Chapter 16. Warranties: Issues of Remote Sellers, Privity, and Notice

16.1. Warranties Given by Remote Sellers

16.1.1. Express Warranties of Remote Sellers. In today's world, products are often made by the manufacturer, distributed throughout the country by one or more distributors, and sold to the end-user by a retail store. Warranties may be given by those parties as well. Can a buyer who purchased a product from a retail store hold a manufacturer liable for breach of an express warranty? The answer is generally yes: Most jurisdictions allow a claim by a remote purchaser against the manufacturer for any express warranties made by the manufacturer.

16.1.1.2. How this is the case is a bit convoluted. Official Comment 2 to § 2-313 states, "Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract."

An example of the sort of case law Comment 2 is talking about is *Whitaker v. Farmhand, Inc*., 567 P.2d 916, 921 (Mont. 1977). That court stated "a remote manufacturer without privity with the purchaser is liable for breach of warranty by advertising on radio and television, in newspapers and magazines, and in brochures made available to prospective purchasers, if the purchaser relies on them to his detriment."

For complete analysis of whether remote seller's warranties create liability vis-à-vis remote purchasers, you must analyze:

- whether a warranty is given at each step of the transaction,
- the type of warranty (express or implied), and
- whether anyone else in the chain of distribution is responsible for that particular warranty.

☑ **Purple Problem 16-1.** KitchenwareCo. manufactures toasters. It provides a limited express warranty with each toaster, and disclaims all other warranties. BeauMart stocks and sells KitchenwareCo. toasters.

(1) Can the customer sue BeauMart for a breach of the limited express warranty given by Kitchenware Co., the manufacturer?

(2) Can the customer sue the manufacturer for its limited express warranty, even though he did not directly purchase the toaster from the manufacturer?

(3) Does BeauMart give an implied warranty of merchantability when it sells the toaster to the customer, or is the only available warranty the express warranty of the manufacturer?

16.1.1.3. ***Dealers' express warranties and remote manufacturers.*** Is a remote manufacturer responsible for any express warranties made by the dealer? The answer is generally no, not unless the manufacturer adopts the dealers express warranty. For example, if an appliance manufacturer provides a limited one-year warranty for a particular model of washing machine, and the retail store provides a three-year warranty for all brands sold by it, the manufacturer is not responsible for the additional or modified express warranties, unless adopted by the manufacturer as its own. See *Gross v. Systems Engineering Corp.*, 36 U.C.C. Rep. Serv. (Callaghan) 42 (E.D. Pa. 1983).

16.1.1.4. ***Basis of the bargain, express warranties, and remote sellers.*** Note that the "basis of the bargain" element of § 2-313 applies to claims against remote manufacturers (though the courts diverge as to when an express warranty becomes a part of the basis of the bargain, as discussed previously). In other words, if a manufacturer provides a warranty through brochures or other advertising, such warranty must become the basis of the bargain.

In *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567–68 (3rd Cir. 1990), plaintiffs claimed that Liggett had breached an express warranty given in its advertisements that "smoking is healthy." Liggett argued that the smoker had not

proved that this advertisement was a part of the basis of the bargain. The court adopted a ***presumption of reliance*** as follows:

> [A] plaintiff effectuates the "basis of the bargain" requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise. Such proof will suffice "to weave" the affirmation of fact or promise "into the fabric of the agreement," U.C.C. Comment 3, and thus make it part of the basis of the bargain. We hold that once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the "basis of the bargain" unless the defendant, by "clear affirmative proof," shows that the buyer knew that the affirmation of fact or promise was untrue. (footnotes omitted)

16.1.1.5. ***Is a direct seller responsible for breach of any express warranties made by the manufacturer?*** If an express warranty is made by an appliance manufacturer as to a specific model of washing machine, and Home Appliance Store sells the machine to a customer, can a customer sue Home Appliance Store for breach of the manufacturer's express warranty? While it has been held that a seller does not adopt a manufacturer's express warranty merely by giving notice of that warranty, *State v. Patten*, 416 N.W.2d 168 (Minn. App. 1987), adoption arises where a seller makes an affirmation about the manufacturer's warranty by means of a statement of fact, a promise or some other action which would tend to induce the buyer to purchase the goods. *Scovil v. Chilcoat*, 424 P.2d 87 (Okla. 1967). In any event, Home Appliance Store, as a merchant seller, makes an implied warranty of merchantability that may give rise to a separate claim by the customer against the store (unless effectively waived, as discussed in the next chapter).

