

**PURCHASERS LACKING PRIVITY OVERCOMING “THE
RULE” FOR EXPRESS WARRANTY CLAIMS: EXPANDING
JUDICIAL APPLICATION OF COMMON LAW THEORIES AND
LIBERAL INTERPRETATION OF U.C.C. SECTION 2-318**

Gary E. Sullivan*

and

Braxton Thrash**

ABSTRACT

The doctrine of privity has dogged contract plaintiffs for several hundred years, but it has been even more challenging for the courts. Never being fully satisfied with one take on it, courts have oscillated back and forth from allowing third-party suits to almost entirely prohibiting them. Even when the doctrine was at its strongest, the courts found ways to avoid its often inequitable dictates. The question seemed to be answered for sales contracts upon the promulgation and adoption of U.C.C. section 2-318. Many states, however, considered the provision unsatisfactory, and it was soon replaced by a set of three alternatives with varying sizes to their protected classes. Several other states adopted non-uniform “hybrid” versions of section 2-318. Despite the efforts of the U.C.C.’s drafters to unify the law of contract across jurisdictions, the area surrounding the doctrine of privity and its effect on the rights of third-party purchasers is still a confusing mass of complex exceptions and acrobatic legal workarounds.

This Article examines the states wrangling over competing versions of section 2-318 and the ever-expanding use of alternative common law theories by courts, specifically concerning the law of express warranties, without focusing on the already heavily commented-on question of whether privity should exist at all. After briefly addressing the history of privity and warranty, this Article covers four ways in which courts allow circumvention of the law of privity when it dictates an inequitable result: liberal interpretation of U.C.C. statutory provisions, construal of direct adver-

* Professor Sullivan is an Assistant Visiting Professor of Law at the University of Alabama School of Law. The authors express particular gratitude to Professor Ronald Krotoszynski, whose suggestions and guidance were invaluable in the drafting process, and Professor Bill Henning for his inspiration and insights.

** Mr. Thrash is a 2010 graduate of the University of Alabama School of Law (J.D., magna cum laude). He is currently engaged in private practice in Tuscaloosa, Alabama.

tisement as contractual privity, application of common law assignment, and an emerging use of common law third-party beneficiary law. This Article addresses each method in detail, synthesizing historical underpinnings and emerging trends, and provides guidance on each method's applicability to various transactional and situational scenarios.

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INTRODUCTION

"[P]rivacy of contract" is "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third

party from doing so.”¹ This classical doctrine, however beautiful in its conceptual simplicity, falls flat against the realities of modern-day commerce, where the intended user of a product almost never buys it from the one who created it. Once, a warranty was made to induce a party into a transaction; now, it induces a party three transactions later. Where, once, the one in real need of the warranty could have it directly from his seller, now he finds himself well down the stream of commerce searching for a paddle to get him back.

The need to run warranties to nonprivacy purchasers arises in all sorts of modern commercial situations. Take, for example, this set of facts involving the sale of a commercial copier and printer to a law office.² Defendant manufactured and sold the copier to the distributor, a licensed seller and lessor of the manufacturer’s product. The manufacturer-distributor’s sales contract created a single, limited manufacturer’s express warranty, specifically noting that the only warranty rights available to buyer and end users were stated in that express warranty. Plaintiff had seen Defendant’s advertisements on television and was convinced to go with Defendant’s product after checking out the product details in Defendant’s sale brochures available in the Distributor’s office. After purchasing the copier from the Distributor, the copier failed to function adequately due to the fault of the manufacturer. Plaintiff sued in state court, claiming

1. BLACK’S LAW DICTIONARY 1320 (9th ed. 2009). At first glance, the Black’s definition appears to reflect the traditional understanding of privity as the relationship between the promisor and the promisee, and that third parties were prevented from suing because they were “stranger[s] to the consideration.” See *Price v. Easton*, (1833) 110 Eng. Rep. 518 (K.B.) 519 (opinion of Denman, C.J.) (“I think the declaration cannot be supported, as it does not shew any consideration for the promise moving from the plaintiff to the defendant.”) (opinion of Littledale, J.) (“No privity is shewn between the plaintiff and the defendant. This case is precisely like *Crow v. Rogers* . . . , and must be governed by it.”); *Crow v. Rogers*, (1723) 93 Eng. Rep. 719 (K.B.) 720 (holding that the plaintiff could not recover because he was a stranger to the consideration).

On second glance, however, it could be read to include intended third-party beneficiaries as “parties to the contract” who are in privity and may sue. This approach would reflect the modern understanding of the concept as entirely separate from the consideration. See, e.g., *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 599 (E.D. La. 1998) (noting that “[l]iteral privity can be finessed by a proxy,” such as third-party beneficiary theory); RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (providing for rights to intended beneficiaries through a promise instead of consideration). In any case, the doctrine of privity, as we shall see, is more complex than this single statement can convey; but it is a reasonable starting point as the understanding that privity in the modern legal realm is essentially the relationship that allows a party to sue on the contract.

2. This fact situation is loosely based on that in *Spiegel v. Sharp Electronics Corp.*, 466 N.E.2d 1040 (Ill. App. Ct. 1984).

damages for the price of the copier, the payments to a licensed repair service, the cost of copies on other machines, and “damage and inconvenience” to Plaintiff’s business. Consider also the possibility that Plaintiff leased the copier from the Distributor, as it did in the original case. The manufacturer is at fault, but, as is most common in today’s commercial reality, Plaintiff did not buy directly from the manufacturer. He is not a party to the contract; therefore, there is no privity. Lacking privity, under traditional warranty principles, Plaintiff would only have recourse against the Distributor.

But why does the privity doctrine exist in the first place? Early courts put forth such reasons as the fear of creating limitless liability,³ and the injustice of allowing an unsuable party to sue on a contract;⁴ however, these arguments were somewhat specious to begin with.⁵ Legal commentators have put forth other rationales as well,⁶ but the most common reason espoused by courts and commentators is probably the blanket statement that the doctrine of privity is the well-established law of the land.⁷ The strict, parties-only privity rule

3. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch.) 404–05.

4. *Tweddle v. Atkinson*, (1861) 121 Eng. Rep. 762 (Q.B.) 763–64; 1 Best & Smith 393.

5. The first argument is really more of an argument for having some limitation on liability than for having a parties-only principle. The second argument is faulty on two premises: (1) the unsuable plaintiff is not entirely unknown to the law, e.g., with regard to a unilateral contract; and (2) it is not unjust to say that the defendant cannot also sue the plaintiff so long as he has recourse against someone, in this case, the promisee. In the words of Robert Flannigan:

There is a promise made *to* benefit the third party; but there is no promise of performance made *by* the third party which could be enforced against him or her. The original parties were obviously aware of this at the time they contracted. Is the original promisor somehow prejudiced by being compelled to perform? Most decidedly not. The promisor got what he bargained for from the promisee or, if not, he is entitled to get it in an action against the promisee. Then consider the alternative. Is it not markedly more ‘monstrous’ that, having received performance, the promisor could ignore his or her own promise?

Robert Flannigan, *Privity – The End of an Era (Error)*, 103 L.Q. REV. 564, 570–71 (1987).

