendant rather than to the quality of the product.<sup>36</sup> The fact that a dangerous product causes harm may not be sufficient to create strict liability; the Restatement notes that some products, although unavoidably dangerous, are useful and justifiable.<sup>37</sup> In those instances, liability does not attach simply because the product causes harm, but because the defendant fails to provide adequate warning of the danger. If the cause of action is based on defective design or construction, however, more courts seem willing to employ strict liability.

While products liability tort law has moved from a negligence standard toward strict products liability, warranty law seems to be proceeding to some extent in the opposite direction. Although breach of warranty is historically a strict liability action, some courts have articulated contractual obligations that require a provider of services to conform to a standard of conduct, not just achieve a particular result. These obligations have been termed, for example, an implied warranty of workmanlike performance, or an implied warranty of care and diligence.<sup>38</sup> Some courts have recognized that these “implied

34. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1964) (“The defective condition may arise . . . from the way in which the product is prepared or packed.”).

35. See *id.* cmt. j.

36. See *Brown v. Superior Court (Abbott Laboratories)*, 751 P.2d 470 (Cal. 1988). The court noted that the concept of failure to warn

focuses not on a deficiency in the product—the hallmark of strict liability—but on the fault of the producer in failing to warn of dangers inherent in the use of its product that were either known or knowable—an idea which “rings of negligence,” in the words of *Cronin*.

*Id.* at 476 (citing *Cronin*, 501 P.2d at 1162).

37. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. i-k (1964).

An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous.

*Id.* cmt. k.

38. *E.g.*, *Woodward v. Chirco Const. Co.*, 687 P.2d 1269, 1270 (Ariz. 1984) (en banc) (“[I]njury incurred due to negligent construction of a residence may give rise to an action for

warranties” are simply pseudonyms for tort duties, and that an action based on their breach is in reality a negligence action.<sup>39</sup> Other courts attempt to distinguish contractual duties from tort duties and voice no concern that creation of new “warranties” might cause confusion and duplication of claims.<sup>40</sup>

*Conclusion.* Basic to the idea of breach of warranty is the notion that the promisor has not delivered what was promised. Breach of warranty is like tort theory in that its roots lie in deceit: the defendant has misrepresented its intention or ability to perform its contractual duties. But breach of warranty differs from tort in that there is no implication that the misrepresentation is intentional. A breach of contract may be inadvertent or commercially justifiable; therefore, it does not carry the same weight of moral disapproval as deceit. Warranty claims also differ from tort claims because warranty duties are voluntarily assumed by entering into a contractual relationship, whereas tort duties are imposed by law on all actors. This last point loses some force if the duties are created by implied warranties; because implied warranties automatically adhere to a contract, there is a reasonable argument that such duties are not voluntarily assumed. But even implied warranties are voluntary and consensual in the sense that the defendant voluntarily entered into the contract and even more so to the extent that they may be modified or excluded.<sup>41</sup>

The type of injury suffered by the plaintiff frequently distinguishes breach of warranty claims from claims based on strict liability in tort. Warranty plaintiffs generally sue for failure of the product or service to live up to their contractual expectations, *i.e.*, for economic harm. Tort plaintiffs are more likely to seek damages for personal injury or harm to their property. Some courts have distinguished claims alleging inadequate products from those alleging dangerous products, finding that warranty is the appropriate theory for

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breach of the implied warranty of workmanlike performance and habitability and an action for breach of the contractor’s common law duty of care.”).

39. *E.g.*, *Hoffman v. Simplot Aviation, Inc.*, 539 P.2d 584, 589 (Id. 1975); *see also infra* text accompanying notes 119-24.

40. *E.g.*, *Kennedy v. Columbia Lumber & Mfg. Co.* 299 S.C. 335, 384 S.E.2d 730 (1989).

41. *See infra* text accompanying notes 99-108 (discussing modification and exclusion of implied warranties).

the former and tort for the latter.<sup>42</sup> Even if the product is dangerous, a tort suit may be unavailable if the only injury claimed is to the product itself.<sup>43</sup>

Although they share a strict liability theory, products liability actions and breach of warranty actions have significant differences. Products liability cases arise from harm caused by dangerous or defective products,<sup>44</sup> while warranty cases typically arise from products that do not satisfy the buyer's or lessee's expectations.<sup>45</sup> Privity of contract between the plaintiff and defendant is more likely to be an issue in warranty cases than in products liability cases.<sup>46</sup> The statute of limitations differs, generally running from the date of the contract performance in warranty actions<sup>47</sup> and from the date of the injury in tort actions.<sup>48</sup> Although the contract limitations period may begin to run at an earlier date, it is generally longer than the limitations period for tort actions.<sup>49</sup> Plaintiffs who sue for breach of warranty may be required to

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42. *E.g.*, *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1173 (3d Cir. 1981); *Russell v. Ford Motor Co.*, 575 P.2d 1383, 1387 (Or. 1978); *see also* William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731 (1990). In the Appendix to his article, Professor Jones includes citations to a large number of cases supporting his statement that, "[a]bsent an accident-like injury to the product itself, or to the person or other property of the buyer, the overwhelming majority of courts deny recovery, in negligence and in strict liability, to the buyer of a defective product . . . ." *Id.* at 799.

43. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986) (holding that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself"). Although *East River S.S.* sounded in admiralty, many state courts have cited it for this proposition outside the admiralty context. *E.g.*, *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993); *American Xyrofin, Inc. v. Allis-Chalmers Corp.*, 595 N.E.2d 650, 653 (Ill. App. Ct. 1992).

44. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1964).

45. *E.g.*, U.C.C. §§ 2-313 to 2-315 (1990). The U.C.C. has been adopted at least in part in all 50 states; Louisiana has not adopted Article 2.

46. *But see* *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (effectively doing away with the privity requirement in certain circumstances by imposing on a manufacturer who distributes a dangerous product a tort duty of care to foreseeable users) and its progeny.

47. *E.g.*, U.C.C. § 2-725(2) ("A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . .").

48. *See generally* KEETON ET AL., *supra* note 3, § 30, at 165, 165-68 ("[T]he statute of limitations is generally held not to begin to run against a negligence action until some damage has occurred.").

49. The U.C.C. limitations period for contracts for the sale of goods is four years. U.C.C. § 2-725(1).

The limitation period for suits on ordinary written contracts outside the U.C.C. is six years in all states except Delaware, the District of Columbia, Maryland, and North Carolina (3 years); California and Texas (4 years); Arkansas, Florida, Idaho, Kansas, Nebraska, Oklahoma, and Virginia (5 years); Montana (8 years); Illinois, Iowa, Louisiana, Missouri, West Virginia, and Wyoming (10 years); Kentucky and Ohio

give notice to the defendant within a reasonable time after discovering the breach or be barred from suing,<sup>50</sup> while tort plaintiffs generally are not subject to any such notice requirement. Recoverable damages also may differ. Purely economic harms may be recoverable in contract but not in tort, while harm to the plaintiff's person or property as a consequence of a defective product may be recoverable in tort but not in contract,<sup>51</sup> unless the harm satisfies the foreseeability test of *Hadley v. Baxendale*.<sup>52</sup>

Because warranties are created by consent, they may be disclaimed or limited by consent.<sup>53</sup> Tort liability based on negligence involves the violation of duties that are imposed by law, not by consent. However, even tort duties of care may be contracted away if there is express agreement between parties of relatively equal bargaining power,<sup>54</sup> unless the waiver implicates public policy.<sup>55</sup> It is inaccurate to speak of waiving duties of care in strict liability, because the liability is based on causation alone, not on the violation of a standard of reasonable care. Some jurisdictions, however, have permitted parties to contract out of even strict liability.<sup>56</sup>

(15 years); and Indiana (20 years).

Robert D. Marshall, *The Applicability of the Uniform Commercial Code to Construction Contracts*, 28 EMORY L.J. 335, 341 n.26 (1979). Tort statutes of limitation are frequently two years or less. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-9, at 404 (4th ed. 1995).

50. *E.g.*, U.C.C. § 2-607(3)(a).

51. The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.

*Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965).

52. 156 Eng. Rep. 145 (Ex. 1854).

53. See U.C.C. § 2-316.

54. The Restatement specifies that exculpatory agreements can be valid: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy." RESTATEMENT (SECOND) OF TORTS § 496B (1964). "Where such an agreement is freely and fairly made, between parties who are in an equal bargaining position, and there is no social interest with which they interfere, it will generally be upheld." *Id.* cmt. b.

55. The Restatement lists several situations in which agreements by one party to assume the risk of the other's negligence would not be enforced as contrary to public policy, including a waiver by an employee of the employer's negligence or a waiver by a customer of the negligence of one who is "a common carrier, an innkeeper, a public warehouseman, a public utility, or is otherwise charged with a duty of public service." *Id.* cmts. f and g.