As an interesting sidenote, Amended Article 2 would have added provisions allowing a buyer to assert a breach of an express warranty against a "remote" seller, including warranties contained in advertising. See Amended §§ 2-313A, 2-313B.

16.1.2. Implied Warranties of Remote Sellers. Although most jurisdictions allow a remote purchaser to sue a manufacturer for breach of the manufacturer's express warranty, there is much more controversy regarding whether the implied warranties of merchantability or fitness for a particular purpose apply to manufacturers or others in the chain of distribution. To add to the confusion, some courts do not distinguish "vertical privity" (*i.e.*, manufacturer sells to distributor sells to retail store sells to consumer) from "horizontal privity" (*i.e.*, retail store sells to consumer, and a person in the consumer's household is injured

by the product). Horizontal privity is separately governed under UCC § 2-318, which we will discuss in more depth further on.

16.1.2.1 Case: *Peterson v. North American Plant Breeders*

Peterson v. North American Plant Breeders

Supreme Court of Nebraska
August 10, 1984

354 N.W.2d 625 Robert PETERSON and William Peterson, doing business as Peterson Brothers, Appellees and Cross-Appellants, v. NORTH AMERICAN PLANT BREEDERS, doing business as Migro Seed Company, a corporation, Appellant and Cross-Appellee. No. 83–374. [Note: Many citations were removed without notation. – EEJ, ed.]

COLWELL, District Judge, Retired:

This is a suit for breach of express warranty and implied warranty of merchantability in the sale of seed corn. North American Plant Breeders, doing business as Migro Seed Company, defendant, appeals from an adverse $76,519.08 jury verdict and judgment in favor of plaintiffs, Robert Peterson and William Peterson, doing business as Peterson Brothers.

Plaintiffs are extensive farmers in the Rock County, Nebraska, area, where much of the land is sandy soil, sometimes called the Sandhills. The Peterson land here was irrigated from wells and four center pivots. The irrigation equipment revolved around each pivot, and all plantings were in circles.

Defendant's headquarters is in Mission, Kansas. It produces hybrid seeds, including the Migro SPX–8 variety. Hybrid seed corn is a product of scientific genetic cross-breeding of corn to produce a seed having desirable germination, growing, and production qualities intended by the producer.

In the spring of 1981 plaintiffs seeded four circles, alternating multiple rows of Migro SPX–8 with other seed varieties produced by four other companies. Plaintiffs regularly kept and maintained records of the several plantings reflecting germination, cultivation, irrigation, fertilizer and herbicide applied, production, and expenses.

The corn crop progressed normally until July 23, 1981, when plaintiffs discovered that 65 to 70 percent of the Migro variety corn plants had broken off around the ear level. The rest of the corn crop of other varieties had minimal damage. The night before this discovery, there had been a thunderstorm which apparently was within the ordinary range of severity. The crop damage was promptly reported to the dealer, who notified defendant, according to his business custom. Plaintiffs continued to irrigate

and otherwise uniformly nurture their total crop, including the Migro plants. The Migro variety corn plants continued to suffer stalk breakage, and by the time of harvest the Migro variety corn plants yielded only 19 ½ bushels of corn per acre. The other varieties of corn on the same farmland yielded 113 ¾ bushels per acre.

Plaintiffs purchased the Migro seed corn from John Sandall (dealer), a neighboring farmer who acted as a Migro dealer and a dealer for other seed companies. * * *

Plaintiffs' expert witness, an agronomist, testified that the cause of the breakage was the poor translocation of silica in the plant. Silica, being in heavy concentration in the Sandhills, is absorbed by the roots of the plant and distributed throughout the plant; the damaged Migro plants had an overabundance of silica deposits at the ear level of the stalk in comparison to the silica level in the leaves. This gathering of silica in the stalk weakened the plants and contributed to their breakage. His opinion was that Migro SPX–8 was unsuitable for planting in the Sandhills.

Defendant's expert, a professor of plant breeding, said that corn plants reach a stage in their growth, about 8 weeks after planting, when, due to rapid growth, the plant stalks are brittle for a 3- to 4-day period. Different varieties of corn, even though planted on the same day, reach this stage at different times, thus explaining the confinement of the damage to one variety of hybrid and relating the damage to the storm. * * *

Defendant contends that privity of contract is an essential requirement between defendant seed producer and the ultimate buyer-user where a breach of warranty of merchantability is claimed and there is a claim of consequential damages for economic loss. We have not previously ruled on this issue.