6. See Gary L. Monserud, *Blending the Law of Sales with the Common Law of Third Party Beneficiaries*, 39 DUQ. L. REV. 111, 118–20 (2000) (noting the observations of Professors Samuel Williston and Arthur Corbin on the development of the law relating to third-party beneficiaries). See generally *id.*

7. See, e.g., *Birmingham Chero-Cola Bottling Co. v. Clark*, 89 So. 64, 65 (Ala. 1921) (“[I]t is well settled as a common-law rule that the benefit of a warranty does not run with the chattel on its resale so as to give the subpurchaser any right of action thereon as against the original seller.”); *Ciociola v. Del. Coca-Cola Bottling Co.*, 172 A.2d 252, 257 (Del. 1961) (“We think, however, that Delaware has been committed by its courts to the common law rule governing actions for breach of implied warranty.”); *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So. 2d 689, 692 n.3 (Fla. Dist. Ct. App. 1979) (“A warranty, whether express or implied, is fundamentally a contract. A contract cause of action requires privity.”), *disapproved on other grounds by Casa Clara Condo. Ass’n, v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244, 1248 n.9 (Fla. 1993); *Perfecting Serv. Co. v. Prod. Dev. & Sales Co.*, 131 S.E.2d 9, 23 (N.C. 1963) (“A majority

is indeed a consequence of the formalistic classical rules of contract of the nineteenth century, which saw the contract as a bargain between parties,⁸ but a purely legal conception without a justifying policy rationale should not—and often does not—overrule an equitable result. Because this pure appeal to authority is not readily susceptible to attack by reasoned argument, the courts have used every means at their disposal to circumvent the sometimes inequitable result of the parties-only privity rule.

This article addresses four ways by which courts have held warranties can run to vertical, nonprivity purchasers;⁹ legislative enactment of U.C.C. § 2-318, Alternative C; still-evolving case law springing from *Randy Knitwear, Inc. v. American Cyanamid Co.*,¹⁰ holding that advertisements create express warranties; assignment of warranties from a privity purchaser to a third party; and common law third-party beneficiary doctrine. In detailing the courts' legal acrobatics, this Article provides commentators and practitioners with a better understanding of the lengths to which courts are willing to go to create an equitable result for nonprivity third parties where express warranties are concerned. First, in the interest of providing a comprehensive understanding of the subject, Part I offers some historical perspective through a brief description of the origins and development of express warranty and privity. Part II covers the courts' techniques and theories in detail with an overview of each subtopic and its application to the facts of our sample case laid out above. Lastly, the article concludes by noting that there are times when the doctrine contradicts our modern notions of equity, and the willingness of courts, under certain circumstances, to carry nonprivity third parties to that distant platform where they can stand in privity with a remote seller.

of the jurisdictions, including North Carolina, require privity between the parties for a recovery for a seller's breach of warranty. This rests on the ground that the warranty is contractual in nature; therefore any party to an action for its breach must also have been a party to the sales contract."); *Wood v. Gen. Elec. Co.*, 112 N.E.2d 8, 11-12 (Ohio 1953) (citing several commentators and other jurisdictions); *Tweddle*, 121 Eng. Rep. at 764; Edmund H. Bennett, *Considerations Moving from Third Persons*, 9 HARV. L. REV. 233, 234-37 (1895).

8. Anthony Mason, *Privity – A Rule in Search of Decent Burial?*, in *PRIVITY: PRIVATE JUSTICE OR PUBLIC REGULATION*, 88, 88-91 (Peter Kincaid ed., 2001).

9. This article will not address the Magnuson-Moss Warranty Act, even though at least one court has held that the Act requires express warranties, as defined by that Act, to run downstream regardless of privity. See *Rentas v. DaimlerChrysler Corp.*, 936 So. 2d 747, 751-52 (Fla. Dist. Ct. App. 2006).

10. *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962).

The easiest option is to use the state's U.C.C. third-party beneficiary statute, but, where that statute does not run privity to the remote buyer, the second best option is based on the idea that it is unfair to allow a seller to advertise a defective product to a remote buyer with impunity, as illustrated by New York's *Randy Knitwear*. The best option, however, is to control one's own destiny with a bargained-for provision assigning the warranties, but, of course, that is only available where the buyer has some bargaining power. The least reliable option is common law third-party beneficiary theory, which turns on the court's beliefs about the party's intentions based on facts that often are not clear-cut. Perhaps, as privity loses its hold on the common law, nonprivity plaintiffs will no longer need these maneuvers to reach justice under the law of contracts. But for now, they require much attention to maintain the integrity of the system for both remote buyers and the chain of sellers.

I. A BRIEF CONTEXTUAL HISTORY OF EXPRESS WARRANTY AND PRIVITY

The concept of warranties has existed since at least medieval times, when the church enforced a duty on "sellers who parted with substandard goods . . . to rectify the wrong done to the buyer, even if the defect were unknown at the time of sale."¹¹ These same duties were carried over into feudal institutions and the law of merchant, until the fall of feudalism and the rise of the mercantile class precipitated the emergence of caveat emptor.¹² With this shift of risk from seller to buyer, English courts began requiring either knowledge of the defect on the part of the seller or an express warranty, one specifically using the magic word "warranty."¹³

Sales warranties as we know them today were originally developed under the tort law of fraudulent misrepresentation,¹⁴ before the creation of the breach of contract claim, and possibly even provided the necessary catalyst for the formation of the law of *assumpsit* itself.¹⁵ By the mid-eighteenth century, however, warranties had

11. BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* 1 (1984).

12. *Id.* at 1-3.

13. *Id.* (citing *Chandelor v. Lopus*, (1603) 79 Eng. Rep. 3 (Exch.)).

14. SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* 251-52 (1909); William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-19 (1943).

15. 2 PATRICIA F. FONSECA & JOHN R. FONSECA, *WILLISTON ON SALES* § 15.1, at 419-20 (5th rev. ed. 1994); see also J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 10 (1888); James J.

begun merging into contract law,¹⁶ creating what William Prosser described as “a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law.”¹⁷ In 1778, the English courts acknowledged in *Stuart v. Wilkins* that assumpsit was an appropriate action on an express warranty, and had been for some time.¹⁸

Unlike warranty, the English courts did not establish the doctrine of privity until the late seventeenth century. Before that time, third-party beneficiary actions were both common and commonly granted, indicating that the privity limitation did not start to come into its own until 1670,¹⁹ and accompanying the rise of the consideration doctrine.²⁰ Many—but not all—commentators consider *Price v. Easton* and *Tweddle v. Atkinson* to have articulated the modern privity doctrine,²¹ simultaneously with the rule that “no stranger to the consideration can take advantage of a contract, although made for his benefit.”²² Others consider *Winterbottom v. Wright*, to be the leading case.²³ Although there may be dispute about the seminal cases,

White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L. REV. 2089, 2090–97 (1998) (providing a brief summary of the evolution of the law concerning warranties).