56. See *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146, 149 (3d Cir. 1974) (holding that Pennsylvania law permits a "freely negotiated and clearly expressed waiver of [strict liability under] § 402A between business entities of relatively equal bargaining strength.").

## 2. *Privity Issues in Warranty Law*

Nearly thirty years ago, Dean Prosser proclaimed the fall of the “citadel of privity” in the area of products liability.<sup>57</sup> However, privity still has limited vitality in the area of warranty liability, where issues relating to both vertical and horizontal privity remain.

Vertical privity concerns persons who are in the chain of title but have not contracted directly with each other. For example, someone who bought a car from a local dealer might want to sue the manufacturer of the car. Under tort law, the buyer can sue.<sup>58</sup> But until recently, this was not the case (and in some jurisdictions is still not the case) for the buyer who wants to sue for economic losses under a contract theory.<sup>59</sup> Even in contract law, however, the trend seems to be away from a vertical privity requirement. In some states there have been enough successful assaults on the vertical privity requirement that it is now settled law in those jurisdictions that a purchaser may sue up the chain of title beyond his or her immediate seller for breach of warranty.<sup>60</sup>

The horizontal privity issue arises when the plaintiff is outside the chain of title altogether. Here, lack of privity with the seller may still bar a

57. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960); Prosser, *supra* note 7, at 791.

58. The seminal case is *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). See *supra* text accompanying notes 13-15. The *MacPherson* court allowed the plaintiff to sue the manufacturer, but questioned whether it would be appropriate for the plaintiff to go behind the product manufacturer to the manufacturer of component parts:

We are not required, at this time, to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in *his* duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong.

*MacPherson*, 111 N.E. at 1053. Later courts have allowed negligence suits against components manufacturers. See *Smith v. Peerless Glass Co.*, 181 N.E. 576 (N.Y. 1932).

59. *E.g.*, *Chem-Tech Finishers, Inc. v. Paul Mueller Co.*, 375 S.E.2d 881 (Ga. Ct. App. 1988); *Evershine Prods., Inc. v. Schmitt*, 202 S.E.2d 288, 231 (Ga. Ct. App. 1973) (“[I]f a defendant is not the seller to the plaintiff-purchaser, the plaintiff as the ultimate purchaser cannot recover on the implied or express warranty, if any, arising out of the prior sale by the defendant to the original purchaser . . .”).

60. *E.g.*, *Rothe v. Maloney Cadillac, Inc.*, 492 N.E.2d 497 (Ill. App. Ct. 1986) (holding that privity was not required for the purchaser of an automobile to sue the manufacturer for breach of implied warranties). In reaching its decision, the court cited both U.C.C. and non-U.C.C. decisions in several other states which held that lack of contractual privity did not bar suits involving either personal injury or economic loss, and discussed policy issues in favor of limiting the privity requirement. The South Carolina Supreme Court has stated flatly that “the concept of privity is no longer viable in this jurisdiction.” *Terlinde v. Neely*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980).

warranty suit. Section 2-318 of the U.C.C.<sup>61</sup> provides three alternatives that states may adopt concerning third-party beneficiaries of warranties on goods. Each succeeding alternative is more liberal than the prior one. The first alternative allows the buyer's family, household, and guests to sue for personal injury caused by a breach of warranty if it is reasonable to expect that they would use, consume, or be affected by the goods.<sup>62</sup> The second alternative extends warranty coverage for personal injury to "any natural person who may reasonably be expected to use, consume or be affected by the goods."<sup>63</sup> The third alternative both extends warranty coverage to "any person" (thus including *de jure* persons such as corporations) and drops the "personal" limitation from the injury requirement.<sup>64</sup>

Outside of the U.C.C., lack of horizontal privity bars litigation to varying degrees. Particularly in a personal injury suit, a plaintiff probably would be more successful with a negligence action based on violation of a legally established duty of care than with an action based on a contractual obligation, unless the plaintiff is qualified to sue under the state's established law on third-party beneficiaries.

### 3. Damages for Breach of Warranty

The traditional measure of damages for breach of contract is the plaintiff's expectancy interest. Under this measure, successful plaintiffs are entitled to damages in an amount calculated to put them in the position they would have enjoyed had the defendant performed the contract obligations without breach.

If a plaintiff's expectancy is for some reason too speculative or difficult to determine, courts may employ a reliance measure of damages. Reliance damages, which are the prevailing measure of damages in tort cases,<sup>65</sup> are

61. Cf. U.C.C. § 2A-216 (setting forth the equivalent provision relating to leases).

62. U.C.C. § 2-318, Alternative A. Twenty-seven states and the District of Columbia had adopted Alternative A at this writing.

63. *Id.*, Alternative B. Seven states and the Virgin Islands had adopted Alternative B or similar language at this writing.

64. *Id.*, Alternative C. Thirteen states had adopted Alternative C or similar language at this writing.

65. Strict liability in tort generally does not cover purely economic losses. See *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) (en banc). But see *Santor v. A. & M. Karagheusian, Inc.*, 207 A.2d 305, 312 (N.J. 1965) ("[A]lthough the doctrine has been applied principally in connection with personal injuries . . . the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved."). The United States Supreme Court has held that the theory of strict liability in tort does not comprehend damage to the product itself, although it does cover harm to other property and personal injury. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

[A] manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.

intended to put the plaintiff back into the position he or she occupied before entering into the contract. Consequential damages, which do not arise directly from the breach but occur as a consequence of it, are recoverable if they "could have been fairly and reasonably contemplated by both the parties when they made this contract."<sup>66</sup>

The U.C.C. provides a panoply of remedies for unhappy buyers of goods.<sup>67</sup> As in traditional contract law, the plaintiff's expectancy interest remains the prevailing measure of damages. For breach of warranty on goods that the buyer decides to keep, section 2-714 provides:

(2) The measure of damages for breach of warranty is the difference . . . between the value of the goods accepted and the value they would have had if they had been as warranted . . . .

(3) In a proper case any incidental and consequential damages . . . may also be recovered.<sup>68</sup>

Outside of the U.C.C., the expectancy measure is also the rule. In *Hoye v. Century Builders, Inc.*,<sup>69</sup> discussed in more detail below,<sup>70</sup> the court found that Century had breached an implied warranty that a house it built for the Hoyes would be fit for human habitation. In determining the measure of damages, the court found that "[t]he difference in value rule is proper in a building contract if there has not been substantial performance."<sup>71</sup> This rule allows the plaintiff to recover "the difference in value between the house in its uninhabitable condition and its value had it been properly constructed."<sup>72</sup>

## B. Application of Warranty Theories to Transactions in Goods

### 1. What Are Transactions in Goods?

Article 2 of the U.C.C. applies to "transactions in goods."<sup>73</sup> In some cases courts must first determine whether a contract involves "goods" at all. The U.C.C. requires that goods be "movable,"<sup>74</sup> so real property is clearly

. . . When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

*Id.* at 871.

66. *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854).

67. U.C.C. §§ 2-711 to 2-718.

68. U.C.C. § 2-714.

69. 329 P.2d 474 (Wash. 1958).

70. See *infra* text accompanying notes 125-28.

71. 329 P.2d at 477.

72. *Id.* at 475.

73. U.C.C. § 2-102. The U.C.C. does not define the word "transaction."

74. The term "goods" is defined as:

excluded. Courts have found that the U.C.C. applies to contracts involving the sale of electricity<sup>75</sup> and computer software,<sup>76</sup> but not to ski lift tickets<sup>77</sup> or liquor licenses.<sup>78</sup>

Article 2 does not exclude from its coverage transactions that include a service component, but courts have made it clear that Article 2 does not apply to contracts exclusively for services.<sup>79</sup> Courts have been willing to apply Article 2, either directly or by analogy, to some contracts that involve goods but are not sales of goods, and to some contracts that involve both goods and services.<sup>80</sup>

Although Section 2-102 uses the words "transactions in goods," many other sections of Article 2, including the provisions relating to warranty,<sup>81</sup> refer specifically to sales of goods. Indeed, Article 2 is entitled "Sales." Before the availability of Article 2A governing leases,<sup>82</sup> many jurisdictions borrowed heavily from Article 2 by analogy in cases involving leases of goods.<sup>83</sup> The need for courts to apply Article 2 by analogy to lease transactions diminishes as more state legislatures adopt Article 2A.

(1) . . . all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-105.

75. *See Cincinnati Gas & Elec. Co. v. Goebel*, 28 Ohio Misc. 2d 4 (1986).

76. *E.g.*, *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), *rev'd in part*, 604 F.2d 737 (2d Cir. 1979).