We have held that an implied warranty that food products are wholesome may be asserted for personal injury against a remote manufacturer if the products are shown to have reached the consumer in the same condition in which they left the manufacturer. Privity of contract has also been removed as a barrier to asserting an express warranty claim based upon statements made in advertising and other printed matters prepared by the manufacturer.

There is a split of authority on the question here presented. *State ex rel Western Seed v. Campbell*, 250 Or. 262, 442 P.2d 215 (1968), follows the traditional rule requiring privity of contract. *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 79, 560 P.2d 154, 157 (1977), represents the contrary rule:

> We perceive no reason to distinguish between recovery for personal and property injury, on the one hand, and economic loss on the other. Instead, we believe that lack of privity between the buyer and manufacturer does not preclude an action against the manufacturer for the recovery of economic losses caused by breach of warranties.

We are persuaded that the latter *Hiles Co.* rule applies to the facts here.

Our Legislature has already addressed the scope of warranty recovery for horizontal nonprivity plaintiffs, Neb. U.C.C. § 2-318 (Reissue 1980), but it has remained silent as to vertical nonprivity plaintiffs seeking recovery such as presented here.

Historically, the privity of contract requirement in suits by an injured ultimate purchaser of a product was seen as necessary to prevent "absurd and outrageous consequences" involving unlimited exposure of manufacturers to liability. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). Such has not been the result in the history of strict liability for defective products litigation for which privity is not required.

The defendant argues that the privity requirement is necessary to prevent it from being exposed to unknown and excessive damages. Recovery for breach of implied warranty is limited to those damages reasonably contemplated by the parties and proximately caused by the breach. Neb. U.C.C. § 2-715 (Reissue 1980). The defendant also argues that if its implied warranty of merchantability is extended to those it expects to ultimately use its seed, and not just to its dealers, then it will in effect be an insurer of its customers' crops. Nothing in this opinion is intended either to suggest such a result or to include buyers dissatisfied with the seed performance that was less or other than expected without regard for all Uniform Commercial Code requirements, § 2-314, and the standard of proof required, § 2-715. The liability arises and that warranty extends to reasonable damages proximately caused by its placing an unmerchantable product in the marketplace. Also, there is no reason that the defendant cannot disclaim its warranty liability by policing its dealers and making sure that its disclaimer reaches the ultimate user of its product during the negotiations for the product's sale. We therefore hold that when a producer of seed places sealed bags of hybrid seed corn in its chain of distribution, it carries with it, unless effectively excluded or modified, an implied warranty of merchantability that protects the ultimate buyer-user in that chain.

16.1.2.1.1 Various Questions and Notes about *Peterson v. North American Plant Breeders*

1. Courts are more willing to allow a claim against a manufacturer or other remote seller for ***personal injuries*** rather than property damage or economic loss. So always begin your analysis with a determination of the type of damages involved. In *Rupp v. Norton Coca-Cola Bottling Co.*, 357 P.2d 802 (Kan. 1960), the Kansas Supreme Court, in allowing a claim for personal injuries arising from the breach of the implied warranty of merchantability against the manufacturer, reasoned as follows:

> "Under the law of Kansas an implied warranty is not contractual. It is an obligation raised by the law as an inference from the acts of the parties or the circumstances of the transaction and it is created by operation of law and does not arise from any agreement in fact of the parties. The Kansas decisions are in accord with the general rule laid down in the adjudicated cases. And under the Kansas decisions privity is not essential where an implied warranty is imposed by the law on the basis of public policy." (Quoting *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501, 504 (10th Cir. 1959).)

2. Not all courts allow a claim for breach of implied warranties relating to personal injuries. See, for example, *Rose v. GMC*, 323 F. Supp. 2d 1244 (N.D. Ala. 2004), in which the court refused to allow a claim for breach of implied warranty of merchantability against an automobile manufacturer for personal injuries sustained as a result of an airbag, due to lack of privity.

3. Some (but not all) courts are reluctant to allow a claim for breach of the implied warrant of merchantability or fitness for a particular purpose against a manufacturer or other remote seller where property damage or economic loss (versus personal injuries) are sustained. The problems of extending implied warranties to a remote manufacturer are expressed by the court in *Professional Lens Plan, Inc. v. Polaris Leasing Corp*., 675 P.2d 887, 898 (Kan. 1984) as follows:

> If contractual privity is not necessary to maintain an action for breach of an implied warranty of fitness [UCC § 2-315], how is it possible for a remote seller to have reason to know any particular purpose for which its goods are required by an unknown ultimate buyer? What is the time of contracting under [UCC § 2-315] between a remote manufacturer and an ultimate purchaser? How does a buyer rely upon the skill or judgment of a seller it has never met or had any dealing with and maybe doesn't even know the existence of? The problems do not end with [UCC § 2-