16. See *Stuart v. Wilkins*, (1778) 99 Eng. Rep. 15 (K.B.) 16 n.1.

17. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 651 (3d ed. 1964). In referring to the absorption of contract back into tort in the twentieth century, Professor Grant Gilmore jokingly dubbed such crossovers “contorts,” GRANT GILMORE, THE DEATH OF CONTRACT 90 (1974), a name that has somewhat caught on in the wider legal profession. See *Schlange-Schoening v. Parrish*, 767 F.2d 788, 793 n.3 (11th Cir. 1985); *McLeod-McKinsey v. Teftec Corp.*, No. SA-05-CA-0183-RF, 2005 WL 2137897 at *1 (W.D. Tex. Aug. 24, 2005) (granting an uncontested motion to dismiss a “contort” claim).

18. *Stuart*, 99 Eng. Rep. at 17.

19. VERNON V. PALMER, PATHS TO PRIVITY 28 (1992); Flannigan, *supra* note 5, at 564–65 n.6; Vernon V. Palmer, *The History of Privity – the Formative Period (1500–1680)*, 33 AM. J. LEGAL HIST. 3, 5 (1989).

20. PALMER, *supra* note 19, at 83.

21. *Price v. Easton*, (1833) 110 Eng. Rep. 518 (K.B.); *Tweddle v. Atkinson*, (1861) 121 Eng. Rep. 762 (Q.B.); see also Monserud, *supra* note 6, at 114–15. But see *id.* at 159–71 (arguing against this “basic misconception”); Flannigan, *supra* note 5, at 565–68 (explaining that the doctrine in fact slowly developed over 200 years beginning with *Bourne v. Mason*, (1669) 86 Eng. Rep. 5; 1 Vent. 6, and ending with *Tweddle*). Flannigan also argues that the court did not base *Tweddle* on prior precedent, but, in fact, premised it on an assumption by the court based on an unnecessary concession by the counsel for the *Tweddle* third party that consideration must move from the suing party. *Id.* at 569–71.

22. See PALMER, *supra* note 19, at 165–66 (quoting Wightman, J. in *Tweddle*, 121 Eng. Rep. at 763–64).

23. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch.); CLARK & SMITH, *supra* note 11, at 10.01 n.1; see also *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916); Harold Greenberg, *Vertical Privity and Damages for Breach of Implied Warranty Under the U.C.C.: It’s Time for Indiana to Abandon the Citadel*, 21 IND. L. REV. 23, 25 (1988); Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 24 n.54 (1987).

there is no dispute that this is the period in which the parties-only privity principle arose.²⁴

Some questions exist as to the true reason for the privity doctrine.²⁵ The court in *Tweddle*, for example, based its holding on two separate reasons. The first, stated by Judge Wightman, was that it was settled law that “no stranger to the consideration can take advantage of a contract, although made for his benefit.”²⁶ The second reason in *Tweddle*, from Judge Crompton, was that “[i]t would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued.”²⁷ Similarly, the *Winterbottom* court relied on privity to bar a third party’s claim to avoid the undesirable eventuality of, what it believed would be, unlimited actions on the contract.²⁸ Despite the flaws in these reasons,²⁹ the common law in the United States maintained the English privity doctrine well into the twentieth century.³⁰

It was not until 1960 that the New Jersey Supreme Court mounted an assault on what Prosser called the “Citadel of Privity.” The court in *Henningsen v. Bloomfield Motors* held that a manufacturer who put a product into the stream of commerce and marketed it to the customer was liable for personal injury on an implied warranty theory regardless of privity.³¹ Before *Henningsen*, the privity defense had already been weakened by the loss of its use in cases involving food and products for intimate bodily use.³² After *Henningsen* expanded

24. PALMER, *supra* note 19, at 159.

25. See G.H. TREITEL, *THE LAW OF CONTRACT* 458 (6th ed. 1983) (summarizing the various arguments in support of the privity doctrine).

26. *Tweddle*, 121 Eng. Rep. at 764; 1 Best & Smith 393. This appeal to authority is often heard from modern courts that apply the privity doctrine. See *Casa Clara Condo. Ass’n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244, 1248 n.9 (Fla. 1993).

27. *Tweddle*, 121 Eng. Rep. at 764. *But see* discussion *supra* note 5. This rationale also has fallen victim to the return to prominence of third-party actions and the adoption of at least some form of U.C.C. section 2-318 in every state. See *infra* note 33.

28. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402, 405 (Exch.). Furthermore, the adoption of U.C.C. section 2-318 curtailed the possibility of unlimited actions but affirmed the principle of an unusable suing party.

29. See *infra* notes 30–32 and accompanying text.

30. See generally William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (discussing the judicial trend away from privity).

31. *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 84 (N.J. 1960).

32. Prosser, *supra* note 30, at 791. The court in *Graham v. Bottenfield’s, Inc.*, 269 P.2d 413, 417 (Kan. 1954), for example, noted that previous courts had abolished privity in transactions involving food on the basis that, in modern economies, food is almost universally packaged for immediate consumption; therefore, the manufacturer should impliedly warrant it as fit for

that reasoning to include all products liability, the privity defense collapsed almost entirely in cases involving personal injury.³³ With this defender of the Citadel fallen, the walls have continued to crumble.³⁴

The crumble of privity, however, has not been confined to the ramparts of tort. Privity in warranty began to crack when the Washington Supreme Court held in *Baxter v. Ford Motor Co.* that the express warranty given by an automobile manufacturer that a windshield was “shatter-proof” created liability despite lack of privity when the windshield did indeed shatter.³⁵ The concept spread with the adoption of a similar rule based on express representations to the consumer in New York’s *Randy Knitwear, Inc. v. American Cyanamid Co.*³⁶

In the meantime, the Uniform Sales Act, which originally governed sales contracts and warranties and confined the latter to the immediate parties of the former, gave way to Article 2 of the Uniform Commercial Code. While the Uniform Sales Act was promulgated in 1906, before third party suits came back into style,³⁷ the U.C.C. came along at the start of a time in which privity was fading so quickly in many states that the strict liability section of the Restatement (Second) of Torts had to be revised twice in three years.³⁸ U.C.C. section 2-318, as originally promulgated in 1952, extended privity to those in the buyer’s household.³⁹ More recently, revisions have created three options for states to expand privity to their liking, only further confusing the subject.⁴⁰

human consumption. The *Graham* court extended this same reasoning to abolish the privity requirement in a suit on the sale of a defective hair dye. *Id.* at 418.

33. Prosser, *supra* note 30, at 793–98 (noting that, within six years of *Henningsen*, twenty-four states had adopted strict liability through case law or statute; two states had indicated a willingness to adopt it; one state had adopted it with limitations; and federal courts had predicted that four more states would adopt it). Today, nearly every state, except Louisiana (which did not adopt any sections of Article 2), has adopted at least some form of U.C.C. section 2-318, all of which impose some form of liability on sellers with regard to personal injury to nonprivity third parties. Diane L. Schmauder, Annotation, *Third-Party Beneficiaries of Warranties Under U.C.C. § 2-318*, 50 A.L.R. 327, § 2[a] (1997); *see also* U.C.C. § 2-318 (1966).

34. For a discussion of the fall of privity in tort and the rise of strict products liability generally, see William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *Assault*], and Prosser, *supra* note 30.

35. *Baxter v. Ford Motor Co.*, 12 P.2d 409, 412 (Wash. 1932).

36. *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399, 403–04 (N.Y. 1962).