77. *See Peterson v. Wildcat Mountain Management Corp.*, 34 U.C.C. Rep. Serv. (Callaghan) 1127 (D.R.I. 1982).

78. *Tomb v. Lavelle*, 444 A.2d 666, 667 (Pa. Super. Ct. 1981).

79. *See, e.g.*, *Gagne v. Bertran*, 275 P.2d 15, 20 (Cal. 1954) (en banc) (stating the general rule that those who sell services "are not liable in the absence of negligence or intentional misconduct.").

80. *See infra* part II.C. (discussing hybrid transactions).

81. *E.g.*, U.C.C. §§ 2-312 to 2-315.

82. The National Conference of Commissioners on Uniform State Laws and the American Law Institute presented Article 2A in 1987. As of September 1994, approximately 40 states had adopted Article 2A. Article 2A covers leases of personal property and contains warranty provisions substantially similar to those in Article 2. *See* U.C.C. §§ 2A-210 (Express Warranties), 2A-211 (Warranties Against Interference and Against Infringement; Lessee's Obligation Against Infringement), 2A-212 (Implied Warranty of Merchantability), 2A-213 (Implied Warranty of Fitness for Particular Purpose).

83. *E.g.*, *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 478 N.Y.S.2d 505, 509 (N.Y. Civ. Ct. 1984); *see also* Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447, 449-54 (1971) (discussing cases that extend Article 2 to leases).

For transactions in goods other than sales or leases, courts may find common-law implied warranties outside of the U.C.C.<sup>84</sup> For instance, in a contract involving the bailment of goods for the mutual benefit of the parties, the bailor impliedly warrants to the bailee that the goods are reasonably fit for their intended purpose.<sup>85</sup> In a contract for the carriage of goods, the shipper makes an implied warranty to the carrier that the goods are packaged in such a way that they are fit to withstand transit.<sup>86</sup>

## 2. *Express and Implied Warranties Under the U.C.C.*

### a. *Creation*

Warranties may be expressly agreed to by the parties or may arise by implication. Although express warranties are common in all kinds of contracts, implied warranties are largely, but not entirely,<sup>87</sup> confined to contracts for the sale or lease of goods. The U.C.C. contains probably the most comprehensive and explicit statement of the various species of warranties applicable to commercial transactions in goods, with Article 2 applying to sales and Article 2A to leases.

Express warranties made by the seller to the buyer in contracts for the sale of goods are provided for in Section 2-313.<sup>88</sup> Express warranties may be

84. See generally E. Allan Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

85. *E.g.*, Ekco Prods. Co. v. United States, 312 F.2d 768, 771 (Ct. Cl. 1963) (when the United States agreed to supply equipment to Ekco for its use in manufacturing cartridges for the United States, it impliedly warranted that the equipment was fit for its intended purpose); Aircraft Sales & Serv., Inc. v. Gantt, 52 So. 2d 388, 391 (Ala. 1951); Berhow v. Kroack, 195 N.W.2d 379, 381 (Iowa 1972).

86. See *Eastern Motor Express, Inc. v. A. Maschmeijer, Jr., Inc.*, 247 F.2d 826 (2d Cir. 1957). In this case, the carrier sued the shipper when drums filled with methyl phenyl acetate leaked onto the carrier's truck, damaging both the truck and some other cargo. The court noted:

Under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made at least as against latent unfitness. Thus a shipper in delivering packaged goods for shipment impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment.

*Id.* at 828 (citation omitted).

87. See *supra* text accompanying notes 84-85.

88. U.C.C. § 2-313 reads in part:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

U.C.C. § 2-313(1).

made either by words or by samples or models of the goods. Implied warranties in the sale of goods are covered by several U.C.C. sections. Implied warranties of merchantability, conformity with a previous course of dealing between the parties, and conformity with common usage of trade are all described in Section 2-314.<sup>89</sup> Section 2-315 covers implied warranties of fitness for a buyer's particular purpose<sup>90</sup> and Section 2-312 covers warranties of good title and no infringements.<sup>91</sup>

89. U.C.C. § 2-314 reads:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-314.

90. U.C.C. § 2-315 reads:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315.

91. U.C.C. § 2-312 reads:

- (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
  - (a) the title conveyed shall be good, and its transfer rightful; and
  - (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
- (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
- (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises

An implied warranty of merchantability arises only in a sale by “a merchant with respect to goods of that kind,” so it would not apply, for instance, to a couch bought at a casual garage sale or a lawn mower bought from a neighbor who is not a lawn mower dealer.<sup>92</sup> “Merchantability” implies that the goods are, among other things, fit for their ordinary purposes. This is probably the most important implied warranty in transactions in goods because it basically guarantees the buyer fair and reasonable treatment by the seller. The implied warranty of merchantability shifts the responsibility of determining that the goods satisfy minimum quality standards from the buyer to the seller. This makes sense, because the seller is likely to be in a better position than the buyer to have access to the goods; to control the quality of their manufacture, packaging, and shipping; and to be qualified to assess their merchantability.

Unlike the implied warranty of merchantability, the implied warranty of fitness for a particular purpose does not require that the seller be a merchant with respect to the goods. Instead, there are two knowledge requirements: if the seller has reason to know (1) the purpose for which the goods will be used, and (2) that the buyer is trusting the seller’s judgment in selecting goods suitable for that purpose, then the warranty attaches.<sup>93</sup>

In addition to the implied warranties of merchantability and fitness, the U.C.C. provides that “other implied warranties may arise from course of dealing or usage of trade.”<sup>94</sup> By “course of dealing,” the U.C.C. refers to previous conduct between the parties to the contract.<sup>95</sup> Course of dealing implied warranties might arise, for instance, if in previous contracts between the buyer and seller, the seller had done something consistently that led the buyer to expect goods of a particular quality, even though previous contracts

out of compliance with the specifications.

U.C.C. § 2-312.

92. There is some doubt as to whether the merchant requirement is necessary. Because Section 2-316 provides that implied warranties can be excluded or modified by usage of trade, course of dealing, or course of performance, the circumstances of a casual sale usually should exclude the warranty on sales by one who is not a merchant. Arguably, in a case in which the buyer should reasonably expect the warranty to attach, a sale by one who is not a merchant should include the warranty.

93. U.C.C. § 2-315. Historically, the seller could defeat the buyer’s claim to this warranty by proving that the buyer had requested a particular brand name item. That exception is specifically eliminated by Comment 5: “The elimination of the ‘patent or other trade name’ exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Article.” U.C.C. § 2-315 cmt. 5. The Comment goes on to note that the inquiry should be whether a buyer actually relied on the seller, and the use of a brand name “is only one of the facts to be considered.” *Id.*

94. U.C.C. § 2-314(3).

95. U.C.C. § 1-205(1) (defining course of dealing as “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”).

had not expressly required that quality. "Usage of trade" is not limited to previous conduct between the contracting parties, but instead is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."<sup>96</sup>

Although not denominated as such, the Warranty of Title and Against Infringements found in Section 2-312 of the U.C.C. is in reality an implied warranty because it arises even though not specified in the contract or expressly agreed to by the parties. Under Section 2-312, sellers warrant that they are conveying good title, that the transfer is rightful, and that the goods are not subject to any security interests or liens of which the buyer has no knowledge.<sup>97</sup> Sellers who are merchants also warrant that the sale does not infringe the rights of any third person, unless the buyer provides the specifications for the goods to the seller, in which case the buyer actually makes this warranty to the seller.<sup>98</sup>

### *b. Modification and Exclusion*

Section 2-316 of the U.C.C. deals with exclusion or modification of warranties in contracts for the sale of goods.<sup>99</sup> Although the U.C.C. permits contracting parties to limit or exclude implied warranties, express warranties are harder to disavow. Section 2-316(1) provides that, to the extent the seller's words or conduct granting express warranties cannot be construed as consistent with words or conduct taking them away, the language taking away the warranties is inoperative.<sup>100</sup> Section 2-313 covers the creation of express warranties but does not provide any method for limiting or modifying them.<sup>101</sup> Comment 4 to Section 2-313 notes that "[a] clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to [the seller's previous description of the goods] and therefore cannot be given literal effect under Section 2-316."<sup>102</sup>

By contrast, implied warranties generally can be either limited or excluded altogether. Section 2-316 permits the modification or exclusion of the implied warranties of merchantability and fitness for a particular purpose if the seller complies with certain requirements designed to bring the limitations to the attention of the buyer. To limit or exclude the warranty of

96. U.C.C. § 1-205(2).

97. U.C.C. § 2-312(1).

98. U.C.C. § 2-312(3).

99. U.C.C. § 2-316. Cf. U.C.C. § 2A-214 (dealing with the lease of goods).

100. U.C.C. § 2-316(1). Cf. U.C.C. § 2A-214(1) (containing the analogous provision for the lease of goods).

101. U.C.C. § 2-313. Cf. U.C.C. § 2A-210 (creating express warranties on leased goods).

102. U.C.C. § 2-313 cmt. 4.

merchantability, "the language must mention merchantability and in case of a writing must be conspicuous."<sup>103</sup> To limit or exclude the warranty of fitness, "the exclusion must be by a writing and conspicuous."<sup>104</sup> However, subsection (3) of Section 2-316<sup>105</sup> provides that a seller may exclude all implied warranties by using "as is" language; by allowing the buyer to fully examine the goods; or by course of dealing, course of performance,<sup>106</sup> or usage of trade. A seller may exclude or modify the warranty of good title and rightful transfer "only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."<sup>107</sup>

The aim of all of the U.C.C. provisions dealing with modification or exclusion of implied warranties appears to be to ensure that the seller effectively communicates to the buyer any such limitations. If the seller follows the U.C.C. rules and disclaims implied warranties specifically and conspicuously, then the buyer cannot reasonably assert that he or she expected those warranties to attach to the contract.