> 315], they only begin. For example, how is a remote manufacturer to afford itself of the ability to exclude or modify warranties under [UCC § 2-316], when the remote manufacturer does not know to whom it must exclude or modify its warranties? In turn, how is an ultimate purchaser, pursuant to [UCC § 2-607(3)(a)], to give notice of defect to a remote manufacturer whom it does not know? Further, how is [UCC § 2-719] authorizing contractual modification or limitation of remedy to operate between parties who have not dealt directly with each other? Specifically, how is a remote manufacturer to avail itself of [UCC § 2-719(3)] which permits limitation or exclusion of consequential damage liability? An across-the-board extension of implied warranties to non-privity manufacturers or sellers, without regard to the nature of either the involved product or the type of damage sought, would spawn numerous problems in the operation of Article 2 of the Uniform Commercial Code.

4. Some courts allow breach of implied warranty claims to be pursued against manufacturers or other remote sellers regardless of the type of injury involved. The reasoning behind this approach is explained by the court in *Israel Phoenix Assurance Co. v. SMS Sutton, Inc.*, 787 F. Supp. 102, 103-04 (W.D. Pa. 1992), as follows:

> Pennsylvania law on the issue of whether privity of contract is required in order to state a claim for breach of warranty has developed over the years. Because breach of warranty claims often parallel strict liability claims, and are used to recover the same damages as strict products liability claims, the development of this area of the law has reflected the development of strict products liability law. This development came to a head, resulting in the abolition of a privity requirement in breach of warranty claims asserted against manufacturers or suppliers by those farther down the chain of distribution, in 1968 in *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968), overruled on other grounds, *AM/PM Franchise Assoc. v. Atlantic Richfield Co.*, 526 Pa. 110, 584 A.2d 915 (1990)[.]
>
> Of course, the damages claimed in *Kassab*, were for damage to the plaintiffs' cows, which constituted their personal property. Following *Kassab*, there remained a question as to whether the Pennsylvania Supreme Court intended to abolish the privity requirement only in cases involving personal injury or property damage as opposed to economic loss. The question arose because of the *Kassab* court's reason for abolishing the privity requirement, which was to bring into line the law governing strict products liability and breach of warranty claims. Because

property damage and personal injury comprise the most usual "products liability" cases, there was room to argue that the *Kassab* court's reasoning would not extend to cases involving purely economic loss or loss to business -- types of damages which arguably arise more often in commercial breach of contract cases than in products liability cases.

In 1989, however, the Pennsylvania Superior Court ruled that *Kassab* "was intended to apply to all breach of warranty cases brought under the warranty provisions of the Uniform Commercial Code for all types of damages, whether they be personal injuries, damage to property or economic loss." *Spagnol Enterprises, Inc. v. Digital Equipment Corp.*, 390 Pa. Super. 372, 568 A.2d 948, 952 (1989).

5. Several jurisdictions continue to require privity for claims against a seller for economic loss arising from breach of an implied warranty. See, for example, *Gregory v. Atrium Door & Window Co.*, 415 S.E. 2d 574 (N.C. App. 1992); *Falcon for Import and Trade Co. v. North Central Commodities, Inc.*, 52 U.C.C. Rep. 2d (Callaghan) 896 (D.N.D. 2004); Tex Enterprises, Inc. v. Brockway Standard, Inc., 66 P.3d 625 (Wash. 2003).

16.2. Privity and Third-Party Beneficiaries

16.2.1. The Concept of Privity. A breach of warranty action is a contract claim. [← *That, apparently, is Burnham & Juras's view. But see "Is warranty liability within the sphere of tort or contract?" in Chapter 10. –EEJ, ed.*] Under the common law principle of privity, only a party to the contract can bring a claim against another party to the contract. In the area of breach of warranty, there are two types of privity, which you must be able to distinguish vertical privity and horizontal privity.

16.2.1.1. ***Vertical privity*** refers to the concept that a series of sales moves a good from the manufacturer to the end purchaser, illustrated as follows:

Components manufacturer

Manufacturer

Distributor

Retailer

Consumer

Under a strict privity doctrine, Consumer could only sue Retailer, who in turn could sue Distributor, who in turn could sue Manufacturer, who in turn could sue Components Manufacturer. Most courts have relaxed the strict privity requirement for breach of a warranty claim, and allow the buyer to sue the manufacturer directly as discussed previously.