37. Prosser, *Assault*, *supra* note 34, at 1128–29.

38. Prosser, *supra* note 30, at 793 n.9 (citing to tentative drafts in 1961, 1962, and 1964).

39. U.C.C. § 2-318 (1966).

40. *See id.*

As more states abolish the privity defense entirely, through statute or judicial pronouncement, those states that retain it cling to it all the more vengefully, even while their courts resort to legal acrobatics to circumvent it when they feel justice requires.

II. FOUR METHODS ALLOWING NONPRIVITY PURCHASERS TO OVERCOME "THE RULE"

This section addresses four of the common methods courts employ to get nonprivity, third-party buyers into something at least approximating the privity of contract their law requires. Some methods require more acrobatics than others, but all, to some degree, carry a buyer, whom the common law of privity does not allow to sue, across the unprotected expanse between himself and the remote seller. First, the broadest and most straightforward method is the application of the legislatively-enacted third alternative to section 2-318 of the U.C.C. Second, most courts also have implemented another method based on the equity of allowing a third party induced by advertising to sue the inducing remote seller, most notably in New York's *Randy Knitwear*.⁴¹ The last two avenues are simple applications of the common law of contract to fill the privity gap: everyday assignment of contract rights and ordinary third-party beneficiary doctrine of common law contract theory.

A. U.C.C. Section 2-318, Alternative C

When the U.C.C. was originally promulgated in 1952, there was only one form for section 318 of Article 2; however, the revolution in privity and third-party beneficiary law caused such a variation in the forms the states enacted that it threatened to undermine the purpose of the uniform laws.⁴² In 1966, the U.C.C. was amended to include two additional options that states could adopt in the alternative to the original.⁴³ As it stands today, section 2-318 reads:

41. See *Randy Knitwear, Inc.*, 181 N.E.2d at 402-04.

42. See U.C.C. § 2-318 Editorial Board Note on 1966 Amendment (2002) (noting that two states refused to adopt the original formulation that was substantially similar to Alternative A, ten states had already enacted non-uniform versions, and others were proposing similarly non-uniform amendments). With no consensus developing among the states, the editorial board reasoned that "the promulgation of alternatives may prevent further proliferation of separate variations in state after state." *Id.*

43. *Id.*

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.⁴⁴

The majority of states retain the original 1952 formulation of the rule, currently embodied in Alternative A.⁴⁵ Of the remaining states that have adopted section 2-318, eight states have chosen Alternative B, and five have chosen Alternative C.⁴⁶ Those states that have chosen Alternatives A and B are the ones in which economic loss liability for nonprivity third parties is hardest to come by. This is largely due to the maintenance of a classical conception of contract

44. U.C.C. § 2-318 (1966).

45. *Id.*; U.C.C. § 2-318 Editorial Board Note on 1966 Amendment (2002) (listing twenty-nine Alternative A states); see also Brian D. Cochran, *Emerging Products Liability Under Section 2-318 of the Uniform Commercial Code: A Survey*, 29 BUS. L. 925 (1974) (discussing the adoption of section 2-318 alternatives in U.S. states and territories).

46. U.C.C. § 2-318 (2002). In this and the preceding footnote, the numbers are based on the list set out in the 2004 Main Volume. There are, however, a myriad of non-uniform enactments that blur the line between Alternatives B and C, which will be addressed *infra* in Part II.D.1.b.

and the dickered, contract nature of warranty in these jurisdictions.⁴⁷ Without the strong focus on consumer protection of other jurisdictions, these jurisdictions tend to narrow damages to the obvious repercussions of breach, i.e., damages to the buyer and those in his home and not to all entities falling within the zone of danger. However, by remaining as close as possible to the pure contract conception of warranty short of simply saying “caveat emptor,” these jurisdictions often leave out some obviously endangered parties, such as those outside of the home and household where a product might be used;⁴⁸ some parties obviously intended to use the product, such as employees,⁴⁹ and parties who cannot face personal injury, such as corporations, who can nevertheless face serious damages from defective products bought for their benefit.⁵⁰ These are the states in

47. See, e.g., *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So. 2d 689, 692 n.3 (Fla. Dist. Ct. App. 1979) (stating that, because warranty is based in contract, privity of contract has continued vitality despite the modern trend toward consumer protection); *Perfecting Serv. Co. v. Prod. Dev. & Sales Co.*, 131 S.E.2d 9, 23 (N.C. 1963) (“A majority of the jurisdictions, including North Carolina, require privity between the parties for a recovery for a seller’s breach of warranty. This rests on the ground that the warranty is contractual in nature; therefore any party to an action for its breach must also have been a party to the sales contract.”); *Monserud*, *supra* note 6, at 130–32.

48. See *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1031 (N.D. Ga. 1974) (“[T]he Fifth Circuit has specifically held that a member of the armed forces injured by a product purchased by the federal government does not fall within the ambit of [section] 109A-2-318.”); *Crews v. W.A. Brown & Son, Inc.*, 416 S.E.2d 924, 930–31 (N.C. Ct. App. 1992) (holding that, since a church was not a “home” and could not have a “family” or “household,” a church member injured by walk-in freezer could not recover under North Carolina’s Alternative A version of section 2-318).

49. See *Anderson v. Watling Ladder Co.*, 472 F.2d 576, 577 (6th Cir. 1973) (holding that Tennessee’s now-repealed Alternative A version of section 2-318 did not apply to an employee who was injured in a fall from a defective ladder because he was not in the employer’s “household”); *Davidson v. John Deere & Co.*, 644 F. Supp. 707, 713 (N.D. Ind. 1986) (“[Indiana’s Alternative A version of section 2-318] would not include [employee] as a third-party beneficiary of any express warranty from Deere to Arco Construction Co.”); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239 (N.D. Ill. 1981) (“[Illinois’s Alternative A version of section 2-318] does not by its terms provide plaintiffs with a basis for relief, for they are neither buyers nor members of a buyer’s household.”); *Calvanese v. W.W. Babcock Co.*, 412 N.E.2d 895, 902 (Mass. App. Ct. 1980) (holding that it was not error for trial judge to dismiss an employee’s case against the manufacturer of a failed ladder for lack of privity under Massachusetts’s now-repealed Alternative A version of section 2-318). *But cf.* FLA. STAT. ANN. § 672.318 (West 2012) (including the additional phrase “or who is an employee, servant or agent of his or her buyer” before “if it is reasonable”); *Whitaker v. Lian Feng Mach. Co.*, 509 N.E.2d 591, 595 (Ill. App. Ct. 1987) (“We hold that the warranty extends to any employee of a purchaser who is injured in the use of the goods, as long as the safety of that employee in the use of the goods was either explicitly or implicitly part of the basis of the bargain when the employer purchased the goods.”).

50. See *Barre v. Gulf Shores Turf Supply, Inc.*, 547 So. 2d 503, 504–05 (Ala. 1989) (“The appellant alleges only economic injuries through the loss of business and profits due to the numerous mechanical failures of the mower purchased from Thompson/T & T Yard Care.

which the common law theories addressed in depth below are most important for plaintiffs.

Alternative C is certainly the broadest of the three alternatives in regards to the extent of allowable third-party beneficiary claims. Where Alternative A only extends privity to natural persons reasonably likely to use the product in the family and household of the buyer, Alternative B extends that further to include all natural persons injured in person by breach of the warranty. Alternative C then takes a massive leap by removing not only the “family and household of the buyer” language, but also the limitations to “natural persons” and “in person” injury. With these two changes, Alternative C essentially opens up privity to everyone, including “legal persons,” even if their injury is solely economic.