### *C. Application of U.C.C. Implied Warranty Theories to Hybrid Sales/Service Transactions*

In hybrid transactions involving both services and goods, the applicability of the U.C.C. depends on the standards of the jurisdiction and the terms of the particular transaction. Hybrid transactions have given courts many opportunities to consider whether application of the U.C.C. is appropriate. Arguably, most sales transactions involve at least some service component. For instance, the purchase of machinery or equipment may include consulting, design, installation, and training provided by the seller. Courts have devised several rationales for deciding whether to apply the U.C.C.,<sup>108</sup> but essentially, these

103. U.C.C. § 2-316(2).

104. *Id.*

105. *Cf.* U.C.C. § 2A-214(3) (containing the analogous provision relating to leases).

106. Unlike "course of dealing," which refers to previous contracts between the parties, and "usage of trade," which refers to general industry or trade custom, the U.C.C. uses "course of performance" to refer to conduct within a single contractual relationship.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

U.C.C. § 2-208.

107. U.C.C. § 2-312(2).

108. Professors Harris and Squillante enumerate no fewer than seven tests for determining whether a hybrid transaction is predominantly for the sale of goods and, consequently, whether the U.C.C. should apply: (1) the predominant thrust (or predominant factor or purpose) test;

break down into two approaches. Either the court classifies the entire contract as one for goods, to which the U.C.C. applies, or one for services, to which the U.C.C. does not apply; or the court divides the contract into its goods and services components and applies the U.C.C. only to the goods portions of the contract. The first approach prevails by far.

*1. Classification of the Contract as One for  
Either Goods or Services*

When confronted with the hybrid-transaction problem, the English courts devised the “essence” test: is the essence of the contract goods or services? In *Clay v. Yates*,<sup>109</sup> this determination affected both the enforceability of the contract and the damages recoverable by the plaintiff.

Most American courts have focused on the predominant purpose of the contract, which is similar to the English “essence” test. In a recent case involving the design of software and supply of a computer system, the Federal District Court for the District of New Jersey employed this test.<sup>110</sup> The court held that the test for determining whether the U.C.C. applies to contracts for a mixture of goods and services is “whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g. contract with artist for painting) or is a transaction of sale with labor incidentally involved (e.g. installation of a water heater in a bathroom).”<sup>111</sup> In a complex contract, this test can require a time-consuming, fact-intensive examination. The terminology of the contract

(2) the predominantly service test; (3) the goods supplied (or final product or movability) test; (4) the public policy test; (5) the divisibility (or separate contracts) test; (6) the contract terminology test; and (7) the gravamen test. 2 HARRIS & SQUILLANTE, *supra* note 6, at 16-26.

109. 156 Eng. Rep. 1123 (1856). In *Clay* the plaintiff printer orally agreed to supply to the defendant the paper, ink, and labor to print a treatise on military tactics with a dedication to Sir William Napier. At the end of the work, the printer discovered that the dedication was libellous and refused to finish printing it. The defendant refused to accept the treatise without the dedication, and the printer sued for payment. The court had to determine whether the contract was subject to the Statute of Frauds, and if not, determine the appropriate measure of damages. Chief Baron Pollock opined that “the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied.” *Id.* at 1125. The court decided that the contract was in essence one for services rather than for goods. As a result, a section of the Statute of Frauds was inapplicable, and the plaintiff’s damages were based on the value of his labor rather than the value of the books. *Id.* at 1126; *see also* Farnsworth, *supra* note 84, at 663 (noting that *Clay* “appears to be the rule today applied by English courts.”). But Farnsworth also states that English courts have been willing to divide hybrid transactions and to apply warranties only to the portion of a contract dealing with goods. *Id.* at 664-65.

110. *Conopco, Inc. v. McCreadie*, 826 F. Supp. 855, 867 (D.N.J. 1993).

111. *Id.* (quoting *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974), a case in which the court found that the U.C.C. applied to a contract for the purchase and installation of bowling equipment because the contract was predominantly for the purchase of goods).

may be important. For instance, if a contract refers to “seller” and “buyer,” the court may be persuaded that the parties intended it to be a sale.<sup>112</sup>

## 2. *Division of the Contract into Components*

In cases where the plaintiff may have problems with both the goods and services supplied under a contract, some courts have tried to divide the contract and apply the U.C.C. only to the goods aspect of the case.<sup>113</sup> This, however, remains a minority position, possibly because it could make cases difficult to administer. For instance, separate statutes of limitation might apply to the goods and nongoods aspects of a contract.

## 3. *Gravamen of the Action Test*

In an approach which falls somewhere between classifying and dividing the contract, at least one court has applied a “gravamen of the action” test to hybrid transactions.<sup>114</sup> This test focuses on the complaint rather than the contract: Does the plaintiff’s complaint deal with the goods aspect or the service aspect of the contract? If the problem is with the goods, the U.C.C.

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112. *E.g.*, *Entron, Inc. v. General Cablevision*, 435 F.2d 995, 1000 (5th Cir. 1970).

113. *See Foster v. Colorado Radio Corp.*, 381 F.2d 222, 226 (10th Cir. 1967) (“We see no reason not to view the Foster contract in two parts as effecting the sale of goods and non-goods.”). Dividing contracts also has precedent in English cases. *See Farnsworth, supra* note 84, at 664-65 (citing cases that apply warranties to defective goods supplied in contracts for automobile repair, hair dyeing, cattle vaccination, and dentures).

114. *Anthony Pools v. Sheehan*, 455 A.2d 434 (Md. Ct. App. 1983). In *Anthony*, the plaintiff was injured when he slipped and fell from the diving board of his new swimming pool. The defendant had designed and built the swimming pool and the diving board. Sheehan contended that the diving board was faulty and sued for, *inter alia*, breach of the implied warranty of merchantability. Anthony Pools maintained that the contract was for the service of building the pool rather than for the sale of goods. The court agreed that, under a predominant factor analysis, the purpose of the contract was “the furnishing of labor and service by Anthony, while the sale of the diving board was incidental to the construction of the pool itself.” *Id.* at 439. However, the court noted that the diving board was an optional accessory, and if purchased alone, the sale clearly would have been subject to an implied warranty of merchantability. The court declined to base its decision on a predominant factor analysis because its application would have produced a result contrary to the legislative policy of Maryland’s U.C.C. § 316. *Id.* at 441. Instead, the court adopted a test that permitted it to apply U.C.C. warranties to the goods aspect of a hybrid transaction even where service was the predominant purpose of the contract. *See id.*

will apply;<sup>115</sup> if the problem is with the service aspect of the contract, the U.C.C. will not apply.<sup>116</sup>

One danger in this varying treatment of hybrid transactions is that the parties may base their agreement on faulty assumptions. For instance, the supplier of goods and services in a hybrid contract may conceive of the transaction as primarily one for services and assume that the U.C.C. does not apply. But if a court determines that the U.C.C. does apply to part or all of the transaction, any warranty disclaimers in the contract will be ineffective unless they comply with the U.C.C. provisions relating to language and conspicuousness.<sup>117</sup> Therefore, if a supplier in a hybrid transaction wants to ensure that it has not inadvertently made implied warranties, the supplier must exclude or modify them in a manner that will be effective under the U.C.C.

*D. Application of Implied Warranty Theories Outside the U.C.C.:  
Conduct vs. Results*

The U.C.C. in effect codifies a shift from the doctrine of *caveat emptor* ("let the buyer beware") to *caveat venditor* ("let the seller beware") with respect to sales and leases of goods. While there has been some movement in that direction in cases not covered by the U.C.C., application of implied warranties to transactions outside the U.C.C. has not achieved the same uniformity among jurisdictions, or even the same consistency within jurisdictions, as has resulted from adoption of the U.C.C. by all of the states. Hence, implied warranties may attach to some service transactions but not to others.