16.2.1.2. ***Horizontal privity*** is quite different from vertical privity. Here we are talking about someone who is not a party to any contract for sale, but who uses the good, perhaps as a guest of the end purchaser or an employee of the end purchaser. Here is an illustration of a so-called horizontal-privity issue:

Seller

⬇

Buyer ➔ Injured person

There is no contractual relationship involved between the injured person and someone in the contractual chain of distribution. For example, Grandpa purchases a lawn mower, which topples over and seriously injures a grandchild who is mowing the lawn for Grandpa. Can the grandchild bring a claim for breach of warranty against the seller of the lawnmower? How about a claim against someone further up the chain, such as a manufacturer (this is where you see horizontal privity combining with vertical privity).

16.2.2. UCC § 2-318. UCC § 2-318 was drafted to provide a breach of warranty claim to certain persons who were not in the chain of sales contracts. As originally drafted (with only Alternative A), § 2-318 was not intended to apply to vertical relationships. The development of vertical privity was a matter of common law. Comment 2 to § 3-313 acknowledges that "the warranty sections of Article 2 are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." Section 2-318 was originally intended to apply to horizontal relationships. See Comment 3 to § 2-318, which states that Alternative A "is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons ***in the distributive chain***." (emphasis added)

16.2.2.1. See the discussion earlier in this chapter for case law developments extending breach of express and implied warranty claims to remote sellers under the concept of vertical privity.

16.2.2.2. When you are filing a claim against someone, such as the manufacturer, a distributor, a retail store, who is in vertical privity with the purchaser, ALWAYS try to avoid application of § 2-318, and RELY INSTEAD on the

concept of vertical privity. Why? Because § 2-318, particularly Alternative A, which is the most widely adopted alternative, ***strictly limits*** the type of damages awardable, and the class of persons who may bring a claim.

16.2.3. Alternatives. After receiving complaints regarding the narrow scope of Alternative A, and in an attempt to stop states from adopting non-uniform provisions regarding third party beneficiaries, in 1966 the Commissioners added Alternatives B and C to § 2-318. Each state is free to adopt the alternative it prefers. Alternative A is the most restrictive alternative as to who can sue a seller for breach of warranty and for what damages; Alternative C is the least restrictive. For various court interpretations of the three alternatives, see Diane L. Schmauder, Annotation, *Third-party Beneficiaries of Warranties Under UCC § 2-318*, 50 A.L.R.5th 327 (1997).

16.2.3.1. Under Alternative A, family members have been held to include parents, spouses, children (both minor and adult), siblings, mothers-in-law, grandchildren, nieces and nephews (and this is a non-exclusive list). The family member ***does not have to reside*** in the purchaser's household.

16.2.3.2. Under Alternative A, examples of household members would include a live-in nanny, an unmarried couple, and college roommates. This class ***must reside*** in the purchaser's household (unlike family members).

16.2.3.3. With regard to the protected class of guests under Alternative A, they must be guests ***in the home*** of the purchaser (and not, for example, a guest in the purchaser's car or boat). Many courts have required there to be some connection between the visit to the home and the injury; for example, injury to a guest who is jumping on a trampoline at the purchaser's residence (home including not only the building, but the premises surrounding the home). On the other hand, if a purchaser gives a gift to a friend while the friend is a guest in the purchaser's home, and the purchaser leaves and the gift results in an injury to the friend elsewhere, the friend may not fall in the protected class. Examples of persons who are not "guests" are paying customers, employees, and tenants.

16.2.3.4. Note that an additional requirement to fall under any of the alternatives is that the person must be "reasonably expected to use, consume or be affected by the goods." For example, if a child is injured while opening a beer bottle, can the bottler argue that it is not reasonable to expect a minor child to be opening a bottle of beer?

16.2.3.5. As noted at Section 16.2.2, Comment 3 states that Alternative A is "***not intended*** to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the ***distributive chain***." (emphasis added). However, the courts in most jurisdictions have declined to extend horizontal privity beyond the classes

enumerated in Alternative A, believing that if a larger horizontal class had been intended, the legislature would have adopted one of the other two alternatives. See, e.g., *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981) (declining to extend the Alternative A class members to an employee injured by a product purchased by his employer).