In this section, however, we will be addressing specifically those states whose legislatures were most open to the consumer-protecting power of third-party beneficiary claims and have enacted Alternative C or a substantially similar non-uniform variant.

1. Abolition of privity through interpretation of Alternative C

Only five states currently have enacted Alternative C as part of their Uniform Commercial Code⁵¹: Hawaii, Iowa, Minnesota, North Dakota, and Utah.⁵² Of the five, most are relatively straightforward

Therefore, the burden is on the appellant to prove that privity of contract existed between him and Gulf Shores Turf before recovery is allowed under an express warranty.”); *Facciolo Paving & Constr. Co. v. Rd. Mach., Inc.*, 8 Chester 375, 376 (Pa. Ct. C.P. Chester Cnty. 1958) (holding that Alternative A did not cover a corporation because it was necessarily neither a member of a family or household nor a guest of the buyer).

51. These jurisdictions had shown some tendency to be more progressive in their protections of the consumer even before adopting the Uniform Commercial Code. *See Chapman v. Brown*, 198 F. Supp. 78, 98-119 (D. Haw. 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (summarizing in detail both the willingness of the Hawaii Supreme Court to choose the better rule over *stare decisis* and its tendency toward protecting consumers before finally concluding that the Hawaii Supreme Court would hold that nonprivity buyers could sue on an implied warranty); *Beck v. Spindler*, 99 N.W.2d 670, 682-83 (Minn. 1959) (extending liability to a remote manufacturer under pre-U.C.C. law because of the manufacturer’s direct contact with the remote buyer), *cited in* MINN. STAT. § 336.2-318 (1969); *Lang v. Gen. Motors Corp.*, 136 N.W.2d 805, 808-10 (N.D. 1965) (citing *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399 (N.Y. 1962), and adopting its extension of implied warranties to third-party consumers through direct advertising); *Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 315 (Utah 1988) (citing *Baxter* and adopting an extension of express warranty to third-party consumers through direct advertising); Note, *Products Liability and the Choice of Law*, 78 HARV. L. REV. 1452, 1453 nn.6-7 (1965) (noting that Hawaii, Iowa, and Minnesota were three of the first fifteen states to extend strict liability beyond food stuffs and intimate bodily use products).

52. See Appendix under “Alternative C” for statute citations. There is little case law interpreting Utah’s version of the statute, but, considering the fact that Utah courts have adopted

about their versions of section 2-318. Courts in Hawaii and North Dakota simply quoted the statute before holding that it extended a warranty to a nonprivity purchaser in an economic loss situation.⁵³ Minnesota, although accepting the breadth of the statute, strictly limited the protected class to those named in the statute, i.e., “those who purchase, use, or otherwise acquire warranted goods.”⁵⁴

Although Iowa nearly fits into this category of jurisdictions with straightforward interpretations of section 2-318, its courts could not bear to limit the privity doctrine so drastically and judicially grafted on a limit to the limitation. Under Iowa law, section 2-318 extends privity in all cases except those involving consequential economic loss.⁵⁵ The court adopted the reasoning of *White and Summers*, who based their opposition to recovery of consequential loss on the principles that the seller should not face unknown liability around

liability for direct, persuasive communication, there is at least some indication that they would not be entirely disinclined to the idea of extending privity beyond the direct buyer and seller relationship. See discussion *infra* Part II.D.1.b.

53. *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734, 743 (Haw. 1983) (“Although *Ontai* was not in privity with G.E. in the sale of the X-ray table and footrest, the warranty to Straub from G.E. extends to *Ontai* by statute, as a third party beneficiary.” (citing H.R.S. § 490:2-318)); *Stroklund v. Thompson/Center Arms Co.*, No. 4:06CV-08, 2007 WL 4191740, at *8 (D.N.D. Nov. 21, 2007) (noting that the legislature had adopted the “most expansive Uniform Commercial Code provision for defining who may be held liable for express or implied warranties”).

Although *Ontai* is an implied warranty case and the Hawaii Supreme Court has never specifically spoken to express warranties, the wider leeway generally given to express warranties regarding privity and the fact that the statute itself specifically addresses them makes it highly likely that the court would have ruled the same way regarding express warranties. See *Stoebner Motors, Inc. v. Automobili Lamborghini S.P.A.*, 459 F. Supp. 2d 1028, 1035–36 (D. Haw. 2006) (extending an express warranty to a third-party beneficiary on the basis of section 2-318 and *Ontai*).

Stroklund held that whether an express warranty of quality on a defective muzzleloader rifle extended to nonprivity purchasers was merely a question of “‘who may reasonably be expected to use, consume, or be affected by the goods’” that could be sent to the jury. *Stroklund*, 2007 WL 419740, at *8 (quoting N.D. CENT. CODE § 41-02-35).

54. *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 21 (Minn. 1997) (“Our understanding of the background and aims of section 336.2-318 leads us to conclude that the scope of a seller’s liability for breach of warranty should recede as the relationship between a ‘beneficiary’ of the warranty and the seller’s goods becomes more remote. Consistent with *Hydra-Mac*—and assuming that section 336.2-318 is otherwise satisfied—those who purchase, use, or otherwise acquire warranted goods have standing to sue for purely economic losses. Those who lack any such connection to the warranted goods must demonstrate physical injury or property damage before economic losses are recoverable. This line comports with legislative intent, provides a clear rule of law, and identifies a sensible limit to liability without disrupting settled precedent.”).

55. See *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 476 (Iowa 2009) (discussing implied warranties); *Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305, 310 (Iowa 1995) (discussing express warranties).

which he cannot properly contract and, similarly, that the rights of the parties to contract should not be abridged.⁵⁶ A similar response came from Virginia, whose Supreme Court determined that the language, “at the time of contracting,” in section 2-715(2) required contractual privity between the plaintiff and defendant and that, since section 2-715(2) was more narrowly tailored to the question than section 2-318, section 2-715(2)’s requirement of privity for consequential economic loss prevailed over section 2-318’s extension.⁵⁷ Even with the loss of consequential damages,⁵⁸ the extension of the third-party beneficiary doctrine’s boundaries is still quite significant, and, in the future, if the states that have moved away from privity can show that liability has not ballooned out of proportion, perhaps these states will be convinced that the equity of privity’s abolition outweighs the reasons for privity.

2. Abolition through adoption of a modified Alternative B

Although we stated earlier that Alternative C was the broadest of the three alternatives, we must mention one caveat to that statement. Several of the states that adopted Alternative B have legislatively deleted “natural” from before “person” and “in person” after “injury,”⁵⁹ thereby recreating Alternative C—with one important

56. *Beyond the Garden Gate, Inc.*, 526 N.W.2d at 309–10 (quoting JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-5, at 539–40 (3d ed. 1988)). White and Summers’s first reason regarding “unknown liability” is somewhat unpersuasive considering the fact that U.C.C. section 2-715(2), which the court also quotes, limits consequential loss to that “resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know.” U.C.C. § 2-715 (2002) (emphasis added). By definition, the seller *must* have reason to know of them, even if he is a remote seller.

