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# FROM CAVEAT EMPTOR TO STRICT LIABILITY: A REVIEW OF PRODUCTS LIABILITY IN FLORIDA

RICHARD C. AUSNESS\*

Since the doctrine of *caveat emptor*<sup>1</sup> gave way to a more enlightened response,<sup>2</sup> the courts have struggled to place the law of products liability on a proper doctrinal foundation. Negligence, implied warranty, and strict liability have been used,<sup>3</sup> but as yet no universally accepted theory has emerged.<sup>4</sup> In light of this problem this article will trace the development of seller's liability in Florida. Special emphasis will be placed upon implied warranty;<sup>5</sup> in addition, the relationship between existing Florida case law, strict liability under the *Restatement of Torts*,<sup>6</sup> and the warranty provisions of the Uniform Commercial Code<sup>7</sup> will be examined.

Breach of warranty was originally tortious in nature and similar to deceit.<sup>8</sup> During the eighteenth century the action in assumpsit based on express warranty evolved.<sup>9</sup> The implied warranty of merchantability was first recognized in 1815,<sup>10</sup> while the implied warranty of fitness appeared later.<sup>11</sup>

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1. See generally Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. J. 1133 (1931).

2. "Modern products liability law proclaims the death of *caveat emptor* and the economic background it once reflected: a miscellany of sellers and buyers bargaining with each other in circumstances of relatively equal financial power and technical sophistication." Dickerson, *The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 440 (1969).

3. In this article the term "implied warranty" will be used in connection with liability arising out of a sale, irrespective of such liability being limited by privity. The term "strict liability" will apply exclusively to strict liability in tort under RESTATEMENT (SECOND) OF TORTS §402A (1965).

4. There are literally hundreds of articles on the subject of products liability. Some of the most recent ones include: Dewey, *Products Liability Without Privity: Contract, Warranty or Tort*, 45 ST. JOHNS L. REV. 76 (1970); Prosser, *Products Liability in Perspective*, 5 GONZAGA L. REV. 157 (1970); Shanker, *Pigeonholes, Privity, and Strict Products Liability*, 21 CASE W. RES. L. REV. 772 (1970); Note, *Products Liability: A Synopsis*, 30 OHIO ST. L.J. 551 (1969).

5. The two basic warranties in the law of sales are merchantability and fitness for a particular purpose. The warranty of merchantability states that the product is of average quality and fit for the ordinary purposes for which such products are used. UNIFORM COMMERCIAL CODE §2-314. The warranty of fitness states that the product is suitable for a particular purpose where the seller is aware of the purpose and the buyer relies on the seller's judgment. UNIFORM COMMERCIAL CODE §2-315.

6. RESTATEMENT (SECOND) OF TORTS §402A (1965).

7. UNIFORM COMMERCIAL CODE §§2-314 to -318.

8. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

9. *Stuart v. Wilkins*, 99 Eng. Rep. 15 (K.B. 1778).

10. *Gardiner v. Gray*, 171 Eng. Rep. 46 (H.L. 1815).

11. See *Jones v. Just*, L.R. 3 Q.B. 197 (1868).

During the nineteenth century the leading English Case, *Winterbottom v. Wright*,<sup>12</sup> was interpreted by American courts to limit the seller's liability for defective products, even in tort,<sup>13</sup> to those in privity with him.<sup>14</sup> The privity requirement continued until 1916 when the celebrated opinion of Justice Cardozo in *MacPherson v. Buick Motor Co.*<sup>15</sup> dismissed privity from products liability actions in negligence. The *MacPherson* decision was accorded immediate acceptance<sup>16</sup> and has been universally followed.<sup>17</sup> Its reasoning has been extended to members of the purchaser's family,<sup>18</sup> employees,<sup>19</sup> subsequent purchasers,<sup>20</sup> others users of the chattel,<sup>21</sup> and bystanders,<sup>22</sup> as well as to property damage.<sup>23</sup> Although the plaintiff's burden in negligence was eased by a constant tightening of the seller's standard of care<sup>24</sup> and by liberal use of *res ipsa loquitur*,<sup>25</sup> considerable pressure remained for the application of some principle of liability without fault.

In 1913, after prolonged agitation over unwholesome food, Washington,<sup>26</sup> followed by Kansas,<sup>27</sup> Mississippi,<sup>28</sup> and other states,<sup>29</sup> dispensed with the requirement of privity where food was involved. Numerous theories were offered to justify the imposition of liability upon sellers in the absence of both negligence and privity of contract. Finally, in 1927 the Mississippi court proposed

12. 152 Eng. Rep. 402 (Ex. 1842). The case held that the breach of a contract to keep a mailcoach in repair after it was sold could give no cause of action in contract to a passenger in the coach who was injured when it collapsed. See W. PROSSER, *TORTS* §93, at 622 (4th ed. 1971).

13. E.g., *Stone v. Van Noy R.R. News Co.*, 153 Ky. 240, 154 S.W. 1092 (1913); *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 80 N.E. 482 (1907); *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn. 419, 178 S.W. 1009 (1915); *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S.W. 421 (1912); *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N.W. 157 (1909).

14. See generally Comment, *The Contractual Aspects of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

15. 217 N.Y. 382, 111 N.E. 1050 (1916).

16. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960).

17. W. PROSSER, *supra* note 12, §96, at 643.

18. E.g., *Baker v. Sears Roebuck & Co.*, 16 F. Supp. 925 (S.D. Cal. 1936).

19. E.g., *Rosebrock v. General Elec. Co.*, 236 N.Y. 227, 140 N.E. 571 (1923).

20. E.g., *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N.Y.S. 131 (3d Dep't 1915).

21. E.g., *Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954); *Reed & Barton Corp. v. Maas*, 73 F.2d 359 (1st Cir. 1934).

22. E.g., *Gaidry Motors, Inc. v. Brannon*, 268 S.W.2d 627 (Ky. 1953); *McLeod v. Linde Air Prod. Co.*, 318 Mo. 397, 1 S.W.2d 122 (1927); *Hopper v. Charles Cooper & Co.*, 104 N.J.L. 93, 139 A. 19 (Ct. Err. & App. 1927).

23. E.g., *Todd Shipyards Corp. v. United States*, 69 F. Supp. 609 (D. Me. 1947).

24. Keeton, *Recent Decisions and Developments in the Law of Products Liability*, 32 INS. COUNSEL J. 620, 620-23 (1965).

25. Kessler, *Products Liability*, 76 YALE L.J. 887, 899 (1967).

26. *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

27. *Parks v. G.C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202 (1914).

28. *Jackson Coca-Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791 (1914).

29. Epstein, *Strict Liability in Tort: A Modest Proposal*, 70 W. VA. L. REV. 1, 9 (1967); Keeton, *Products Liability—Current Developments*, 40 TEXAS L. REV. 193, 205-06 (1961).

the idea of an implied warranty running with the goods from the manufacturer to the consumer similar to a covenant running with land.<sup>30</sup> This proposition was later discarded for the theory of an implied warranty made directly to the consumer,<sup>31</sup> but since that time implied warranty<sup>32</sup> has served as the basis of a seller's liability for food as well as other products.<sup>33</sup>

A warranty, implied from the nature of the transaction<sup>34</sup> or the relative situations of the parties,<sup>35</sup> arises by operation of law, irrespective of the seller's intention.<sup>36</sup> However, it is still associated with contract<sup>37</sup> principles such as privity.<sup>38</sup> Warranty, to the extent it is available to the litigant, is superior to negligence because it imposes a form of liability without fault upon the seller of goods.<sup>39</sup> Defenses such as contributory negligence<sup>40</sup> and assumption of risk<sup>41</sup> are not entirely effective, since the defendant's standard of care is not normally at issue. The privity requirement has also been circumvented in a number of cases holding that commercial advertising and labeling techniques of manufacturers give rise to express warranties upon which the

30. *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

31. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800-01 (1966).

32. See Corman, *Implied Sales Warranty of Fitness for a Particular Purpose*, 1958 WIS. L. REV. 219; Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

33. Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493, 494-500 (1962); Prosser, *supra* note 4, at 160.

34. Implied warranty has been extended in some instances to services and to sales or rentals of real property. Note, *Product Liability for a Defective House*, 18 CLEV.-ST. L. REV. 319 (1969); Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458 (1970); Note, *Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970).

35. Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501, 506 (1964).

36. Prosser, *supra* note 32, at 123-24; Comment, *Implied Warranty: Disclaimer Ineffective*, 22 U. MIAMI L. REV. 433, 434 (1967).

37. The mixed nature of implied warranty has created numerous problems. The Florida supreme court in *Whiteley v. Webb's City*, 55 So. 2d 730 (Fla. 1951), held that the state wrongful death act would support actions in tort but not in contract and denied recovery under the statute for breach of warranty. In 1953, however, the statute was changed to include actions *ex contractu*. Fla. Laws 1953, ch. 28280, §1, at 934 (now FLA. STAT. §768.01 (2) (1969)). See also FLA. STAT. §768.03 (2) (1969) (wrongful death to minors). But see Public Administrator of New York County v. *Curtiss-Wright Corp.*, 224 F. Supp. 236 (D.C.N.Y. 1963). Another problem area is the applicable statute of limitations period. *Creviston v. General Motors Corp.*, 210 So. 2d 755 (2d D.C.A. Fla. 1968). See LoPucki, *Statute of Limitations in Warranty*, 21 U. FLA. L. REV. 336 (1969); Note, *Statutes of Limitations: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775 (1970). Cf. UNIFORM COMMERCIAL CODE §2-725.

38. Prosser, *supra* note 31, at 801.

39. See generally W. PROSSER, *supra* note 12, §103, at 671.

40. See also Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 631 (1968); Note, *Contributory Negligence in Warranty Law*, 15 U. FLA. L. REV. 85 (1962).

41. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961).

ultimate consumer is entitled to rely.<sup>42</sup> Thus, the plaintiff's chances of prevailing are somewhat better when the suit proceeds under warranty theory.<sup>43</sup>

A third form of products liability has rejected warranty language entirely and has predicated liability purely in tort.<sup>44</sup> This was first proposed in the *Restatement of Torts*<sup>45</sup> and was applied by the California supreme court in *Greenman v. Yuba Power Products, Inc.*<sup>46</sup> Strict liability is regarded by some authorities as superior to implied warranty because it avoids such pitfalls as privity, disclaimers, and other unwanted legacies of the law of sales.<sup>47</sup>

#### IMPLIED WARRANTY AND FOOD

For many years Florida has used warranty as a basis of recovery in contract.<sup>48</sup> The doctrine first appeared in a personal injury context in *Smith v. Burdine's, Inc.*<sup>49</sup> where the plaintiff suffered internal injuries after using a brand of lipstick purchased in reliance upon a saleswoman's assurance that the product was safe. The court held that the employee's conduct gave rise to an implied warranty of fitness and the plaintiff was allowed to recover from the retailer, since the parties were in privity.<sup>50</sup>

Florida also followed the lead of other states<sup>51</sup> in discarding privity in cases involving food. In *Blanton v. Cudahy Packing Co.*<sup>52</sup> the Florida supreme court held the manufacturer of food products liable for injuries sustained by a consumer, even though no privity was established between the parties. In that case the plaintiff became seriously ill after consuming a foreign substance in a canned meat product processed by the defendant. Despite the lack of privity between the parties, the court allowed the action, concluding that the

42. *E.g.*, *Free v. Sluss*, 87 Cal. App. 2d 933, 197 P.2d 854 (App. Dep't Super. Ct. 1948); *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932). *See also* Comment, *Implied Warranty—Sales by Retailers—Third Party Beneficiary*, 16 U. MIAMI L. REV. 758, 762 (1962).

43. Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 Sw. L.J. 26 (1965).

44. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 9 (1965).

45. RESTATEMENT (SECOND) OF TORTS §402A (1965).

46. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

47. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

48. *E.g.*, *West Coast Lumber Co. v. Wernicke*, 137 Fla. 363, 188 So. 357 (1939); *Berger v. E. Berger & Co.*, 76 Fla. 503, 80 So. 296 (1918). *See* Parkinson & Sanders, *Implied Warranty in Florida*, 12 U. FLA. L. REV. 241, 251-53 (1959).

49. 144 Fla. 500, 198 So. 223 (1940).

50. *See also* *West Coast Lumber Co. v. Wernicke*, 137 Fla. 363, 188 So. 357 (1939) (sale of seed by name); *American Mfg. Co. v. McLeod & Co.*, 78 Fla. 162, 82 So. 802 (1919) (sale by sample).

51. Prosser, *supra* note 16, at 1103.

52. 154 Fla. 872, 19 So. 2d 313 (1944).

"implied warranty theory of liability comports with the general trend of the best reasoned cases."<sup>53</sup>

Once liability under implied warranty for the manufacturers of food products was established,<sup>54</sup> the responsibilities of retailers in the absence of privity soon underwent examination. *Sencer v. Carl's Markets, Inc.*<sup>55</sup> involved a plaintiff who was poisoned by the contents of a can of sardines purchased from the defendant's store. The seller maintained it was more equitable to place the duty of inspection on the manufacturer because only the manufacturer could ascertain the contents of the sealed container.<sup>56</sup> Nevertheless, the court declared that the sale of food, even in sealed containers, was subject to an implied warranty of fitness for human consumption, which inured to the benefit of the ultimate consumer.<sup>57</sup> Although the dissenting opinion argued that this would impose an excessive burden upon small businessmen, the majority responded that retailers could protect themselves by dealing only with reputable suppliers who were susceptible to suit in the state.<sup>58</sup>

When the question of liability initially arose for unwholesome food consumed in a restaurant, many courts denied recovery based upon implied warranty.<sup>59</sup> The courts, which used the negligence theory, considered serving meals to be a service rather than a sale,<sup>60</sup> and thus reflected the era of the boarding house where meals were included with the room.<sup>61</sup> This approach, however, proved to be unsuitable to the modern practice of purchasing meals in a restaurant where each item was separately priced.<sup>62</sup>

The Florida supreme court, in *Cliett v. Lauderdale Biltmore Corp.*,<sup>63</sup> refused to make the technical distinction between a sale and a service and held the defendant liable to consumers under the implied warranty theory.<sup>64</sup> A later case, however, declined to find liability where the plaintiff contracted

53. *Id.* at 876, 19 So. 2d at 316.

54. See also *Wagner v. Mars, Inc.*, 166 So. 2d 673 (2d D.C.A. Fla. 1964) (pin in candy bar).

55. 45 So. 2d 671 (Fla. 1950).

56. 45 So. 2d at 672-73. See W. PROSSER, *supra* note 12, §95, at 631.

57. 45 So. 2d at 673. The common law warranty of fitness for human consumption in connection with food products is treated as an implied warranty of merchantability under the UNIFORM COMMERCIAL CODE §2-314(1).

58. The court indicated that a retailer, who was held liable under these circumstances, might thereupon bring suit against the manufacturer for breach of warranty. Cf. UNIFORM COMMERCIAL CODE §2-607.

59. E.g., *Merrill v. Hodson*, 88 Conn. 314, 91 A. 533 (1914); *Goodwin v. Country Club of Peoria*, 323 Ill. App. 1, 54 N.E.2d 612 (1944); *Stewart v. Martin*, 353 Mo. 1, 181 S.W.2d 657 (1944); *Nisky v. Childs*, 103 N.J.L. 464, 135 A. 805 (Ct. Err. & App. 1927).

60. E.g., *Lynch v. Hotel Bond Co.*, 117 Conn. 128, 167 A. 99 (1933).

61. See Comment, *Sales—Implied Warranty of Fitness in Sale of Food by Restaurant*, 3 U. MIAMI L. REV. 638 (1949).

62. See UNIFORM COMMERCIAL CODE §2-314(1).

63. 39 So. 2d 476 (Fla. 1949).