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115. [W]here, as part of a commercial transaction, consumer goods are sold which retain their character as consumer goods after completion of the performance promised to the consumer, and where monetary loss or personal injury is claimed to have resulted from a defect in the consumer goods, the provisions of the Maryland U.C.C. dealing with implied warranties apply to the consumer goods, even if the transaction is predominately [sic] one for the rendering of consumer services.

*Anthony*, 455 A.2d at 441.

116. The *Anthony* court based its decision to adopt the gravamen test in part on Dean Hawklund's discussion of a Nevada case, *Worrell v. Barnes*, 484 P.2d 573 (Nev. 1971), in his treatise at 1 WILLIAM D. HAWKLUND, UNIFORM COMMERCIAL CODE SERIES § 2-102:04 (1982). *Worrell* involved a fire allegedly caused by a defective fitting installed by a contractor hired to do carpentry work and to connect the plaintiff's appliances to an existing liquified petroleum gas system. *Anthony* also cited *Newmark v. Gimbel's Inc.*, 258 A.2d 697 (N.J. 1969), in which the plaintiff successfully sued Gimbel's when a permanent wave solution applied at the defendant's beauty salon damaged her hair and scalp. Although the transaction was arguably predominantly for services, the court noted that plaintiff clearly would have had a warranty action against the seller if she had purchased the solution and applied it herself. The court held that the law should not vary because of the circumstances under which the permanent was applied. *Id.* at 700-01.

117. See U.C.C. § 2-316.

Although the majority position is still that implied warranties do not attach to service transactions, courts have been persuaded in some cases to impose implied warranties on the supplier.

Courts apply two basic types of implied warranties to contracts outside the U.C.C. The first type focuses on the promisor's conduct in performing the contractual obligations; courts use language like "workmanlike performance" or "skillful and professional conduct." The second type focuses on results; for example, a warranty of fitness, of habitability, or of suitability. The first type of warranty is unnecessary and is, in fact, counterproductive: unnecessary because it duplicates coverage provided by the law of negligence, and counterproductive because it clouds the strict liability nature of warranty.

### *1. Warranties of Conduct*

In *Pepsi Cola Bottling Co. v. Superior Burner Service Co.*,<sup>118</sup> the plaintiff sued for damage to a boiler, alleging that the damage was caused by the defendant's faulty repair. The plaintiff based its case on theories of negligence in tort and breach of implied warranty in contract. The Alaska Supreme Court considered whether a "cause of action for breach of an implied warranty to repair in a workmanlike manner" existed separate from and in addition to a negligence claim.<sup>119</sup> The court denied the implied warranty claim, finding it identical to the negligence claim and noting that the plaintiff had a sufficient remedy in tort.<sup>120</sup>

Apparently the court reached the conclusion that the negligence and warranty claims were identical by viewing the warranty claim as an assertion that an "implied warranty of workmanlike performance existed."<sup>121</sup> With the word "performance," the court focused on the defendant's conduct and whether the defendant met the standard of care required in a negligence context rather than on the adequacy of the repair. Courts that focus on the process rather than the result are likely to conclude that there is no difference between the proof required to show negligence and that required to show breach of an implied warranty of fitness.

As a basis for its decision, the Alaska court cited a Florida opinion, *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., Inc.*<sup>122</sup> *Audlane* was a suit against an engineering firm that provided designs and specifications for metal and wooden trusses used in building construction. The plaintiff constructed trusses according to the defendant's design and then sold

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118. 427 P.2d 833 (Alaska 1967).

119. *Id.* at 839.

120. *Id.* at 843.

121. *Id.* at 840.

122. 168 So. 2d 333 (Fla. Dist. Ct. App. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1965).

them to a residential building contractor. The trusses collapsed after the contractor installed them in the roof of a house under construction, necessitating extensive repairs to the roof. The plaintiff argued that the designer should be liable for breach of an implied warranty that the design was fit for its intended purpose.<sup>123</sup> The Florida court, however, disagreed:

With respect to the alleged "implied warranty of fitness," we see no reason for application of this theory in circumstances involving professional liability. . . . An engineer, or any other so-called professional, does not "warrant" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use." These are terms uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised [sic] his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this "warranty" occurs if he was negligent.<sup>124</sup>

But note that the plaintiff's contention was not that the defendant had been negligent in designing the trusses, just that the design did not work. The Florida court did not explain why the concepts of fitness and merchantability are "uniquely applicable to goods," or why a professional does not warrant the quality of service provided.

## 2. Warranties of Results

In 1958 the Supreme Court of Washington considered a claim arising out of a contract for the construction of a new home.<sup>125</sup> John Hoyer and his wife purchased a lot from Century Builders and selected a house plan from many that Century had available. When construction was complete, the house was uninhabitable because of a raw sewage discharge that Century was unable to correct. The Hoyes sued on a contract theory, and the court found that Century had breached an implied warranty that the completed house would be fit for human habitation. The court assumed that the doctrine of *caveat emptor* was still applicable to sales of real property, and noted that "if the case presented the sale of a new, but nevertheless completed house, there would be no implied warranty of fitness."<sup>126</sup> By finding that an implied warranty of habitability did attach to a construction contract, even if not to a sales contract, the court acknowledged that implied warranties could be imposed on service contracts. The *Hoye* court also commented that "[t]he uniform current of

123. *Id.* at 334.

124. *Id.* at 335.

125. *Hoye v. Century Builders, Inc.*, 329 P.2d 474 (Wash. 1958).

126. *Id.* at 476.

decisional law in the United States is in accord” with its holding,<sup>127</sup> and that the English courts had recognized this warranty as early as 1931.<sup>128</sup>

Several years later, an implied warranty of merchantability and fitness was applied to the design and construction of a sewage treatment plant.<sup>129</sup> The sewer system for Omaha, Nebraska was overburdened with waste from meat packing houses in the southern part of town. When the city system could not process all the waste, raw sewage was dumped into the Missouri River. Downstream communities and the United States government strongly objected to the pollution, and Omaha was faced with a deadline for eliminating it. Fred S. Carver, Inc., a manufacturer of hydraulic press equipment, proposed to the city that a process developed in conjunction with Charles Greenfield could solve the problem. The city contracted with the newly-formed Carver-Greenfield Corporation (CGC) to design and build a plant to process the sewage and finance the project with a city bond issue. When the plant was finished, it did not work.<sup>130</sup>

The federal district court determined that the city was entitled to implied warranties on the transaction under the U.C.C., commenting that “[i]t is clear that courts are turning to the Uniform Commercial Code to resolve the problems of transactions of this type.”<sup>131</sup> The court did not consider whether this was a transaction in goods as defined by the U.C.C.<sup>132</sup> and did not clarify whether the U.C.C. was applicable directly or only by analogy. Instead, it deemed the U.C.C. should apply because “the buyer relied on the seller and the seller’s expertise to examine a problem, [and] recommend, design, and manufacture a product which, it was represented, would afford a solution.”<sup>133</sup> The court held that both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose applied to the contract. It further held that neither warranty had been effectively excluded, because contract language that purportedly limited or excluded the warranties did not comply with the language and conspicuousness requirements of the U.C.C.<sup>134</sup>

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127. *Id.*

128. *Id.* at 477 (citing *Miller v. Cannon Hill Estates, Ltd.*, 2 K.B. 123 (1931)).

129. *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F. Supp. 1069 (D. Neb. 1976).

130. The woes of the city and the reasons why the plant failed are detailed at length in the opinion. *Id.* at 1076-84.

131. *Id.* at 1085 (citing *Aluminum Co. of America v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. 1971); *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964)).

132. *See* U.C.C. § 2-105.

133. *Carver-Greenfield Corp.*, 413 F. Supp. at 1085.

134. *Id.* at 1086; *see supra* text accompanying notes 103-04.

In *Air Heaters, Inc. v. Johnson Electric, Inc.*,<sup>135</sup> the North Dakota Supreme Court considered a contract under which Johnson Electric designed, manufactured, and installed an electrical system in a building owned by Air Heaters. When a fire destroyed a substantial part of the building, Air Heaters sued Johnson Electric for, among other things, breach of the U.C.C. implied warranty of fitness for a particular purpose. The court noted that the contract involved both goods and services. Johnson Electric supplied wires, fuses, and conduits, but it was also responsible for installing the goods "in the proper fashion."<sup>136</sup> Adopting the predominant factor test of *Bonebrake*,<sup>137</sup> the court found that Air Heaters had failed to prove that the contract's predominant purpose was the sale of goods. Therefore, the court declined to impose the U.C.C. implied warranties on Johnson Electric.<sup>138</sup>

However, the plaintiff's claim was not completely disallowed. The court noted that "the fact that the implied warranties under the Uniform Commercial Code are not applicable in this case, does not necessarily mean that there are no implied warranties covering this particular contract."<sup>139</sup> The court followed North Dakota precedent in holding that an implied warranty of fitness may arise in construction contracts

under circumstances where (1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, designs, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.<sup>140</sup>

South Carolina courts have gone beyond the approach taken by the Washington Supreme Court in *Hoye*<sup>141</sup> and have found that an implied warranty of habitability attaches to the sale of a new house whether or not the seller was responsible for building the house.<sup>142</sup> Locating the source of this

135. 258 N.W.2d 649 (N.D. 1977).