57. *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 491 S.E.2d 731, 733–34 (Va. 1997). The *Beard* court must have been searching for a way to limit the expansion of privity because sections 2-715(2) and 2-318 are only incompatible if one assumes, as the court did, that the seller and buyer in section 2-715(2) must be in privity of contract. However, neither the language in the statute nor the guidance from the comments require that conclusion. For example, the “buyer” could be the privity buyer’s third-party buyer of whose “general or particular requirements and needs . . . the seller at the time of contracting had reason to know.” See VA. CODE ANN. § 8.2-715 (West 2012). Virginia also has a non-uniform version of section 2-318. See VA. CODE ANN. § 8.2-318 (West 2012); discussion *infra* Part II.D.1.b.

58. At least one court has used traditional common law third-party beneficiary theory to circumvent this question with regard to section 2-318 and consequential economic loss. *Ag-Grow Oils, L.L.C. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 276 F. Supp. 2d 999, 1014 (D.N.D. 2003) (“Fortunately, this Court need not resolve this conflict because it concludes that Ag-Grow is an intended third-party beneficiary of the warranty given to Ibberson by Anderson, and thus privity is satisfied.”).

59. See the Appendix under “Modified Alternative B” for a list of states and their statutes’ citations. One of the states in this category, Wyoming, enacted its version as a modification of

distinction: their versions retain Alternative B's total bar to contractual exclusion or limitation.

Alternative C concludes with the statement that "[a] seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."⁶⁰ This formulation of the exclusion clause allows for contractual limitation of section 2-318 to cover only third parties with personal injuries; in effect, parties in privity in an Alternative C state can limit liability in the contract to that described in Alternative B—but no further. Because the exclusion clause under Alternative B contemplates the same result, i.e., that the contracting parties must at least maintain coverage of third parties for personal injury, Alternative B's exclusion clause allows no exclusion or alteration, because the statute already extends privity only to personal injury cases.⁶¹

Modified Alternative B states, on the other hand, include the expansive inclusiveness of Alternative C *and* the strict limitation on the exclusion clause of Alternative B, creating a hybrid statute that not only expands the protected class to include all legal persons suing for all injuries, but also prohibits the original seller from contractually limiting liability to third parties to personal injury.⁶² The courts have generally taken a very straightforward approach to these modified Alternative B statutes as well, applying them much in the same way courts have applied Alternative C statutes.⁶³ One court went so far as to refer to a modified Alternative B statute as Alternative C.⁶⁴

the original version of section 2-318 before the promulgation of Alternatives B and C. See Robert Braucher, *The Uniform Commercial Code – A Third Look?*, 14 W. RES. L. REV. 7, 15 (1962). In 1962, Professor Braucher offered Wyoming's version as a basis for an alternative form of the original section 2-318 that so many states had found objectionable. See *id.* at 15–16.

60. U.C.C. § 2-318 (2002).

61. See *id.*

62. See, e.g., Appendix under "Modified Alternative B."

63. See, e.g., *Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771, 778 (D.S.D. 1982) ("South Dakota courts have authorized actions against manufacturers by non-privity buyers based upon warranty theories."), *aff'd in part and rev'd in part on other grounds*, *Horizons, Inc. v. Avco Corp.*, 714 F.2d 862 (8th Cir. 1983) (affirming the award of consequential damages but reversing the amount); *Hansen v. Mercy Hosp.*, 570 P.2d 1309, 1311 (Colo. App. 1977) (citing the statute and holding that an action for breach of warranty could lie); *W. Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810 (Wyo. 1980) (holding that "a remote purchaser such as Western is not foreclosed from bringing an action to recover an economic loss . . . from a manufacturer such as Sheridan because of lack of privity"). For a more detailed discussion of judicial application of Alternatives B and C, see generally William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions that Have Adopted Uniform Commercial Code Section 2-318 (Alternatives B & C)*, 27 AKRON L. REV. 197 (1993).

64. *Horizons, Inc.*, 551 F. Supp. at 778 ("South Dakota adopted [U.C.C. section] 2-318, Alternative C, but with some critical variations.").

As intrusive on the power to contract as this may appear, the seller still has the option of completely disclaiming the warranty under U.C.C. section 2-316 or limiting remedies under U.C.C. sections 2-718 and 2-719.⁶⁵

3. *The impact of Virginia's non-uniform version of section 2-318*

Several states maintain their pre-revision versions of section 2-318 despite the impetus those very statutes gave the movement to revise the U.C.C. to maintain uniformity. When Virginia first adopted the U.C.C. in 1964, its legislature enacted a non-uniform version of section 2-318 instead of the only version available at the time, today's Alternative A.⁶⁶ The version adopted by Virginia borrowed the foreseeability requirement from the U.C.C. version and extended it to *any* "damages for breach of warranty, express or implied," sought by *any* plaintiff, so long as he was foreseeable.⁶⁷

65. See *Rynders v. E.I. Du Pont, De Nemours & Co.*, 21 F.3d 835, 840 (8th Cir. 1994) ("The proviso to section 2-318, which states that '[a] seller may not exclude or limit the operation of this section,' prohibits the seller from establishing a contractual privity requirement; it does not limit the seller's ability to modify or exclude warranties under section 2-316."); *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 343 (Wyo. 1986) (noting that "appellant's cause of action in warranty could have been barred by a disclaimer of warranty even though he did not personally bargain with the manufacturer and accept the disclaimer" because the court had already "explicitly held that a remote buyer cannot prevent the manufacturer from disclaiming warranties in his original contract with the original buyer"); U.C.C. § 2-318 cmt. 1 (1966).

It should be noted that, regarding express warranties, U.C.C. section 2-316 is somewhat limited in its usefulness. Subsection (1) of that section wipes out any words or conduct contradicting an express warranty where the words or conduct cannot be read consistently with those creating the warranty. U.C.C. § 2-316 (2002). Essentially, an express warranty, once made, cannot be disclaimed by generic disclaimer language; it must be explicitly withdrawn so that it does not become a "basis of the bargain" at all.

Subsection (4) of section 2-316 does, however, provide for limitation of damages under U.C.C. sections 2-718 and 2-719. The former allows for liquidated damages that are reasonable under the circumstances, U.C.C. § 2-718(1) (2002), and the latter provides for contractual alteration of the U.C.C.'s remedies through addition, substitution, or limitation, U.C.C. § 2-719(1) (2002). These alterations, however, are merely optional, i.e., the U.C.C. default remedy provisions are still available, unless they are made expressly exclusive in the contract. *Id.* The default remedies are also available if the court determines that the limited remedy has failed "of its essential purpose," U.C.C. § 2-719(2), or that the limitation is unconscionable. U.C.C. § 2-719(3). See generally Russell J. Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 TEX. L. REV. 60 (1974).