64. This approach is known as the Massachusetts-New York rule. See *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407 (1918); *Temple v. Keeler*, 238 N.Y. 344, 144 N.E. 635 (1924).

food poisoning at a church fundraising dinner where the defendant, a professional caterer and member of the church, had gratuitously assisted in the preparation of the food.<sup>65</sup>

While most injuries involving food are caused by foreign impurities, liability may occasionally depend upon whether the presence of a particular substance constituted a breach of warranty.<sup>66</sup> For example, in *Zabner v. Howard Johnson's, Inc.*<sup>67</sup> the plaintiff suffered injuries to his gums and teeth when he bit into a piece of walnut shell contained in maple walnut ice cream. The lower court gave judgment for the defendant on the theory that the walnut shell was natural to the product sold and could not be called a foreign substance.<sup>68</sup> The appellate court rejected the foreign-natural test in favor of the reasonable expectation test,<sup>69</sup> holding that the ice cream was reasonably fit if particles of walnut shell in the product should have been anticipated and guarded against by the consumer.<sup>70</sup>

Many jurisdictions extended the protection of implied warranty from food to products for intimate bodily use,<sup>71</sup> such as polio vaccine,<sup>72</sup> soap,<sup>73</sup> detergent,<sup>74</sup> and clothing.<sup>75</sup> In Florida, however, the first move in this direction involved containers of products for human consumption.<sup>76</sup> Other jurisdictions had also attempted to distinguish between food and containers.<sup>77</sup> The first

65. *Wentzel v. Berliner*, 204 So. 2d 905 (2d D.C.A. Fla. 1967).

66. See Prosser, *supra* note 31, at 809-10.

67. 201 So. 2d 824 (4th D.C.A. Fla. 1967).

68. *Id.* at 825. See also *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891 (S.D. Cal. 1955); *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936); *Lamb v. Hill*, 112 Cal. App. 2d 41, 245 P.2d 316 (4th Dist. 1952); *Silva v. F.W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P.2d 76 (1st Dist. 1938); *Davidson-Paxon Co. v. Archer*, 91 Ga. App. 131, 85 S.E.2d 182 (1954); *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E.2d 718 (1949); *Goodwin v. Country Club of Peoria*, 323 Ill. App. 1, 54 N.E.2d 612 (1944); *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941); *Adams v. Great Atl. & Pac. Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960).

69. 201 So. 2d at 827. See also *Wood v. Waldorf Sys., Inc.*, 79 R.I. 1, 83 A.2d 90 (1951); *Paolinelli v. Dainty Foods Mfrs., Inc.*, 322 Ill. App. 586, 54 N.E.2d 759 (1942); *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A.2d 442 (1959); *Boneberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

70. 201 So. 2d at 827.

71. *Wade, supra* note 44, at 7.

72. *E.g., Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. 320 (Ct. App. 1960).

73. *E.g., Kruper v. Proctor & Gamble Co.*, 113 N.E.2d 605 (Ct. App. Ohio 1953), *rev'd on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954).

74. *E.g., Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961). See also *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

75. *E.g., Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962). See also *Ingalls v. Meissner*, 11 Wis. 2d 371, 105 N.W.2d 748 (1960).

76. *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910 (Fla. 1953).

77. See, *e.g., Soter v. Griesedieck W. Brewing Co.*, 200 Okla. 302, 193 P.2d 575 (1948); *Anheuser-Busch, Inc. v. Butler*, 180 S.W.2d 996 (Tex. Civ. App. 1944); *Latham v. Coca-Cola Bottling Co.*, 175 S.W.2d 426 (Tex. Civ. App. 1943). See also *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *McAlester Coca-Cola Bottling Co. v. Lynch*, 280 P.2d 466 (Okla. 1955).

case, *Florida Coca-Cola Bottling Co. v. Jordan*,<sup>78</sup> was brought by a plaintiff who had swallowed broken glass contained in a bottle purchased from a soft drink machine. The court considered whether one who purchased a bottled soft drink could maintain an action directly against the bottler under implied warranty for injuries sustained as a result of a foreign substance in the beverage. The resulting judgment for the plaintiff simply extended the *Blanton* holding from sealed cans to sealed bottles.<sup>79</sup> In *Canada Dry Bottling Co. v. Shaw*,<sup>80</sup> however, a purchaser recovered for injuries sustained when a beverage bottle broke as she attempted to open it. In its discussion the court suggested that *Jordan* supported the extension of warranty principles to containers if the glass particles in the bottle were due to a defective container.<sup>81</sup> Accordingly, the suit was permitted against both the bottler and the retailer.

Although the *Canada Dry* rationale was subsequently used to allow recovery against a bottler for injuries resulting from a defective container,<sup>82</sup> the Florida supreme court, in *Foley v. Weaver Drugs, Inc.*,<sup>83</sup> refused to extend the implied warranty concept to retailers for injuries caused by defective containers. In this case the plaintiff lacerated her wrist while attempting to open a bottle of reducing pills purchased by her husband. The supreme court, affirming the district court of appeal's summary judgment for the defendant,<sup>84</sup> stated on the question of retailer liability:<sup>85</sup>

We are not persuaded that considerations of public policy require us to extend to food containers the "implied warranty" liability of retailers as to the food contained therein; on the contrary, we are of the opinion that it would be unreasonably burdensome to extend liability in this respect.

Although this holding overruled the *Canada Dry* doctrine to the extent it applied to retailers, the court did not indicate whether a bottler was liable

78. 62 So. 2d 910 (Fla. 1953).

79. *Id.* at 911.

80. 118 So. 2d 840 (2d D.C.A. Fla. 1960).

81. "It is interesting to note that in the *Jordan* case . . . the plaintiff was injured while swallowing broken glass which was contained in the bottle. It does not appear from the opinion whether the glass was a portion of the bottle itself, or extraneous to it. If the glass was not an internal portion of the bottle, then the *Jordan* case must be classified with those warranty cases concerning foreign substances in prepared food, and its value here is to show Florida authority for implied warranty and to show that the purchaser can sue the bottler. On the other hand, however, if the glass that the plaintiff swallowed came from the bottle itself, then the *Jordan* case takes on a far stronger meaning in relation to the case at bar. It cannot be said that implied warranty would, or should, make a distinction between a case where the container broke on the inside and a case where the container broke on the outside and injured the opener." *Id.* at 843.

82. *Renniger v. Foremost Dairies, Inc.*, 171 So. 2d 602 (3d D.C.A. Fla.), *cert. denied*, 177 So. 2d 480 (Fla. 1965).

83. 177 So. 2d 221 (Fla. 1965), *aff'g* 172 So. 2d 907 (3d D.C.A. Fla. 1965).

84. 172 So. 2d 907 (3d D.C.A. Fla. 1965).

85. 177 So. 2d at 229.

for injuries from a defective container. Technically, the *Foley* case did not affect the plaintiff's action against the bottler, and the *Renniger v. Foremost Dairies, Inc.*<sup>86</sup> decision, which had allowed such an action, was not expressly overruled. The question was ultimately settled when implied warranty was extended to the manufacturers of all products.<sup>87</sup>

#### EXTENSION OF IMPLIED WARRANTY TO OTHER PRODUCTS

In 1958 a Michigan court, in *Spence v. Three Rivers Builders & Masonry Supply, Inc.*,<sup>88</sup> extended implied warranty without privity to all products. Within a few years *Spence* was accepted by a number of courts.<sup>89</sup> Florida, however, limited its application of implied warranty to inherently dangerous products. In *Matthews v. Lawnlite Co.*<sup>90</sup> the plaintiff sued the manufacturer of an aluminum lounge chair, which had amputated the plaintiff's finger as he was examining the product for possible purchase. The court cited the *Restatement of Torts*<sup>91</sup> for the proposition that the manufacturer would be liable in negligence if the product was dangerous due to defective design. The court apparently extended this reasoning to implied warranty, introducing the "imminently dangerous" doctrine of *MacPherson* into the discussion. The decision ultimately held that a recovery might be grounded on implied warranty even in the absence of privity.<sup>92</sup> Although the cited provision of the *Restatement* dealt with negligence, the holding in *Matthews* has been applied to both negligence<sup>93</sup> and implied warranty cases,<sup>94</sup> but not without some criticism for lack of doctrinal clarity.<sup>95</sup>

*Continental Copper & Steel Industries, Inc. v. E. C. "Red" Cornelius, Inc.*<sup>96</sup>

86. 171 So. 2d 602 (3d D.C.A. Fla. 1965).

87. See *Gay v. Kelly*, 200 So. 2d 568 (1st D.C.A. Fla. 1967). See also UNIFORM COMMERCIAL CODE §2-314 (2) (e).

88. 353 Mich. 120, 90 N.W.2d 873 (1958).