136. *Id.* at 652.

137. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974); *see supra* text accompanying note 111.

138. 258 N.W.2d at 653.

139. *Id.*

140. *Id.* (quoting *Dobler v. Malloy*, 214 N.W.2d 510, 516 (N.D. 1973) (following *Robertson Lumber Co. v. Stephen Farmers Co-op. Elevator Co.*, 143 N.W.2d 622, 626 (Minn. 1966))).

141. *Hoye v. Century Builders, Inc.*, 329 P.2d 474 (Wash. 1958).

142. In South Carolina, the implied warranty of habitability is made only by the vendor of a new home to the purchaser. *See chronologically Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970) (holding that an implied warranty of habitability is made to a purchaser by a builder-vendor of a new home); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976) (extending the implied warranty of habitability so that it is made by a vendor of a new

warranty in the English common law,<sup>143</sup> the South Carolina Court of Appeals has described it in terms similar to the U.C.C. warranty of fitness for a particular purpose.<sup>144</sup> Unlike most provisions in a contract for the sale of real property, the implied warranty of habitability does not become merged in the deed upon conveyance of the property, but survives as an independent covenant.<sup>145</sup> Although the warranty of habitability is made only by the initial seller,<sup>146</sup> it is not made only to the initial buyer: "lack of privity does not bar a remote purchaser from suing an initial vendor on an implied warranty theory."<sup>147</sup>

Recently, the South Carolina Supreme Court permitted a suit by condominium owners against an architect for negligence and for "breach of an implied warranty that the plans and specifications were suitable and fit for use in construction of buildings designed for use as condominiums."<sup>148</sup> The court noted that South Carolina had recognized since 1951 that one who "furnishes plans and specifications for a contractor to follow in a construction job . . . impliedly warrants their sufficiency for the purpose in view."<sup>149</sup>

home who is not the builder); *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (1986) (holding the implied warranty of habitability is *not* made to a purchaser by a builder who is not a vendor of a new home); *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988) (holding that an implied warranty of habitability is *not* made to a purchaser by construction contractors or subcontractors who are not vendors of a new home). *But see also* *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) (stating that although a builder who is not a seller does not make an implied warranty of habitability, "a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability." (citation omitted)).

143. The implied warranty of habitability was first recognized in the common law in the decision of *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113. In that case, the King's Bench held that the builder-vendor of a house who knew his purchaser intended to use it as a dwelling impliedly warranted it would be fit for that purpose.

*Carolina Winds*, 297 S.C. at 77, 374 S.E.2d at 899. But note the distinction drawn by the *Hoye* court when it assumed that *caveat emptor* was still the law in real estate transactions in Washington. *See Hoye*, 329 P.2d at 476.

144. U.C.C. § 2-315. *See Carolina Winds*, 297 S.C. at 77, 374 S.E.2d at 899 ("[A] builder-vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use.") (citing *Rutledge*, 254 S.C. 407, 175 S.E.2d 792).

145. *Carolina Winds*, 297 S.C. at 77 n.1, 374 S.E.2d at 899 (citing *Rutledge*, 254 S.C. 407, 175 S.E.2d 792; *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984)).

146. *See Arvai v. Shaw*, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986).

147. *Id.* at 164, 345 S.E.2d at 716 (citing *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980)).

148. *Beachwalk Villas Condominium Ass'n v. Martin*, 305 S.C. 144, 145, 406 S.E.2d 372, 373 (1991).

149. *Id.* at 146, 406 S.E.2d at 374 (quoting *Hill v. Polar Pantries*, 219 S.C. 263, 271, 64

The South Carolina courts thus recognize two sorts of implied warranties in these construction cases: those relating to outcome (the implied warranty of habitability, or fitness for a particular purpose), and those relating to conduct (the implied warranty of care, diligence and workmanlike performance). As the Florida court noted in *Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc.*,<sup>150</sup> the second sort of "warranty" is in reality a negligence theory rather than a strict liability theory. So although nonvendor builders may owe duties to buyers, and although the duties arise out of the contract by which the builder is engaged, these duties are more like tort (negligence) duties than traditional contract (strict liability) duties.

Admiralty law recognizes an implied warranty of workmanlike service.<sup>151</sup> Courts have used this warranty to hold stevedoring companies liable to shipowners for injury to employees<sup>152</sup> and for loss or damage to cargo<sup>153</sup> when the shipowners cannot prove that the stevedores were negligent.

### III. A PROPOSED STANDARD FOR IMPOSITION OF IMPLIED WARRANTIES

#### *A. Policy Implications of Implied Warranties*

Some commentators suggest that one reason for treating service transactions under a negligence analysis while permitting strict liability for goods transactions is that consumers of goods and services have different expectations.<sup>154</sup> The argument is articulated as follows. Consumers of goods contract for tangible, specific products whose defective status is subject to clear determination. These consumers' expectations do not focus on the care or skill with which a product was manufactured, but rather, on the end result—the quality of the goods. By contrast, consumers of services contract for a quality of performance that relates to diligence, care, and skill, and is

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S.E.2d 885, 888 (1951)).

150. 168 So. 2d 333 (Fla. Dist. Ct. App. 1964).

151. See *Moore-McCormack Lines, Inc. v. International Terminal Operating Co.*, 619 F. Supp. 1406, 1410 (S.D.N.Y. 1985) (discussing the history of this warranty).

152. E.g., *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

153. E.g., *Stein Hall v. S.S. Concordia Viking*, 494 F.2d 287 (2d Cir. 1974).

154. See David Crump & Larry A. Maxwell, *Should Health Service Providers Be Strictly Liable for Product-Related Injuries? A Legal and Economic Analysis*, 36 Sw. L.J. 831, 836 (1982) ("The sale of a product is a discrete, isolated event, and the product can sensibly be subjected to expectations of uniformity. . . . A service, on the other hand, is an event with a time duration. . . . The inquiry more appropriately focuses upon the quality (reasonableness) of the service."); see also Dana Shelhimer, *Sales-Service Hybrid Transactions and the Strict Liability Dilemma*, 43 Sw. L.J. 785, 793 (1989) (citing James B. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 18 (1978), and distinguishing Michael M. Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 697-98).

less susceptible to definition or analysis. Service consumers, therefore, focus on the process rather than the result.

The above reasoning seems fallacious, however, because rational consumers of both goods and services should be concerned more with results than with process. Whether a merchant agrees to help a buyer select an appropriate air conditioning unit or a repair person agrees to fix a broken air conditioning unit, the consumer is contracting for a working air conditioner, not for careful or skillful service. Why should an implied warranty attach to one transaction but not the other?

Another reason courts and commentators advance for distinguishing between goods and services deals with the relative abilities of providers of goods and services to bear or spread risk.<sup>155</sup> One rationale for imposing strict products liability is that suppliers of goods are better able to bear or spread the risk than consumers.<sup>156</sup> Commentators have noted that many service providers are not in the same position as mass producers of goods. A manufacturer who produces thousands of rubber wastebaskets or millions of shingles in a year can effectively spread the cost of a damage award among a large number of purchasers by raising the price of all goods sold. Conversely, many service providers may individualize and tailor their work to the needs of a specific purchaser and may provide services to a relatively small number of purchasers during a given time period. The argument is that mom and pop service providers are not as able as large manufacturers to bear or spread the risk associated with their services.

The argument fails for at least two reasons. First, it compares the wrong things. The appropriate comparison is not between large manufacturers and small service providers, but between the seller of goods or services on one hand and the purchaser of these goods or services on the other. Strict liability in the form of implied warranties does not apply only to large manufacturers. It applies to all sellers of goods if the sellers are merchants with respect to goods of the kind involved in the transaction<sup>157</sup> or if the buyer has depended on the sellers' expertise in selecting appropriate goods.<sup>158</sup> Whether the supplier sells goods or services, it is in the business of providing them to purchasers. The supplier is more likely than the purchaser to enter into similar transactions with multiple parties. For instance, it is more likely that a mechanic will repair multiple cars than that a car owner will employ multiple mechanics; it is more likely that an eye doctor will have multiple patients than that a patient will have multiple eye doctors. Therefore, although small repair

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155. *E.g.*, Shelhimer, *supra* note 157, at 792; Jimelle E. King, Note, *Products Liability—Strict Liability Does Not Apply to Repairers*, 58 TUL. L. REV. 1251, 1258 (1984).