66. See Richard E. Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 817 (1965).

67. See the Appendix under "Non-Uniform Versions" for citation and full text of statute. Virginia's statute was enacted in 1962, two years before the state enacted the U.C.C. and was originally codified as Virginia Code section 8-654.3. See *Brockett v. Harrell Bros., Inc.*, 143 S.E.2d 897, 901 (Va. 1965) (quoting section 8-654.3 and noting that it was replaced by section 2-318). It was substituted for the earliest form of U.C.C. section 2-318 when Virginia enacted that

Virginia's adoption of a non-uniform section 2-318 sparked revisions to several other states' third-party beneficiary statutes. In 1969, 1971, and 1973, Maine, Massachusetts, and New Hampshire,⁶⁸ respectively, replaced their original versions (today's Alternative A) with one based heavily on Virginia's version, despite the presence, by that time, of the three official alternatives.⁶⁹ Despite the alternate wording, however, the Virginia statute essentially had the same effect as Alternative C; courts generally hold that the face of the statute abolishes privity.⁷⁰ Maine's version took a slightly more winding course and eventually ended up allowing all claims even without privity—except those by commercial plaintiffs.⁷¹ Another state that adopted the Virginia version of section 2-318 has traveled an even more confusing course. Arkansas's legislature adopted its current section 2-318 in 1961.⁷² In 1965, the legislature added the Virginia version of section 2-318 as section 2-318.1, denying defendants the

statute in 1964. See VA. CODE ANN. § 8.2-318 (2001). For a contemporary overview of the Virginia statute, see Emanuel Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982, 984–90 (1962).

A companion statute covers cases not provided for in section 2-318, such as damages for injury to persons or property from negligence. See VA. CODE ANN. § 8.01-223 (1992). Courts have held, however, that the companion statute does not cover economic loss. See *Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1182 (4th Cir. 1997) (“In Virginia, the economic loss rule applies in negligence suits This rule remains in force notwithstanding the statutory abolition of the privity requirement in negligence actions for injury to persons and damage to property.” (citations omitted)).

68. See the Appendix under “Non-Uniform Versions” for citations and full text of statutes.

69. Cochran, *supra* note 45, at 932; see also Kenneth W. Oder, Note, *Reforming the Law of Consumer Recovery and Enterprise Liability Through the Uniform Commercial Code*, 60 VA. L. REV. 1013, 1032–33 n.96 (1974).

70. See *Sullivan v. Young Bros. & Co.*, 91 F.3d 242, 249–50 (1st Cir. 1996) (quoting the Maine statute, noting that plaintiff met the statutory requirements, and dismissing the defendant's defense); *Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116, 118 (4th Cir. 1995) (“[T]he Virginia legislature simply chose to adopt a provision creating a broader class of beneficiaries than that created by the U.C.C. provision, which is limited to household guests and members. Such a broad statute was in keeping with the Virginia anti-privity statute that predated the current [section] 8.2-318.”); see also VA. CODE § 8.2-318 (2012); *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 797 (N.H. 1993) (holding that privity was not a valid defense against an implied warranty claim for direct economic loss because the legislature had abolished privity by adopting a statute that was essentially like Alternative C of the U.C.C.).

71. See *Sebago, Inc. v. Beazer E., Inc.*, 18 F. Supp. 2d 70, 97–99 (D. Mass. 1998) (detailing the case law developments and holding against the plaintiff based on the principle in Massachusetts law that “commercial plaintiffs must allege privity to maintain a breach of warranty action against a manufacturer”).

72. See ARK. CODE ANN. § 4-2-318 (West 2012).

defense of lack of privity against even those buyers to whom section 2-318 does not extend privity.⁷³

All in all, the variance in language from Alternative C has not led to much variance in the result. Like the jurisdictions implementing the other forms of Alternative C, the ease by which a plaintiff can maintain a suit despite privity has left privity all but defeated in these jurisdictions.

B. *Randy Knitwear and Company*

1. *Randy Knitwear v. American Cyanamid Co. and its legacy*

In 1961, a case came before the Court of Appeals of New York that drastically changed the face of warranty law in the state and would become a strong influence on other states around the country. In that case, the court, citing a thirty-year-old Washington decision that had gained some traction across the country and noting various policy reasons, decided that privity of contract had run its course and needed to be put to rest.⁷⁴ The New York case was *Randy Knitwear v. American Cyanamid Company*, and the Washington case cited was *Baxter v. Ford Motor Company*—two cases that, in today's advertisement-laden society, have done considerable damage to the privity citadel regarding express warranty.

The facts behind *Randy Knitwear* are similar to the facts behind many commercial transactions in today's market. American Cyanamid was a manufacturer of chemical resin used to treat fabric to keep it from shrinking.⁷⁵ It provided licensed manufacturers of fabrics with the resin for treatment and labels for the final product stating that the product was "Cyana" finished.⁷⁶ Randy Knitwear purchased these treated fabrics at a higher cost from the licensed manufacturers—based on American Cyanamid's written statements in trade journals, direct advertisements, and garment labels—but soon

73. See *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 437 S.W.2d 459, 462 (Ark. 1969) (holding that section 2-318.1, recodified in 1987 as section 4-86-101, eliminated privity for those fitting the requirements of the statute and that there was nothing in the statute or the case law that denied its protection to those seeking economic loss). *But see* *Staples v. Batesville Casket Co.*, No. 5:07CV214JMM, 2008 WL 509430, at *3 (E.D. Ark. Feb. 20, 2008) (holding that plaintiff did not fit within section 2-318's protected class and therefore had no standing to bring suit in federal court).

74. *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399, 401-02 (N.Y. 1962).

75. *Id.* at 400.

76. *Id.* at 400-01.

found that regular washing caused the fabric to shrink and deform.⁷⁷ Randy Knitwear brought a claim against American Cyanamid for breach of express warranty,⁷⁸ and American Cyanamid moved for summary judgment on the grounds that there was no privity of contract between it and the plaintiff.⁷⁹

The court began its assessment of the privity problem by noting that, despite the fact that the New York Court of Appeals had previously adopted the strict contractual privity requirement for both express and implied warranties, these holdings were a product of the questionable characterization of warranty as contractual in nature when, in fact, breach of warranty was originally based in tort.⁸⁰ It further noted that the Court of Appeals had only one year previously held that privity was a nonfactor in cases involving implied warranties of foodstuffs and household goods, recognizing that privity "should be dispensed with in a proper case in the interest of justice and reason."⁸¹ After acknowledging the New York court's receptiveness to abolition of the privity defense, the court addressed a case from the other side of the country that had done just that in a case like the one at bar.

In *Baxter v. Ford Motor Company*, the plaintiff purchased a Model A Town Sedan from a Ford dealer upon the representations by both the dealer and the manufacturer that the windshield was made of shatterproof glass.⁸² While driving the car a few months later, a pebble thrown by a passing car shattered the windshield, causing the loss of the plaintiff's left eye and damage to the sight in his right.⁸³ The plaintiff filed suit against both the dealer and Ford.⁸⁴ The trial court entered judgment for both defendants.⁸⁵ The plaintiff appealed, claiming that the trial court erred in not allowing him to present evidence as to printed matter produced by Ford and given to the dealer for sales assistance.⁸⁶ The court held that the plaintiff had a cause of action,⁸⁷ reasoning:

77. *Id.* at 400.

78. The court held that the breach of warranty claim against one of the licensed manufacturers was not properly disclaimed. *Id.* at 404.

79. *Id.* at 400.

80. *Id.* at 401 & n.2.

81. *Id.* at 401.

82. *Baxter v. Ford Motor Co.*, 12 P.2d 409, 410 (Wash. 1932).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 413.