89. E.g., *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959); *Beck v. Spindler*, 256 Minn. 543, 99 N.W.2d 670 (1959); *Henningesen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

90. 88 So. 2d 299 (Fla. 1956). Cf. *King v. Douglas Aircraft Co.*, 159 So. 2d 108 (3d D.C.A. Fla. 1963).

91. "A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design." *RESTATEMENT OF TORTS* §398 (1934).

92. 88 So. 2d at 301.

93. E.g., *Rawls v. Ziegler*, 107 So. 2d 601 (Fla. 1958).

94. E.g., *Bernstein v. Lily-Tulip Cup Corp.*, 177 So. 2d 362 (3d D.C.A. Fla. 1965), *aff'd*, 181 So. 2d 641 (Fla. 1966); *King v. Douglas Aircraft Co.*, 159 So. 2d 108 (3d D.C.A. Fla. 1963).

95. Note, *Products Liability: Doctrinal Problem and the Restatement's Answer*, 17 U. FLA. L. REV. 421, 434-35 (1964).

96. 104 So. 2d 40 (3d D.C.A. Fla. 1958).

represented significant progress toward universal acceptance of the implied warranty theory of products liability in Florida.<sup>97</sup> In this case the plaintiff, a building contractor, purchased electric cable manufactured by the defendant for underground transmission of high voltage current. The plaintiff relied on the manufacturer's assertion that the cable was suitable for this purpose, and when the cable proved to be inadequate the plaintiff was forced to replace it. Despite the lack of privity with the manufacturer, the purchaser brought suit on the theory that the implied warranty of fitness had been breached. After reviewing prior warranty cases the court concluded that the *Matthews* decision supported the application of implied warranty to all manufactured goods. In effect, the court held that a consumer, ultimate user, or purchaser could recover from a manufacturer, regardless of privity, under an implied warranty of fitness when he relied on the skill and judgment of the manufacturer.<sup>98</sup>

In Florida the privity rule was further abrogated by *Lily-Tulip Cup Corp. v. Bernstein*,<sup>99</sup> an action for personal injuries against the manufacturer based on the implied warranty of merchantability by a consumer not in privity with the defendant. The plaintiff, a hospital patient, was injured when a cup manufactured by the defendant came apart spilling its hot contents on her. The trial court refused to apply implied warranty, since the article was neither a foodstuff nor an inherently dangerous product, but the district court of appeal, quoting from *Hoskins v. Jackson Grain Co.*,<sup>100</sup> reversed the trial court and stated:<sup>101</sup>

There is a conflict of opinion about the accountability of a manufacturer to a consumer on the theory of implied warranty in the absence of privity, but this court has become aligned with those courts holding that suit may be brought against the manufacturer notwithstanding want of privity.

The *Lily-Tulip* decision was affirmed by the Florida supreme court<sup>102</sup> and has been uniformly followed in cases between consumers and manufacturers involving the sale of goods.<sup>103</sup>

The Florida courts, however, have declined to extend the *Lily-Tulip* decision to retailers. The leading Florida case refusing to hold retailers liable

97. See Comment, *Sales—Implied Warranty—Privity Unnecessary*, 13 U. MIAMI L. REV. 252 (1958).

98. 104 So. 2d at 41. See *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514, 515 (Fla. 1953). See also *West Coast Lumber Co. v. Wernicke*, 137 Fla. 363, 188 So. 357 (1939); *Berger v. E. Berger & Co.*, 76 Fla. 503, 80 So. 296 (1918); *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410 (1909).

99. 177 So. 2d 362 (3d D.C.A. Fla. 1965), *aff'd*, 181 So. 2d 641 (Fla. 1966). See generally Comment, *Implied Warranty: Strict Liability of the Manufacturer in Absence of Privity for All Products*, 19 U. FLA. L. REV. 193 (1966).

100. 63 So. 2d 514, 515 (Fla. 1953).

101. 177 So. 2d at 364.

102. 181 So. 2d 641 (Fla. 1966).

103. *E.g.*, *Gates & Sons, Inc. v. Brock*, 199 So. 2d 291 (1st D.C.A. Fla. 1967); *Barfield*

under implied warranty for items other than food was *Carter v. Hector Supply Co.*,<sup>104</sup> which involved a maintenance employee who was injured when the frame of a riding lawnmower broke beneath him. The district court of appeal held there could be no liability against the retailer under implied warranty where the defect was equally discoverable by buyer or seller.<sup>105</sup> The Florida supreme court held that the absence of privity between the retailer and plaintiff barred the suit. The court reviewed the inherently dangerous devices doctrine, but concluded: "There is nothing in the record to suggest that the commodity involved . . . could in any respect be classified as a dangerous instrumentality such as an automobile or an airplane."<sup>106</sup> The court also distinguished the *Continental Copper* and *Matthews* cases on the ground that they involved manufacturers rather than retailers. Likewise, the food cases were rejected as inapplicable, while *Smith v. Burdine's, Inc.*<sup>107</sup> was discarded because the parties there had been in privity.

While the *Carter* opinion indicated that an action against the retailer for negligence might be available if the retailer could be charged with actual or implied knowledge of the defect, the court concluded by stating:<sup>108</sup>

The sum of our holding here simply is that one who is not in privity with a retailer has no action against him for breach of an implied warranty, except in situations involving foodstuffs or perhaps dangerous instrumentalities, a problem not present here. This is the rule for the reason that a warranty is essentially an aspect of a contractual relationship and will not generally be implied absent such a relationship between the parties.

The *Carter* opinion appears to have been followed in later retailer-liability decisions.<sup>109</sup> Possible exceptions to this limitation of a retailer's liability, however, are cases involving third party beneficiaries and inherently dangerous articles.

In *McBurnette v. Playground Equipment Corp.*<sup>110</sup> a three-year-old child whose finger was severed by a swinging "sky rider" brought suit against the retailer. Since the product had been purchased by the child's parents, there was no privity with the retailer, and the district court of appeal dismissed the suit under the authority of the *Carter* case.<sup>111</sup> The Florida supreme court

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v. Atlantic Coast Line R.R., 197 So. 2d 545 (2d D.C.A. Fla. 1967); *Power Ski of Florida, Inc. v. Allied Chem. Corp.*, 188 So. 2d 13 (3d D.C.A. Fla. 1966).

104. 128 So. 2d 390 (Fla. 1961).

105. 122 So. 2d (3d D.C.A. Fla. 1960).

106. 128 So. 2d at 391.

107. 144 Fla. 500, 198 So. 223 (1940).

108. 128 So. 2d at 391.

109. *E.g.*, *Odum v. Gulf Tire & Supply Co.*, 196 F. Supp. 35 (N.D. Fla. 1961); *Brown v. Hall*, 221 So. 2d 454 (2d D.C.A. Fla. 1969); *Gates & Sons, Inc. v. Brock*, 199 So. 2d 291 (1st D.C.A. Fla. 1967).

110. 137 So. 2d 563 (Fla. 1962). See Comment, *Implied Warranty — Sales by Retailers — Third Party Beneficiary*, 16 U. MIAMI L. REV. 758 (1962).

111. 130 So. 2d 117 (3d D.C.A. Fla. 1961).

reversed and held that the plaintiff's action was not barred by lack of privity:<sup>112</sup>

We think common sense requires the presumption that one in the position of the minor plaintiff in this cause is a naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law, and as such he stands in the shoes of the purchaser in enforcing the warranty.

This reasoning imputed to the retailer the knowledge that certain goods are purchased for family as well as for personal use.<sup>113</sup> Strict application of privity in this context would have virtually absolved all sellers of responsibility for defective products specifically designed for infants. Since there was little precedent in Florida for this decision,<sup>114</sup> the court was forced to rely upon authority from other jurisdictions to sustain its position.<sup>115</sup> However, the court cautioned that the case did not represent "an infringement or abandonment of the basic principle upon which the requirement of privity in warranty actions is premised: that warranties do not 'run with' personal property and consequently do not inure to the benefit of third parties who may subsequently acquire proprietary interest in the article warranted."<sup>116</sup>

It is surprising, considering the factual resemblance to *Matthews v. Lawn-lite*,<sup>117</sup> that the court in *McBurnette* did not expressly extend to retailers the inherently dangerous device exception to the privity rule. *Carter* had implied this extension and, despite the absence of any express reference to inherently dangerous products, this arguably might be regarded as an alternative basis for the *McBurnette* decision.<sup>118</sup>

There seems to be little justification for Florida's continuing adherence to the privity rules where retailers are concerned. The rationale for holding retailers liable to the consumer for defective products was articulated by the California court in *Vandermark v. Ford Motor Co.*:<sup>119</sup>

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. . . . In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be

112. 137 So. 2d at 566.