☑ **Purple Problem 16-2.** Complete the blanks in the following chart:

	Who is protected?	For what?	Can seller's exclude or limit?
Alt. A	Any _____ person in buyer's _____ or in buyer's _____ or who is guest in buyer's home, IF it is reasonable to expect that such person may use, consumer, or be affected by the goods	Personal injury only	Seller may not exclude or limit the class of protected beneficiaries or type of injury protected against (personal injury)
Alt. B	Any natural person who _____ _____ _____	Personal injury only	Seller may not exclude or limit the class of protected beneficiaries or type of injury protected against (personal injury)
Alt. C	Any person (includes entities) who may reasonably be expected to use, consume or be affected by the goods	_____ _____	Seller may exclude or limit the class of protected beneficiaries or type of injury protected against, *other than* injury to the person of individuals (but, for example, could exclude property damages or lost profits; could exclude non-natural persons as beneficiaries)

☑ **Purple Problem 16-3.** Calvary Baptist Church purchased and installed a walk-in freezer that was expressly warranted to have a safety door which could always be opened from the inside. Vicky, a 13-year old member of the congregation, was volunteering in the kitchen, and while inside the walk-in freezer the door shut behind her. She could not open it, and suffered severe frostbite before she was discovered. Can Vicky bring a claim for breach of warranty against the freezer manufacturer under Alternative A? B? C?

☑ **Purple Problem 16-4.** Landlord Bob installs a water cooler in an apartment which he owns, rented by Ted. The water cooler leaks, and destroys Ted's valuable book collection. Can Ted bring a claim for breach of warranty against the water cooler manufacturer for the property damage under Alternative A? Under Alternative B? Under Alternative C?

☑ **Purple Problem 16-5**. We read in Chapter 7 how an express warranty must be part of the "basis of the bargain." Many courts require some knowledge of the existence of the warranty and reliance thereon on the part of the purchaser. Does the "basis of the bargain" apply to plaintiffs who are not purchasers who bring a claim under UCC § 2-318?

16.2.4. Remote Sellers under UCC § 2-318. Assume that you have a person who falls within the horizontal protected class of one of the alternatives. For example, the wife of a purchaser is injured while using a motorcycle helmet purchased by her husband. In an Alternative A state, she is in the protected class as a member of the purchaser's family, and her damages are also within the allowable class of damages (personal injury). She files a claim against the manufacturer, who sold the helmet to a retail store, who sold the helmet to her husband. Is the manufacturer liable?

16.2.4.1. Under Alternative A, the wife is able to bring a claim against the seller (note that a "seller's warranty" extends to "his [the seller's] buyer." Who is the seller? The retail store, not the manufacturer. To get to the manufacturer, she will have to rely upon a "vertical" privity concept. Some states incorporate, on top of § 2-318, the vertical privity analysis discussed earlier in these materials and at Chapter 7.3 to allow the family member to sue a manufacturer up the line from the immediate seller. In other words, they allow the wife to bring a claim under § 2-318, then go to common law concepts of vertical privity to extend her

claim past the immediate seller up the chain to the manufacturer. But not all states allow this. See, for example, *Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985), which disallowed a claim brought by a wife who was injured while using the helmet purchased by her husband.

16.2.4.2. If the wife's claim had been brought in a jurisdiction with Alternative B or C, she could argue that on their face these sections do not limit privity to the seller's immediate buyer. Note that Alternative A says that the seller's warranty extends to "his buyer" while Alternatives B and C say that "A seller's warranty … extends to any natural person" in B and to "any person" in C. Thus, a court could find that there is no privity requirement under § 2-318 Alternatives B or C (instead of having to rely on common law vertical privity). All that the wife has to show is that it is reasonable for a manufacturer to expect a good to pass through a line of distribution and end up with the end purchaser, who in turn may reasonably be expected to allow others to use such good. However, the problem with relying on § 2-318 to establish vertical privity (versus common law vertical privity) is the limitation of the types of damages awardable under Alternative B (personal injury only), although Alternative C allows any type of damage to be compensated.

16.3. Notice of Breach.

16.3.1. In order for a buyer to bring a breach of warranty claim against a seller, UCC § 2-607(3) requires the buyer to provide to the seller notice of the breach within a reasonable time after the buyer discovers or should have discovered the breach. UCC § 2-607(3) has applicability broader than the warranty context, but it can be particularly important in the warranty context because it can trip up consumers. Here is UCC § 2-607(3):

> § 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.
>
> …
>
> (3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
>
> (b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation

or be barred from any remedy over for liability established by the litigation.

Note that this provision is not just applicable to quality warranties (such as the implied warranty of merchantability), but also to other warranties, such as the warranty against infringement.

Although it is clear that the buyer must notify the seller, there is a split of authority whether, when a buyer makes a claim against a remote seller, the buyer needs to give notice only to the direct seller, or whether the remote seller must also receive timely notice of the claim. See Jane Massey Draper, Annotation, *Sufficiency and Timeliness of Buyer's Notice Under UCC § 2-607(3)(a) of Seller's Breach of Warranty*, 89 A.L.R.5th 319 (2001).