156. *See Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

157. *See* U.C.C. § 2-314.

158. *See* U.C.C. § 2-315.

shops may not be able to spread risks as widely nor as easily as large manufacturers, they should be more able to do so than their customers. Risk spreading, if indeed the goal, can be more easily accomplished by the service provider than by the purchaser.

Second, the seller of services should be in a better position than the purchaser to procure insurance against losses. Again, this is because of the seller's volume of transactions compared to that of the purchaser. Even if the service provider is a small operation, it is likely to engage in more transactions of the same type than is the purchaser. As a result, providers of insurance should be better able to evaluate the risks against which they are insuring. For instance, an insurance company that issues a policy to an elevator repair company should be able to define the amount and type of liability likely to arise from such services. However, if the owner of a building with an elevator takes out an insurance policy, the policy would cover either multiple types of risks or only risks relating to elevator repair. With multiple risk coverage, it would be more difficult for the insurance company to determine how much and what kind of liability would likely arise. Therefore, the insurer would charge more for the policy, either to pay for the uncertainty of the risk or to pay for the cost of assessing the risk. Single risk coverage would also be uneconomical for the insured party because of (1) the costs of estimating and deciding whether to cover each risk and (2) the transaction costs in securing separate coverage for each risk. If an insurer undertakes the same risk whether the policy is issued to the service provider or the service purchaser, but the risk is easier to assess when the policy holder is the service provider, then the policy should be cheaper in the hands of the service provider.

Implied warranties may advance certain public policy goals. The implied warranty provisions of Article 2 are intended in part to equalize the bargaining power between buyers and sellers of goods by holding sellers to minimum quality standards absent a specific disclaimer. Thus, implied warranties derogate from the common-law principle of *caveat emptor*.

Why should it be necessary to shift the burden of inspection and quality control from buyer to seller? *Caveat emptor* is equitable when the buyer has both a genuine opportunity to examine the goods and the ability to judge their quality, but it becomes inequitable when those conditions do not exist.<sup>159</sup> Over the last couple of centuries, the economy has gradually shifted from one based on face-to-face transactions with a craftsman to one characterized by mass production and extended distribution chains. As a result, consumers are much less likely to have direct contact or communication with anyone responsible for producing the goods they purchase. In addition, goods have

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159. See *Blood Balm Co. v. Cooper*, 10 S.E. 118 (Ga. 1889); *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913); see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1964).

become increasingly diverse and mechanically complex. The typical purchaser of a car today is probably less able to judge its soundness than was the typical purchaser of a wagon in 1850. Therefore, buyers' bargaining power, or power to protect themselves from entering into bad bargains, has become attenuated. Because the seller is generally in a better position than the buyer to control and evaluate the quality of the goods, it is fair that the seller should bear the burden of either warranting that the goods are of adequate quality or communicating to the buyer that the seller refuses to so warrant.

If the rationales for imposing implied warranties of quality are (1) to equalize bargaining power and (2) to put the burden on the party with the ability to control and evaluate quality, is there any reason to restrict implied warranties to transactions in goods? Do purchasers of services have more bargaining power than purchasers of goods? Are they better able to control and evaluate the quality of the services they receive? As mentioned above, one reason purchasers of goods have less bargaining power is that attenuated distribution chains make it less likely that they will deal directly with producers of goods. Perhaps this is not true of service transactions. To the extent that services are tailored to meet the needs of individual purchasers, both pure service transactions and hybrid transactions are more likely to involve face-to-face contact and negotiation between the buyer and seller than are sales of mass-produced goods.

This argument is not convincing, however. First, the U.C.C. warranties do not come into force only with respect to mass-produced goods. They apply with equal vigor to specially manufactured goods<sup>160</sup> and other sales transactions, regardless of the buyer's actual contact with the seller or ability to discern and bargain for specific quality standards.

Second, purchasers of services, like purchasers of goods, are less likely to be able to control or evaluate quality than sellers. How many consumers feel deep trepidation whenever they must take their car to a mechanic or their TV to a repair shop because they are ill-equipped to evaluate the quality of the work? Consumers of professional services are at an even greater disadvantage because, by definition, a nonprofessional is not qualified to judge the quality of professional services.

Third, even the face-to-face nature of service transactions may be on the decline; buyers are frequently directed to ship their cameras or stereos to authorized service centers for repair. Finally, there are certainly service transactions in which a standardized service is performed without any bargaining about the buyer's particular needs. For example, the purchaser of

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160. An exception is the warranty of no infringements. To the extent the buyer provides specifications to the seller, the seller does not make this warranty, and the buyer "must hold the seller harmless against any such claim which arises out of compliance with the specifications." U.C.C. § 2-312(3).

a train ticket from Washington to Philadelphia does not have the opportunity to bargain over whether the train will also stop in Baltimore. Likewise, the purchaser of an oil change from a franchise outlet receives only its standard checklist of services.

If there are policy reasons for imposing minimum quality standards in contracts for the sale of goods (unless the parties specifically agree to the contrary), then there seem to be no compelling reasons not to impose minimum quality standards in contracts for the provision of services as well. Rather than inquiring whether a contract's predominant purpose is the provision of goods or services, the salient question should be whether the purchaser reasonably expected, and paid for, goods or services that conform to some minimum quality standard.

To the extent that implied warranties are intended to protect consumers, there is no clear basis for treating purchasers of goods differently from purchasers of services. In fact, in consumer transactions, it seems likely that purchasers of services frequently will be even more worthy of protection, because they will be less able than purchasers of goods to monitor and evaluate the quality of performance rendered under a contract. For instance, at the time of purchase, a consumer who buys a television can compare it to other sets to see whether the picture is good. But a consumer of television repair services may not have enough information to intelligently compare the repair shop's analysis and service decisions with those of another shop. Although some states have recognized an implied warranty of workmanlike service, this "conduct" warranty is not as beneficial to the consumer as a "results" warranty of fitness or merchantability. As discussed previously,<sup>161</sup> the rational consumer should be more interested in results than in process. Therefore, the consumer needs some assurance that the end result of the performance, whether services or goods, will satisfy the consumer's reasonable expectations.

### *B. Articulation of a Standard that Takes Policy Goals into Account*

One reason courts impose and enforce implied warranties is to satisfy expectations that, although not expressed in the contract, were reasonably understood by the contracting parties to be part of their deal. But if courts are truly in the business of enforcing the parties' deal (as opposed to imposing on the parties a deal to which they did not agree), courts should not impose unexpressed terms on the parties to a contract unless they are able to discern with reasonable certainty what the parties intended. Thus, in determining whether implied warranties should attach to a contract, courts should focus on

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161. See *supra* note 154 and accompanying text.

whether the unexpressed expectations of the contracting parties are discernable with sufficient certainty so that they should be enforced against one party for the benefit of the other. A court should make this determination by asking two questions: (1) does the contract obligate the promisor to attain a specific result? and (2) is it reasonably certain that the result is attainable?

In a recent article, Professor Zamir discussed “conformity obligations” in the contract law of various countries.<sup>162</sup> Express and implied warranties in Anglo-American law are one species of conformity obligations; they oblige the promisor to conform its performance to the promisee’s reasonable expectations as expressed in, or implied by, the contract.<sup>163</sup> Although nonconformity in its broadest sense is equivalent to breach, the article applies the term more narrowly. Professor Zamir advocates the international adoption of a unified conceptual framework of contract liability based on the conformity of the promisor’s performance with certain contractual obligations.<sup>164</sup> Specifically, Professor Zamir proposes that conformity obligations be applied to contracts designed to obtain some result as opposed to contracts intended to adopt appropriate means for achieving the purpose.<sup>165</sup> For instance, conformity obligations would not apply in most employment contracts, because employees are generally expected to use reasonable care and skill to do their work, rather than to attain some specific result.<sup>166</sup> However, conformity obligations would apply to a service contract for repair or construction, because the objective of the contract is the end rather than the means.

To the extent American courts have been willing to imply warranties of quality in contracts that are not for the sale of goods, the unifying factor seems to be that the result achieved was not the result sought in the contract. As the *Audlane* court noted, the breach of a warranty of quality when applied to

162. Eyal Zamir, *Toward a General Concept of Conformity in the Performance of Contracts*, 52 LA. L. REV. 1 (1991).

163. *See id.* at 17-29.

164. *See id.* at 4-5.