113. Cf. UNIFORM COMMERCIAL CODE §2-318.

114. See Comment, *supra* note 110, at 764.

115. E.g., *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961); *Lindroth v. Walgreen Co.*, 329 Ill. App. 105, 67 N.E.2d 595 (1946); *Twombler v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); *Blessington v. McCroy Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953).

116. 137 So. 2d at 567.

117. 88 So. 2d 299 (Fla. 1956). See text accompanying notes 90-95 *supra*.

118. Cf. *Toombs v. Fort Pierce Gas Co.*, 208 So. 2d 615 (Fla. 1968).

119. 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964) (footnotes omitted).

in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and the retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

This view has been endorsed by a number of writers<sup>120</sup> and courts,<sup>121</sup> although it has also provoked some criticism.<sup>122</sup>

Another unsettled question is the status of nonusers who are injured by defective products.<sup>123</sup> The warranty protection under *Lily-Tulip* extended only to the consumer or user of the product,<sup>124</sup> and subsequent cases generally failed to apply it where nonusers were injured.<sup>125</sup> Recovery was denied, for example, where the plaintiff, a bystander, was struck in the eye by debris from a defective electric sander.<sup>126</sup> Nationally, there is a split of authority regarding liability to nonusers<sup>127</sup> although the trend now appears to be in favor of nonusers.<sup>128</sup>

In Florida, nonusers prevailed in *Toombs v. Fort Pierce Gas Co.*<sup>129</sup> an action by occupants of a duplex injured by the explosion of a propane gas storage tank. Reversing the decision of the district court of appeal,<sup>130</sup> the Florida supreme court allowed all of the injured parties to maintain an action, since the inherently dangerous device exception to the privity rule extended liability to all persons in the vicinity of proper use of the product. The

120. E.g., F. HARPER & F. JAMES, TORTS §28.30 (1956); S. SCHREIBER & P. RHEINGOLD, PRODUCTS LIABILITY 2:28 (1967); W. PROSSER, TORTS §101, at 665 (4th ed. 1971); Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30, 45 (1965); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800-01 (1966).

121. E.g., *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244, 247 (Alas. 1969); *Sweeny v. Matthews*, 94 Ill. App. 2d 6, 13-14, 236 N.E.2d 439, 442 (1966); *Williams v. Ford Motor Co.*, 411 S.W.2d 443, 449 (Mo. Ct. App. 1966).

122. See, e.g., Comment, *Torts—Strict Liability for Retailers?*, 45 WASH. L. REV. 431, 435-39 (1970).

123. See Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970); Note, *Strict Products Liability and the Bystander*, 64 COLUM L. REV. 916 (1964); Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971).

124. Cf. UNIFORM COMMERCIAL CODE §2-318.

125. E.g., *Engel v. Lawyers Co-operative Publishing Co.*, 198 So. 2d 93 (3d D.C.A. Fla. 1967).

126. *Rodriguez v. Shell's City, Inc.*, 141 So. 2d 590 (3d D.C.A. Fla. 1962). This case, however, involved a suit against the retailer who sold the sander.

127. Cases that have denied recovery include: *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966); *Kuschy v. Norris*, 25 Conn. Supp. 383, 206 A.2d 275 (Super. Ct. 1964); *Berzon v. Don Allen Motors, Inc.*, 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dep't 1965).

128. Prosser, *Products Liability in Perspective*, 5 GONZAGA L. REV. 157 (1970). The leading case in this area is *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965). See also *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965).

129. 208 So. 2d 615 (Fla. 1968). See Comment, *Piercing the Shield of Privity in Products Liability—A Case for the Bystander*, 23 U. MIAMI L. REV. 266 (1968).

130. 193 So. 2d 669 (4th D.C.A. Fla. 1967).

supreme court also rejected the district court's distinction between sales and bailments and the defendant's liability thereunder.<sup>131</sup>

#### DISCLAIMERS OF IMPLIED WARRANTY

The contractual nature of implied warranty has led to considerable confusion over the status of disclaimers.<sup>132</sup> Various devices have been employed to destroy the effect of disclaimers. Some courts have refused to recognize disclaimers because they were so ambiguous that the buyer did not realize what he had given up,<sup>133</sup> while others have declined to enforce disclaimers because they were drafted so as to purposely escape the average buyer's attention.<sup>134</sup> The third method used is the "displacement theory," which allows the court to deny recovery only when the same area is covered by the express warranty, and thereby displaces a co-existent implied warranty.<sup>135</sup> The Florida supreme court first considered the disclaimer problem in a case involving watermelon seed.<sup>136</sup> A contract between a seed merchant and a farmer contained a disclaimer clause.<sup>137</sup> When the seed represented to be "black diamond" proved to be a less valuable variety, the court, apparently applying the displacement theory, held that the disclaimer did not eliminate an implied warranty as to the variety. The court, however, added that the disclaimer was sufficient to exclude any implied warranties relating to quality productiveness.<sup>138</sup>

Disclaimer provisions in new car warranties have resulted in substantial litigation in recent years. Most automobile warranties state that they replace any other warranties, express or implied, and limit the manufacturer's or seller's liability to replacement of defective parts. Such disclaimers were recognized<sup>139</sup> until *Manheim v. Ford Motor Co.*<sup>140</sup> where the Florida supreme

131. 208 So. 2d at 617.

132. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966). Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

133. E.g., *International Harvester Co. v. Bean*, 159 Ky. 842, 169 S.W. 549 (1914). See also *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

134. *Celanese Corp. v. John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954); *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965); *Turner v. Kunde*, 256 Iowa 835, 128 N.W.2d 196 (1964); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Calumet Cheese Co. v. Chas. Pfizer & Co.*, 25 Wis. 2d 55, 130 N.W.2d 290 (1964).

135. See *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964); *Posey v. Pensacola Tractor & Equip. Co.*, 138 So. 2d 777 (1st D.C.A. Fla. 1962).

136. *Corneli Seed Co. v. Ferguson*, 64 So. 2d 162 (Fla. 1953).

137. The sales contract provided: "The Corneli Seed Co. gives no warranty, express or implied as to description, quality, productiveness, or any other matter . . ." *Id.* at 163.

138. *Id.* at 164. See also *American Can Co. v. Horlamus Corp.*, 341 F.2d 730 (5th Cir. 1965).

139. See, e.g., *Friedman v. Ford Motor Co.*, 179 So. 2d 371 (3d D.C.A. Fla. 1965); *Rozen v. Chrysler Corp.*, 142 So. 2d 735 (3d D.C.A. Fla. 1962). But see *Smith v. Platt Motors, Inc.*, 137 So. 2d 239 (1st D.C.A. Fla. 1962).