16.3.2. It is important to emphasize that the notice requirement can vitiate an otherwise perfectly good warranty claim. Professor Daniel Keating quotes a general counsel of an international electronics manufacturer as saying, "[F]or those of us on the sales side, we sure as heck like §2-607. Many a buyer has run up on that rock and failed to give timely notice of breach. I've had a couple of cases in which that's been a real meat ax. … I find that too often lawyers … are just terribly careless when it comes to looking at the Code and doing what the Code says to do." Daniel B. Keating, *Sales: A Systems Approach* at 185 (6th ed. 2016).

16.3.3. Case: *Hebron v. American Isuzu Motors*

This case is one Professor Keating has used to underline the importance of timely notice of warranty breach.

Hebron v. American Isuzu Motors, Inc.

U.S. Court of Appeals for the Fourth Circuit
July 28, 1995

60 F.3d 1095. Rachel E. HEBRON, Plaintiff–Appellant, v. AMERICAN ISUZU MOTORS, INCORPORATED, Defendant–Appellee. and Jane Doe, Defendant. No. 94–1745. Argued April 4, 1995. Judge NIEMEYER wrote the opinion, in which Judge MURNAGHAN and Senior Judge BUTZNER joined. [Note: Footnotes were worked into the above-the-line text as parentheticals without specific notation. – EEJ, ed.]

PAUL V. NIEMEYER, Circuit Judge:

In June 1991, Rachel E. Hebron was driving her 1991 model Isuzu Trooper truck on Interstate 395 in Alexandria, Virginia, when she was "cut off" without warning by a vehicle entering her lane directly in front of her.

Hebron braked and turned the steering wheel to the right to avoid a collision. Her truck swerved and then rolled over, causing Hebron to sustain permanent injuries. The driver of the other vehicle failed to stop and has never been identified.

Two years later, in June 1993, after the Isuzu truck had been disposed of, Hebron sued American Isuzu Motors, Inc., for $750,000 in damages, giving American Isuzu its first notice of her claim on July 12, 1993, when it received a copy of her complaint. The complaint alleged that the Isuzu truck was not safe "to drive upon the public highways" and that American Isuzu breached the implied warranty of merchantability given when its dealer sold Hebron the truck in December 1990.

On the eve of trial, after discovery had been completed, American Isuzu renewed an earlier-filed motion for summary judgment based in part on Hebron's failure to provide American Isuzu with "reasonable notice" of her claim in violation of Virginia's Uniform Commercial Code, § 8.2–607(3)(a) of the Virginia Code. The district court granted the motion, observing that Hebron failed to provide notice for over two years without any explanation and during that period disposed of the truck, thus "depriving [American Isuzu] of any opportunity to inspect the vehicle to prepare its defense." The court explained that even though the reasonableness of notice is usually a factual question, in this case "Hebron's two-year delay before notifying [American Isuzu] of the alleged breach of warranty is unreasonable as a matter of law." The court relied on two cases in which merchant buyers were found, as a matter of law, to have given insufficient notice: *Smith–Moore Body Co. v. Heil Co.*, 603 F.Supp. 354, 358 (E.D.Va.1985) (seven-month delay in giving notice held to be unreasonable), and *Begley v. Jeep Corp.*, 491 F.Supp. 63, 66 (W.D.Va.1980) (delay of two years and five months held to be unreasonable). In both cases, the seller was deprived of an opportunity to investigate the accident in a timely manner and to inspect the allegedly defective product.

I

On appeal, Hebron contends that § 8.2–607(3)(a) of the Virginia Code applies only to a contractual relationship between "commercial parties," and that the district court erred in failing to recognize that hers is a personal injury claim made by a retail buyer. She argues that "the notice requirement of the Uniform Commercial Code was not enacted to control product liability personal injury litigation," relying primarily on *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W.Va. 22, 268 S.E.2d 296 (1980) (holding that defense of lack of notice is unavailable in product liability actions for personal injuries under

West Virginia Uniform Commercial Code provision). However, Hebron cannot provide any authority from Virginia in support of this contention.

Section 8.2–607(3)(a) of the Virginia Code, which remains consistent with the language of § 2–607 of the Uniform Commercial Code, provides:

> (3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; ....