165. *Id.* at 42-46. Professor Zamir states:

Where result obligations are concerned, nonconformity between the result promised and that achieved constitutes breach. . . . As opposed to this, where the obligation can be met by adopting appropriate steps for achieving the result, then a difference between the hoped-for result and that actually attained is neither a sufficient condition nor a necessary one for the purpose of liability. . . . At most, the difference (between the hoped-for result and that attained) may serve as evidence of the promisor’s negligence where our experience tells us that, were there no negligence, the desired result would have usually followed. Moreover, the measure of damages in such cases is not the difference between the result achieved and that desired, but the difference between the actual result and that which would probably have followed in the absence of negligence.

*Id.* at 43.

166. *Id.* at 46.

conduct (such as a warranty of workmanlike performance) rather than result (such as a warranty of merchantability) is identical to negligence. It is therefore misleading to speak of it as a breach of warranty because it improperly suggests a strict-liability standard.<sup>167</sup>

In sum, both fairness and efficiency dictate that American law should provide implied warranty protection to promisees regardless of whether a contract is for goods, services, or some combination, whenever (1) the promisee has contracted for a result rather than a standard of conduct, and (2) the result contracted for is of sufficient clarity and specificity to allow confident determination of whether a breach has occurred. There should be three species of these implied warranties, analogous to those set forth in the U.C.C.: (1) a warranty of fitness for ordinary purposes ("FOP warranty") similar to the U.C.C.'s implied warranty of merchantability; (2) a warranty of fitness for a particular purpose if known to the promisor ("FPP warranty") similar to the U.C.C.'s implied warranty of fitness for a particular purpose; and (3) a warranty of conformance with common understanding ("CCU warranty") similar to the U.C.C.'s usage of trade and course of dealing.

To resolve issues of scope or interpretation, courts applying these warranties should be able to draw by analogy from the text and comments of the U.C.C. as well as from the large body of U.C.C. case law. The FOP warranty can be informed by concepts from the U.C.C. implied warranty of merchantability that a promisor's performance is of "fair average quality," is sufficient to "pass without objection in the trade," and is "fit for the ordinary purposes for which such [performance is] used."<sup>168</sup> These ideas are not by their nature limited to transactions in goods and easily can be applied to service contracts or hybrid contracts. Although they have not used the FOP label, courts have imposed FOP warranties in specific circumstances; for example, the implied warranty of habitability is in reality a warranty that the dwelling is fit for its ordinary purpose—human habitation. Therefore, this is not a new concept but rather a broader articulation of what promisees may reasonably expect.

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167. [I]n the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised [sic] his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this "warranty" occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the "implied warranty" are the same. The use of the term "implied warranty" in these circumstances merely introduces further confusion into an area of law where confusion abounds.

Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Assocs., 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1964); *see supra* text accompanying notes 122-24.

168. U.C.C. § 2-314.

The FOP warranty should not carry the same “merchant” restriction that the U.C.C. imposes on the implied warranty of merchantability. Instead the FOP warranty should arise regardless of whether the promisor is a “professional” or an “amateur.” The merchant requirement is unnecessary and counterproductive in both the U.C.C. and in this broader context. It is unnecessary in the U.C.C. because its effect is captured by the “course of dealing” and “usage of trade” language; and unnecessary generally because implied warranties should only arise when they are within the reasonable expectations of the parties to the contract. If someone contracts to fix a leaky roof, in the absence of any contractual indication to the contrary, the roof owner can reasonably expect that the leak will be stopped, regardless of the promisor’s apparent expertise or regular employment. However, a promise to try to find the leak, or a contract price substantially less than the normal roofing company’s fee, or perhaps even a price based on an hourly rate instead of a flat fee, could evidence that the promisor had agreed to a standard of performance rather than a particular result.

From the implied warranty of fitness for a particular purpose, the concept that the promisee should be able to rely on the promisor’s expertise in supplying a performance appropriate to the promisee’s needs also makes sense in contexts other than the sale of goods. In fact, this FPP warranty is likely to be the most useful of the implied warranties in the context of services tailored to the needs of the individual promisee.

Where the contract is silent or ambiguous, the warranty of conformance with common understanding would allow courts to rely both on general usage of trade and on the specific prior dealings of the contracting parties to determine exactly what result the parties had agreed on. This warranty might operate to the benefit of either the promisor or the promisee, depending upon whether the result expected by the promisee was actually in conformance with common understanding.

Implied warranties should not attach to contracts whose object is to secure a standard of performance. One way to distinguish between a contract for a particular result and a contract for a standard of performance is the certainty of the result’s attainability. For instance, in the medical context, it might appear that a contract between a sick person and a doctor is a results contract, because the patient’s goal is to get well. However, even with significant advances in medical knowledge and skill in recent years, the complexity of human physiology and psychology make it impossible to predict how a given patient will respond to a course of treatment. Therefore, a medical patient generally does not have a reasonable expectation that the doctor has promised a particular result, and it is inappropriate to hold a doctor to a warranty that the patient will get well—unless the doctor made an express warranty that the patient would get well.<sup>169</sup>

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169. Architects, doctors, engineers, attorneys, and others deal in somewhat inex-

One of the most basic principles of a just legal system is that the law should be consistent and predictable; it should treat like situations in a like manner. Therefore, to the extent that there is no fundamental difference between transactions in services and transactions in goods, the law should treat both kinds of transactions the same. Currently, contracts for the sale, consignment, entrustment, and lease of goods are clearly covered by implied warranties. Other transactions may or may not be covered; there is considerable variation among jurisdictions. The rationales advanced by courts and codifiers for imposing implied warranties on suppliers of goods—disparity in access to information, ability to control quality, and ability to bear or spread risk—also apply in the context of service contracts when (1) the contract is intended to procure a result rather than a process and (2) it is reasonably certain that the result is attainable. Therefore, instead of drawing an artificial line between goods and services, the line should be drawn between those contracts that meet these two criteria and those that do not.

Imposition of implied warranties in service transactions should advance three goals: (1) more certainty of contract enforcement, particularly in the context of hybrid transactions; (2) better communication of information from the promisor to the promisee; and (3) higher quality service. Although the application of implied warranties to transactions other than sales and leases of goods seems to be expanding, the expansion is erratic and haphazard, both among different jurisdictions and within a single jurisdiction among different types of transactions. A principled standard for determining when implied warranties apply would make contract enforcement easier for courts and more predictable for contracting parties. In transactions where implied warranties are appropriate, promisors would be encouraged to communicate more effectively with promisees, particularly where promisors are not as certain of their ability or willingness to guarantee a particular result that the promisee might otherwise expect. When promisors communicate their commitments more completely, promisees should be able to bargain more effectively, either for better promises or for lower prices. And to the extent that promisors fail to communicate limitations on their intention or ability to achieve a particular result, promisees could rely on implied warranties to enforce their right to achieve that result.

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act sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

*City of Mounds View v. Waljarvi*, 263 N.W.2d 420, 424 (Minn. 1978).

#### IV. CONCLUSION

American contract law has moved away from *caveat emptor* to a rule that imposes implied warranties in some transactions. These transactions generally are those in which (1) the contract's object is to provide a specific end product or to accomplish a specified goal, and (2) the contract's end product or goal is clearly attainable. Examples include contracts for the sale of goods, contracts to provide habitable housing, and contracts for the design and construction of products or facilities. At the same time, the courts have expanded tort liability for defective products to hold sellers of such products strictly liable for harm to users and consumers of the products. The expansion of liability in both contract and tort, however, has centered on claims involving products or goods. The majority of courts considering the issue have said that neither strict liability in tort nor implied warranties apply to transactions involving services.

To explain their refusal to apply implied warranties to service contracts, some courts have focused on the fact that warranties that relate to the promisor's conduct or to the quality of the service are identical to a negligence standard. Where the plaintiff has sought an implied warranty of results, rather than conduct, courts have simply held that implied warranties are inapplicable outside the context of transactions in goods.<sup>170</sup> Courts have also contended that it is inappropriate to impose implied warranties on service providers because services frequently are not susceptible to the level of definition and certainty that characterizes goods.<sup>171</sup>

This article agrees that there is no need to expand the concept of implied warranty to duplicate the protection provided by the law of negligence. In many service contracts, however, the goal of the contractual relationship is capable of enough specification and definition to reasonably impose an implied warranty that the services provided will accomplish the specified end. In these cases, there seems to be little reason to hold providers of services to a lower standard of quality than that imposed on providers of goods.

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170. See *Audlane Lumber & Builders Supply v. D.E. Britt Assocs.*, 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964) (“‘merchantable’ [and] ‘fit for an intended use’ . . . are terms uniquely applicable to goods”), *cert. denied*, 173 So. 2d 146 (Fla. 1965).

171. See *supra* note 154 and accompanying text.