140. 201 So. 2d 440 (Fla. 1967); see Comment, *Implied Warranty: Disclaimer Ineffective*, 22 U. MIAMI L. REV. 433 (1967).

court held that neither the absence of privity between manufacturer and the purchaser nor the execution of a written agreement *between manufacturer and dealer* limiting or disclaiming implied warranties would preclude recovery by the purchaser of a new automobile when such warranties were breached. *Manheim* concerned an expensive automobile that failed to run properly notwithstanding numerous repairs by the dealer. The suit was directed against the manufacturer only. The court apparently utilized the "leaping warranty" concept,<sup>141</sup> under which disclaimers are restricted to the contracting parties<sup>142</sup> and do not extend to the ultimate consumer.<sup>143</sup>

A later case, *Crown v. Cecil Holland Ford, Inc.*,<sup>144</sup> permitted an action by the purchaser against both a manufacturer and dealer for personal injuries sustained as a result of a defective automobile. Although automobiles are regarded as dangerous instrumentalities in Florida,<sup>145</sup> the case was apparently not decided on this basis. Several earlier decisions (not involving disclaimers) had not allowed suits against dealers<sup>146</sup> on the theory that they merely acted as agents for the manufacturer as far as the warranty was concerned. In *Desandolo v. F & C Tractor & Equipment Co.*<sup>147</sup> the seller sought to force payment on a note given by the purchaser of a bulldozer. The buyer counterclaimed for breach of implied warranty, but the court held that the written warranty between the parties in lieu of all other warranties was sufficient to exclude the implied warranties of fitness and merchantability.<sup>148</sup> The *Desandolo* court distinguished the *Manheim* case, since it dealt "only with the effect of a disclaimer in a contract between a manufacturer and its dealer."<sup>149</sup> Since the transaction in *Desandolo* involved the dealer and the purchaser, the court concluded that the disclaimer was effective. A significant difference between this case and *Crown* was that *Desandolo* did not involve personal injuries, although this distinction was not emphasized in the opinion. Thus, it seems that no clear rule respecting disclaimers of warranty by retailers has yet evolved in Florida, although a manufacturer's liability cannot be disclaimed. The cautious attitude of the Florida courts compares unfavorably with the unequivocal rejection of the manufacturer's warranty by the New Jersey court in *Henningsen v. Bloomfield Motors, Inc.*<sup>150</sup>

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141. See Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 448 (1969).

142. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

143. 201 So. 2d at 443.

144. 207 So. 2d 67 (3d D.C.A. Fla. 1968).

145. *E.g.*, *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

146. *E.g.*, *Hardee v. Gordon Thompson Chevrolet, Inc.*, 154 So. 2d 174 (1st D.C.A. Fla. 1963); *Smith v. Platt Motors, Inc.*, 137 So. 2d 239 (1st D.C.A. Fla. 1962). See also *Posey v. Ford Motor Co.*, 128 So. 2d 149 (1st D.C.A. Fla. 1961).

147. 211 So. 2d 576 (4th D.C.A. Fla. 1968).

148. *Id.* at 580.

149. *Id.* at 579.

150. 32 N.J. 358, 161 A.2d 69 (1960). See also *Connolly v. Hagi*, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. Ct. App. 1962); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber Inc.*, 252

The Uniform Commercial Code<sup>151</sup> provides a method for excluding or limiting warranties.<sup>152</sup> The *Desandolo* case cited this provision but did not apply it, since the Code had not yet become effective in Florida. The question finally arose in *Ford Motor Co. v. Pittman*.<sup>153</sup> In this case, due to a defect in the wiring, the plaintiff's new automobile caught fire, and the plaintiff sued under an implied warranty. The defendant replied that all implied warranties were excluded under the terms of the Code. The court disagreed, holding that the manufacturer was not a "seller" to the ultimate consumer under the Code and thus could not make use of its disclaimer provisions.<sup>154</sup> This reasoning invites the conclusion that retailers may exclude implied warranties under the provisions of section 2-316 even when personal injuries are concerned. Whether such a result could be upheld by the Florida courts remains to be seen.

#### UNAVOIDABLY UNSAFE PRODUCTS

It has been suggested that much of the doctrinal complexity of products liability could be eliminated by the adoption of strict liability in tort as the sole basis of liability. Even under this approach, however, there are difficulties when unavoidably unsafe products are concerned.<sup>155</sup> Florida courts, deciding cases concerning such products as cigarettes, drugs, and blood for transfusions have stopped just short of adopting strict liability and have continued to apply implied warranty theory.

Cigarettes<sup>156</sup> were involved in the celebrated case of *Green v. American Tobacco Co.*<sup>157</sup> At one stage in the complex history of this case, pursuant to a statutory certification procedure,<sup>158</sup> the federal court of appeals presented to the Florida supreme court the question of whether the law of Florida required knowledge of the harmful nature of smoking tobacco for manufac-

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Iowa 1289, 110 N.W.2d 449 (1961).

151. UNIFORM COMMERCIAL CODE §2-316.

152. See Franklin, *supra* note 132, at 992-1016; Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. MIAMI L. REV. 11, 32-37 (1968).

153. 227 So. 2d 246 (1st D.C.A. Fla. 1969).

154. *Id.* at 249.

155. See James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550 (1966); Comment, *Cigarettes and Vaccine: Unforeseeable Risks in Manufacturer's Liability Under Implied Warranty*, 63 COLUM. L. REV. 515 (1963); Comment, *Strict Liability for Drug Manufacturers: Public Policy Misconceived*, 13 STAN. L. REV. 645 (1961).

156. Rossi, *The Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored*, 34 S. CAL. L. REV. 399 (1961).

157. 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970); 391 F.2d 97 (5th Cir. 1968); 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); 304 F.2d 70 (5th Cir. 1962); 154 So. 2d 169 (Fla. 1963). See Comment, *Torts: Products Liability—Test of Actual Safety in Cigarette Cases*, 21 OKLA. L. REV. 351 (1968).

158. FLA. STAT. §25.031 (1969). See Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962); Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

turer liability under the implied warranty of merchantability.<sup>159</sup> The Florida court responded<sup>160</sup> that "our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge of a defective or whole-some condition is wholly irrelevant to his liability on the theory of implied warranty."<sup>161</sup> The court indicated that it had expressly overruled in *Carter v. Hector Supply Co.*<sup>162</sup> the lower court's holding that "proof of actual or implied knowledge of a defect on the part of a [defendant] is essential to his liability on an implied warranty."<sup>163</sup> The court also stated no reasonable distinction could be made between the physical and practical impossibility of obtaining knowledge of the dangerous condition and scientific inability resulting from a current lack of human knowledge or skill.<sup>164</sup> Although the opinion specifically dealt with tobacco, a product for personal consumption, it contained no limitation to such products. Other decisions have held that cigarette manufacturers were not liable for unforeseen side effects, such as cancer, which were not foreseeable.<sup>165</sup>

The broad language in *Green* has since proved somewhat difficult to reconcile with subsequent decisions. In *McLeod v. W. S. Merrell Co.*<sup>166</sup> the plaintiff brought an action against two retail druggists for injuries caused from taking a drug. The issue was whether a retail druggist impliedly warranted the product he dispensed pursuant to a doctor's prescription where the injury resulted from the nature of the product itself. Factually, this differed from the food cases, since there was no adulteration of the drug.<sup>167</sup> The district court of appeal refused to hold the defendants liable, since the prescription was filled in accordance with its directions and sealed packets were used. The court concluded that the warranty of fitness was inapplicable, since the plaintiff relied on the doctor, not the druggist, for selection of the drug; the warranty of merchantability was found to be absent because the product was available to the general public only through prescription.

In support of its position the *McLeod* court referred to the strict liability provisions of the *Restatements* without expressly recognizing them as

159. 154 So. 2d at 170.

160. The court really asked the wrong question. The proper question would have been whether there was a breach of warranty when a product in common use has inherent dangers that cannot be eliminated. See Prosser, *supra* note 128, at 167.

161. 154 So. 2d at 170.

162. 128 So. 2d 390 (Fla. 1961).

163. 154 So. 2d at 171.

164. *Id.*

165. *E.g.*, *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970); *Ross v. Philip Morris*, 328 F.2d 3 (8th Cir. 1964); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963). But see *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). See also White, *Strict Liability of Cigarette Manufacturers and Assumption of Risk*, 29 LA. L. REV. 589 (1969).

166. 174 So. 2d 736 (Fla. 1965), *aff'd* 167 So. 2d 901 (3d D.C.A. Fla. 1964).

167. The court also determined that §402A of the RESTATEMENT OF TORTS was not applicable. 174 So. 2d at 739.

binding.<sup>168</sup> The court noted that comment (k)<sup>169</sup> contained an exception for new and experimental drugs that, because of lack of time and opportunity for sufficient medical experience, could not be considered absolutely safe although available experience justified the marketing and use of the drug notwithstanding a medically recognizable risk.<sup>170</sup> The court limited the scope of implied warranty with respect to prescription drugs to an assurance that: (1) the druggist had compounded the drug prescribed; (2) he had used due care in filling the prescription; (3) proper methods had been used in the compounding process; and (4) the drug had not been adulterated.<sup>171</sup> The *McLeod* case reflected the practical difficulties of applying implied warranty theory to certain products.<sup>172</sup>

Another troublesome group of cases<sup>173</sup> deals with blood transfusions.<sup>174</sup> The leading decision in Florida was *Russell v. Community Blood Bank*<sup>175</sup>

168. *Id.* See also Note, *Products Liability, Doctrinal Problems and the Restatement's Answer*, 17 U. FLA. L. REV. 421 (1964).