The term "buyer" is defined as "a person who buys or contracts to buy goods." Va.Code § 8.2–103(1)(a). The word "person" in that definition is not restricted to commercial parties or merchants, and the definition does not explicitly exclude retail consumers. Since "merchant" is a defined term under the Uniform Commercial Code, see Va.Code § 8.2–104(1), that term surely would have been used in the notice provision in § 8.2–607 if such a restrictive application were intended. Any doubt about whether the term "buyer" in § 8.2–607(3)(a) includes both retail consumers and merchant buyers is resolved by the official comment to § 8.2–607(3)(a) which addresses both merchant buyers and retail buyers. Comment 4 provides in part:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards....

Va.Code § 8.2–607(3)(a), cmt. 4 (emphasis added). Thus, even though the requirement of reasonable notice may be more strictly applied to merchant buyers than to retail consumers, the term "buyer" as used in § 8.2–607(3)(a) clearly applies both to merchant buyers and retail consumers. Retail consumers are, under the plain meaning of the word, "persons" who buy or contract to buy goods. See Va.Code § 8.2–103(1)(a). See also Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 2–607:27, at 137 (3d ed. 1983) ("When the buyer sues the seller for *personal injuries* based upon a breach of warranty it is necessary that he had complied with the notice provision." (emphasis added)); *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 969 (4th Cir.1971) (observing generally that lack of notice of a breach is a defense to a warranty claim) (dictum); *Belton v. Ridge Tool Co.*, No. 90–1406, 1990 WL 116783 (4th Cir. June 4, 1990) (unpublished) (Va.Code § 8.2–607(3)(a) bars any remedy for personal injuries when notice is delayed 19 months without explanation).

In the absence of any indication that § 8.2–607(3)(a) was intended to apply only to merchant buyers, we hold that it applies to all buyers of goods, including retail consumers.

II

Hebron also contends that the question of whether she gave American Isuzu reasonable notice of the breach of warranty is a question of fact reserved for the jury. She correctly notes that a question of reasonableness is ordinarily one of fact. But this is so only within a limited range of factual circumstances. The district court, recognizing the general rule, found that in this case the two-year unexplained delay in giving notice, coupled with the plaintiff's disposal of critical evidence, was unreasonable as a matter of law. We agree.

Hebron waited two years to notify American Isuzu of her claim, and when she did, she had already disposed of the vehicle. Moreover, she produced no evidence about her vehicle or any claimed defect. She took no pictures, had no inspection conducted, and retained nothing from the vehicle after the accident. (Hebron argues that her claim is based on a defective design and that any copy of the truck in question could be evaluated for trial. Even in a design defect claim, however, the plaintiff must prove that the defect caused her injuries. Any potential defense for American Isuzu that Hebron's truck had some other problem or condition which caused it to roll over was lost along with the truck.) Finally, she has offered no explanation for the delay, despite having been invited to do so in response to the motion for summary judgment. One of the important functions of the summary judgment process is to elicit the positions of the parties and have them tested under applicable law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). In the circumstances of this case, we hold that a two-year delay in giving notice under § 8.2–607(3)(a) is unreasonable as a matter of law where no explanation for the delay is provided and actual prejudice is sustained. The prejudice caused to American Isuzu goes to the heart of the statute's purpose.

The essence of Hebron's claim is that implied as part of the sale of the Isuzu truck was an implied promise that the truck was fit for the ordinary purposes for which such goods are used. See Va.Code § 8.2–314(2)(c). But also implied, through the same commercial code that grounds her claim, is the requirement that when the buyer has reason to believe that this promise was breached, she must notify the seller within a reasonable time. This obligation is made a condition of any remedies. See Va.Code § 8.2–607(3)(a). Since Hebron chose to sue only for breach of implied warranty of merchantability and thus elected only to invoke rights arising out of her contractual relationship with American Isuzu, see, e.g., *Harris v. Hampton Roads Tractor & Equipment Co.*, 202 Va. 958, 121 S.E.2d 471, 473–74 (1961) (implied warranty claim is essentially contractual), she was required, as a condition to enforcing the warranty, to give "reasonable notice" after the breach was discovered. Such notice serves the important functions of promoting the voluntary resolution of disputes and

minimizing prejudice to the seller from the passage of time. (Another function of the notice rule, which is not implicated here, is enabling the seller to cure the breach. This policy relates principally to commercial transactions where losses from defective goods can be minimized. See *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 273 S.E.2d 681, 684 (1981).) As stated in comment 4:

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

Va.Code § 8.2–607(3)(a), cmt. 4. These purposes were defeated by Hebron's failure to give reasonable notice to American Isuzu in this case.

Accordingly, we affirm the judgment of the district court.

AFFIRMED.