169. 174 So. 2d at 739. "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs . . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again, with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product attended with a known but apparently reasonable risk." RESTATEMENT (SECOND) OF TORTS §402A, comment k at 353-54 (1965).

170. If the product is safe for normal use, there is no liability when it injures the rare abnormal user. See Noel, *The Duty To Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959).

171. 174 So. 2d at 739.

172. One result of the *McLeod* decision is the reemergence of the sealed container doctrine. Presumably the rule will be limited to certain classes of drugs.

173. *E.g.*, *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

174. *Boland, Strict Liability in Tort for Transfusing Contaminated Blood*, 23 ARK. L. REV. 236 (1969); *Haut & Alter, Blood Transfusions—Strict Liability?*, 43 ST. JOHNS L. REV. 557 (1969); *Sweatt, Serum Hepatitis Through Blood Transfusions: A Wrong Without a Remedy?*, 24 SW. L.J. 305 (1970); Note, *Products Liability—Determination of Liability of Hospitals and Blood Banks for Hepatitis Transmitted Through Transfusion*, 18 KAN. L. REV. 119 (1969); Note, *Products Liability—The Blood Transfusion as a Sale*, 11 WM. & MARY L. REV. 1004 (1970).

175. 185 So. 2d 749 (2d D.C.A. Fla. 1966), *rev'd on other grounds*, 196 So. 2d 115 (Fla. 1967); see Comment, *Sales: Implied Warranties in Blood Transfusions*, 20 U. FLA. L. REV. 110 (1967); Comment, *Blood Banks, Bad Blood, and Implied Warranty*, 22 U. MIAMI L. REV. 479 (1966).

where the plaintiff contracted hepatitis through a transfusion of tainted blood. It was admitted that "the defect of serum hepatitis virus cannot be eliminated regardless of the amount of inspection or care."<sup>176</sup> Faced with the holding in the *Green case*, the court turned from implied warranty to the *Restatement of Torts*, section 402A, to hold that the plaintiff could proceed against the blood bank only if he could show his injuries "were caused by the failure to detect or remove a deleterious substance capable of detection or removal."<sup>177</sup> The court admitted that this approach resembled negligence more closely than warranty. Although *Russell* had rejected any distinction between sale and service,<sup>178</sup> subsequent cases resurrected this vestige of the law of sales by holding that transfusions of blood by a hospital were to be considered a service to which no implied warranties attached,<sup>179</sup> while those of blood banks were considered sales and therefore subject to implied warranty.<sup>180</sup> A recently enacted statute has apparently settled the matter by declaring that implied warranties will not attach to transfusions of blood by either hospitals or blood banks where the defect is not detectable.<sup>181</sup>

It should be emphasized, however, that when the manufacturer of an unavoidably unsafe product knows or should know there is danger to a substantial number of persons, even though they constitute only a small percentage of the population, he is under a duty to give warning;<sup>182</sup> after he gives the warning, however, he does not become liable merely because he has sold the product.<sup>183</sup>

#### STRICT LIABILITY FOR DEFECTIVE PRODUCTS

Many commentators have urged the courts to abandon the concept of warranty and base products liability exclusively upon strict liability in tort.<sup>184</sup> This view was adopted in 1963 by the American Law Institute.<sup>185</sup>

176. 185 So. 2d at 753.

177. *Id.* at 755.

178. *Id.* The leading case making such a distinction is *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954). See also *Lovett v. Emory Univ., Inc.*, 116 Ga. App. 281, 156 S.E.2d 923 (1967); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Hubbell v. S. Nassau Communities Hosp.*, 46 Misc. 2d 847, 260 N.Y.S.2d 539 (Sup. Ct. 1965); *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

179. *E.g.*, *White v. Sarasota County & Pub. Hosp. Bd.*, 206 So. 2d 19 (2d D.C.A. Fla. 1968).

180. *E.g.*, *Holder v. Sayet*, 196 So. 2d 205 (3d D.C.A. Fla. 1967).

181. FLA. STAT. §672.316 (5) (1969).

182. *E.g.*, *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958); see *Dillard & Hart, Product Liability: Directions for Use and the Duty To Warn*, 41 VA. L. REV. 145 (1955).

183. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800-01 (1966).

184. *E.g.*, *Epstein, Strict Liability in Tort: A Modest Proposal*, 70 W. VA. L. REV. 1, 11 (1967); *Noel, Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1017 (1957); Prosser, *The Assault Upon the Citadel (Strict Liability to the Con-*

Justice Traynor of California in *Greenman v. Yuba Power Products, Inc.*<sup>186</sup> followed this approach and allowed recovery in tort against a manufacturer despite the plaintiff's lack of privity and his failure to give timely notice of the breach as required by the Uniform Sales Act.<sup>187</sup> The *Greenman* case was well received<sup>188</sup> and is now thought to be the majority position.<sup>189</sup>

Advocates of strict liability have maintained that this doctrine will encourage manufacturers to improve the safety of their products<sup>190</sup> and will permit the distribution of loss among the consuming public instead of upon the injured victim alone. This risk-spreading rationale was first proposed by Justice Traynor in *Escola v. Coca-Cola Bottling Co.*<sup>191</sup> and later restated in *Greenman*.<sup>192</sup>

Although some courts have failed to distinguish between implied warranty and strict liability,<sup>193</sup> the two concepts are distinct — one is transactional while the other is behavioral.<sup>194</sup> Strict liability, however, is not absolute liability;<sup>195</sup> where implied warranty requires that the plaintiff must prove that the product was not merchantable or fit for the purpose sold, strict liability demands that he must show the article was defective<sup>196</sup> and his injury was proximately

sumer), 69 YALE L.J. 1099, 1134 (1960). But see Plant, *Strict Liability for Injuries Caused by Defects in Products — An Opposing View*, 24 TENN. L. REV. 938, 940-48 (1957); Smyser, *Product Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343, 359 (1965).

185. RESTATEMENT (SECOND) OF TORTS §402A (1965): "*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 was 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."

186. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

187. UNIFORM SALES ACT §49.

188. Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Wights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965).

189. See W. PROSSER, TORTS §97, at 678 (4th ed. 1971).

190. Epstein, *supra* note 184, at 16-17; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965).

191. 24 Cal. 2d 453, 462-64, 150 P.2d 436, 441-42 (1944).

192. 59 Cal. 2d 57, 61, 377 P.2d 897, 901, 27 Cal. Rptr. 647, 701 (1963). See also Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 723 (1965).

193. Dickerson, *The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 443 (1969).

194. McCurdy, *Warranty Privity in Sales of Goods*, 1 HOUSTON L. REV. 201, 225 (1964).

195. Comment, *Tort Defenses to Strict Products Liability*, 20 SYRACUSE L. REV. 924, 925 (1969).

196. Keeton, *Products Liability — Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855, 858 (1963); Traynor, *supra* note 190, at 367. One commen-

caused by the defect.<sup>197</sup> One decision has even held that the defect must have been the sole cause of the plaintiff's injuries.<sup>198</sup> In addition, the *Restatement* requires that the product be used for its ordinary use.<sup>199</sup> In spite of its apparent improvement over implied warranty, the strict liability approach is not entirely free of difficulties. Problems have arisen, for example, in connection with the liability of retailers, the rights of injured bystanders, and the matter of wholly economic losses due to defective products.

California, which had decided the landmark *Greenman* case, in *Vandermark v. Ford Motor Co.*,<sup>200</sup> became the first state to extend strict liability to retailers. Most strict liability jurisdictions immediately followed,<sup>201</sup> and it now seems likely that retailers as well as manufacturers and wholesalers will be subject to strict liability for defective products.<sup>202</sup>

Another problem area is the status of the nonuser who is injured by a defective product. The *Restatement* provides that the seller shall be liable to "users and consumers."<sup>203</sup> Although these terms are liberally defined in comment 1,<sup>204</sup> the American Law Institute has declined to indicate whether section 402A may apply to persons other than consumers or users.<sup>205</sup> Arguably, courts will apply strict liability only to nonusers whose presence is foreseeable.

There is a split of authority on whether strict liability in tort is available to the plaintiff in the absence of personal injuries.<sup>206</sup> New Jersey, in *Santor v. A & M Karaghousian, Inc.*,<sup>207</sup> allowed recovery under strict liability for economic losses, while California limited such cases to contractual remedies in

tator has suggested that the criterion for establishing that the article is defective for purposes of imposing strict liability in tort upon the seller is the same as the requirement of merchantability under §2-314(2)(c) of the UNIFORM COMMERCIAL CODE. Rapson, *supra* note 192, at 700.

197. Sandler, *Strict Liability and the the Need for Legislation*, 53 VA. L. REV. 1509, 1509-10 (1967); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 22 (1965).

198. *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968). See also Comment, *Products Liability—A Limitation on the Doctrine of Strict Liability of §402A*, 72 DICK. L. REV. 543 (1968).

199. RESTATEMENT (SECOND) OF TORTS §402A (1965). See also Note, *Products Liability: A Synopsis*, 30 OHIO ST. L.J. 551, 565 (1969).

200. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

201. E.g., *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); see Comment, *Tort—Strict Liability for Retailers?*, 45 WASH. L. REV. 431, 433 n.13 (1970).

202. RESTATEMENT (SECOND) OF TORTS §402A, comment f at 350 (1965).

203. RESTATEMENT (SECOND) OF TORTS §402A(1) (1965).

204. RESTATEMENT (SECOND) OF TORTS §402A, comment 1 at 354 (1965).

205. RESTATEMENT (SECOND) OF TORTS §402A, comment o at 348 (1965); Dickerson, *supra* note 193, at 442; Note, *supra* note 199, at 564.

206. See Note, *Manufacturer's Responsibility for Defective Products: Continuing Controversy Over the Law To Be Applied*, 54 CALIF. L. REV. 1681 (1966); Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

207. 44 N.J. 52, 207 A.2d 305 (1965). See also Note, *Privity Eliminated as a Requirement in Loss-of-Bargain Products Liability Cases—The Effects of Santor*, 19 RUTGERS L. REV. 715 (1965).

*Seely v. White Motor Co.*<sup>208</sup> At the present time it is uncertain which position will ultimately prevail.

#### PRODUCTS LIABILITY AND THE UNIFORM COMMERCIAL CODE

The law of products liability has been further complicated by the enactment in most states of the Uniform Commercial Code.<sup>209</sup> The warranty provisions of the Code, which are set forth in sections 2-312 through 2-318, do not depart significantly from the warranty law developed under various sections of the Uniform Sales Act.<sup>210</sup> Nevertheless, the draftsmen realized that products liability was a rapidly developing field and their official comments indicated that the Code was not intended to restrict this development. Thus, in a number of areas the Code was consistent with subsequent judicial decisions under the strict liability in tort doctrine.<sup>211</sup> Quite apart from the Code's general approach to products liability, however, there are two specific objections: the first concerns the status of privity under the Code<sup>212</sup> while the second relates to its notice and disclaimer provisions.

The Code takes no position on privity except in section 2-318,<sup>213</sup> where only designated "third party beneficiaries" are expressly placed within the warranty protection.<sup>214</sup> To avoid any retention of privity Utah and California refused to adopt section 2-318,<sup>215</sup> Connecticut codified comment 3 of the section,<sup>216</sup> and Virginia enacted a substitute version of section 2-318 that eliminated privity entirely.<sup>217</sup> Notwithstanding these actions, it has been argued that the removal of privity would be inconsistent with the basically contractual nature of the Code, and warranty would then become a hybrid form of action without a firm basis in either tort or contract.<sup>218</sup>

The notice and disclaimer provisions of the Code have also raised serious questions.<sup>219</sup> Although the courts have sometimes objected to a requirement that the seller be notified of a breach of warranty within a reasonable time, some provision for notice is necessary so that the manufacturer of the goods can correct any design and processing deficiencies or recall similarly defective

208. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

209. See Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966).

210. UNIFORM SALES ACT §§12-15.

211. See Rapson, *supra* note 192, at 695.

212. Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 61 VA. L. REV. 804, 815-16 (1965).

213. Franklin, *supra* note 209, at 999-1000.

214. Speidel, *supra* note 212, at 815-16.

215. See Speidel, *supra* note 212, at 817-18; Comment, *Tort Action for Strict Liability in Products Liability Cases*, 26 WASH. & LEE L. REV. 143, 145 (1969).

216. CONN. GEN. STAT. ANN. §42a-2-318 (Supp. 1971).

217. VA. CODE ANN. §8.2-318 (1965). See also COLO. REV. STAT. ANN. §155-2-318 (1963).

218. Comment, *supra* note 215, at 149 n.31. No substantial purpose seems to be served by the retention of the privity doctrine.

219. *Id.* at 147.

products.<sup>220</sup> The Uniform Sales Act<sup>221</sup> permitted the seller to disclaim any warranty and the Code has continued this policy, although in somewhat restricted form.<sup>222</sup> The Code allows the courts under section 2-302 to invalidate unconscionable disclaimers. In addition, a limitation of consequential damages for personal injuries in the case of consumer goods is held to be prima facie unconscionable under section 2-319 (3).<sup>223</sup> Nevertheless, comment 3 to section 2-719 states that "the seller in all cases is free to disclaim warranties in the manner provided in section 2-316." This implies that such disclaimers will not necessarily be regarded as unconscionable under the Code.<sup>224</sup> A Florida court, however, has already refused to allow manufacturers to disclaim an implied warranty under the Code's provisions.<sup>225</sup>

One solution to these difficulties is to retain common law theories of liability along with the Code, thus providing the injured consumer with a choice of remedies.<sup>226</sup> This approach was contemplated by the proponents of strict liability<sup>227</sup> and has been utilized by some courts.<sup>228</sup> This method, however, has been condemned because some of the Code's provisions relate explicitly to consumer sales<sup>229</sup> and the Code's special treatment of personal injuries<sup>230</sup> strongly indicates that other sections also pertain to the ultimate consumer. Since it is a serious matter for a court to ignore a whole body of statutory law that is directly concerned with a particular problem and to substitute a wholly distinct set of principles, some legislative guidance may be desirable to resolve this question.

#### CONCLUSION

The law of products liability in Florida prior to the enactment of the Uniform Commercial Code may be summarized as follows: Manufacturers were liable under implied warranty to all users or consumers of their products, regardless of privity. Retailers were liable under implied warranty to consumers in the absence of privity only for food, products specially designed for third persons, and possibly inherently dangerous products. Neither manufacturers nor retailers were liable to nonusers except in the case of inherently dangerous products. Special rules limited liability with respect to unavoidably unsafe products, while disclaimers of implied warranties

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220. Kessler, *Products Liability*, 76 YALE L.J. 887, 905-06 (1967).

221. UNIFORM SALES ACT §71.

222. Prosser, *supra* note 183, at 831.

223. See Note, *Manufacturer's Responsibility for Defective Products: Continuing Controversy Over the Law To Be Applied*, 54 CALIF. L. REV. 1681 (1966).

224. Rapson, *supra* note 192, at 710.

225. Ford Motor Co. v. Pittman, 227 So. 2d 246 (1st D.C.A. Fla. 1969).

226. Note, *supra* note 207, at 734.

227. Wade, *supra* note 197, at 11.

228. E.g., *Suvada v. White Motor Car Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

229. Franklin, *supra* note 209, at 995.

230. See UNIFORM COMMERCIAL CODE §§2-318, -719.

were ineffective as to manufacturers. No substantial changes appear to have come about by the enactment of the Uniform Commercial Code. In particular the question of retailer liability, in the absence of privity to those other than the designated classes in section 2-318, is presently undecided.

Florida products liability law is unnecessarily complicated to the extent that it is based upon outdated theories of warranty. Florida should consider discarding the warranty approach entirely in favor of strict liability in tort. This approach would free the courts of the doctrinal tangle associated with implied warranty and would permit future developments on a more rational basis. Although not without its own problems, section 402A of the *Restatement of Torts* represents the best statement of strict liability principles. The Uniform Commercial Code should not be permitted to hinder this development by restricting the liability of either manufacturers or retailers.