Since the rule of *caveat emptor* was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.⁸⁸

It was this equitable argument that seems to have swayed the court in *Randy Knitwear*.⁸⁹

The court there not only cited the *Baxter* case, but also noted the trend of states that followed Washington's lead.⁹⁰ At least six states had adopted similar principles in the intervening years and a majority of commentators approved.⁹¹ To the *Randy Knitwear* court, the modern market is one in which the effective warranty comes through advertising, and the consumer really needs protection from the manufacturer who has induced his purchase through published

88. *Id.* at 412.

89. *Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399, 401-02 (N.Y. 1962).

90. *See id.* at 402 ("[I]n the 30 years which have passed since that decision, not only have the courts throughout the country shown a marked, and almost uniform, tendency to discard the privity limitation and hold the manufacturer strictly accountable for the truthfulness of representations made to the public and relied upon by the plaintiff in making his purchase, but the vast majority of the authoritative commentators have applauded the trend and approved the result.").

91. *Id.* at 402 nn.3-4. The six states to which the court cites are California in *Burr v. Sherwin Williams Co.*, 268 P.2d 1041 (Cal. 1954); Connecticut in *Hamon v. Digliani*, 174 A.2d 294 (Conn. 1961); Kentucky in *Graham v. John R. Watts & Son*, 36 S.W.2d 859 (Ky. 1931); North Carolina in *Simpson v. American Oil Co.*, 8 S.E.2d 813 (N.C. 1940); Ohio in *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1958); and Pennsylvania in *Silverman v. Samuel Mallinger Co.*, 100 A.2d 715 (Pa. 1953).

The court also cites to several contemporary commentators: 1 WILLISTON ON SALES § 244a (rev. ed. 1948); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.04(4) (Matthew Bender & Co. 1960); Lester W. Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938); B. Joan Holdridge, *Advertised-Product Liability: Law of Manufacturer's Liability*, 8 CLEV.-MARSHALL L. REV. 14, 39 (1959); Dix W. Noel, *Manufacturers of Products - The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 999-1009, 1018 (1957); Prosser, *Assault*, *supra* note 34, at 1134-38.

representations.⁹² The court also makes two additional policy arguments of its own. First, it acknowledges that, through a series of indemnity and recoupment actions, the “manufacturer will ultimately be held accountable for the falsity of his representations, but only after an unduly wasteful process of litigation.”⁹³ Not only is this process wasteful in terms of judicial efficiency, the court argues, but the series of actions that it requires can also lead to a failure of the justice system by leaving the aggrieved party without a remedy due to insolvency of, lack of jurisdiction over, or disclaimers by the intervening parties, even though it was the representation by the manufacturer that induced the purchase.⁹⁴ The court came back to this focus on the misrepresentation when it dismissed any limitation of the new principle to personal harm or injury, observing that most other courts had dispensed with that limitation. The court stated, “this makes sense. Since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved.”⁹⁵ The court concluded with a broad statement that “the old court-made rule should be modified to dispense with the requirement of privity.”⁹⁶

It was, however, the concurrence that carried the day. Judge Froessel concurred in the result but refused to dispense with privity “without limitation.”⁹⁷ He would have limited the opinion to the facts of the case, involving representations in newspapers and periodicals repeated on the manufacturer’s own labels and with the manufacturer’s knowledge and authorization.⁹⁸ In practice, the more limited principle has become the rule in New York.⁹⁹ It is this more limited rule that is so popular across a broad swath of American ju-

92. *Randy Knitwear*, 181 N.E.2d at 402.

93. *Id.* at 403.

94. *Id.*

95. *Id.* at 404.

96. *Id.*

97. *Id.* at 405 (Froessel, J., concurring).

98. *Id.* at 404–05 (Froessel, J., concurring).

99. See *Mull v. Colt Co.*, 31 F.R.D. 154, 170 (S.D.N.Y. 1962) (citing *Randy Knitwear* for the proposition that “the Court of Appeals dispensed with the need for privity in an action for breach of express warranty by a remote purchaser against a manufacturer who induced the purchaser by representing the quality of the goods in advertising and on labels affixed to the goods”); *Hole v. Gen. Motors Corp.*, 442 N.Y.S.2d 638, 640 (N.Y. App. Div. 1981) (distinguishing *Randy Knitwear* as only applicable to express warranties); see also *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81, 82–84 (N.Y. 1963) (acknowledging that the language of *Randy Knitwear* would seem to have abolished privity but nevertheless holding on a tort-based “source of danger” principle).

risdictions. In fact, the rule in *Baxter* and *Randy Knitwear* is the generally accepted rule.¹⁰⁰

100. See, e.g., *Burr v. Sherwin Williams Co.*, 268 P.2d 1041, 1049 (Cal. 1954) (citing *Baxter*); *Hawkins Constr. Co. v. Matthews Co.*, 209 N.W.2d 643, 654 (Neb. 1973) (citing *Randy Knitwear*), overruled on other grounds by *Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 332 N.W.2d 39, 43-44 (Neb. 1983); *Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 315 (Utah 1988) (quoting *Baxter*). See generally WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 651 (4th ed. 1971).

Due to this fact, the framers of the U.C.C. expressly adopted the approach of *Randy Knitwear* in section 2-313B of the 2003 Revision. U.C.C. § 2-313B cmt. 1 (2005). Section 2-313B(3) states:

If in an advertisement or a similar communication to the public a seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, and the remote purchaser enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise, or description, or that the seller will perform the remedial promise, the seller has an obligation to the remote purchaser that: (a) the goods will conform to the affirmation of fact, promise, or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise, or description created an obligation; and (b) the seller will perform the remedial promise.

Id. § 2-313B(3). Subsection (5) expressly allows consequential damages and “the loss resulting in the ordinary course of events,” but it disallows lost profits and empowers sellers to modify or limit remedies to the remote seller so long as they are notified no later than the time of purchase. *Id.* § 2-313B(5)(a), (c). However, as of 2012, no state has yet adopted any part of Revised Article 2, including section 2-313B. See THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, LEGISLATIVE REPORT BY ACT 2012, http://uniformlaws.org/shared/legreports/legrpt_act.pdf (last visited Oct. 7, 2012).

Unlike the courts in *Baxter* and *Randy Knitwear*, some jurisdictions have based their rules firmly in principles of contract, ignoring or avoiding the undercurrent of tort present in *Baxter* and *Randy Knitwear*. This leads, as it often has with issues regarding warranty and privity, to cross-pollination of the two areas of law. Often, the holdings are based on the requirements in U.C.C. section 2-313 with a quick, boilerplate follow-up stating that such an advertising warranty does not require privity of contract and never addressing the fact that that very proposition came from *Baxter* and *Randy Knitwear*. See, e.g., *Triple E, Inc. v. Hendrix & Dail, Inc.*, 543 S.E.2d 245, 247-48 (S.C. Ct. App. 2001). One influential case that did just that, *Hawkins Const. Co. v. Matthews Co.*, stated that “[l]iability . . . flows from the provisions of section 2-313, U.C.C. . . . The Waco brochure . . . constituted express warranties under the above provisions. . . . A manufacturer or seller may be held liable under such an advertising warranty even though he is not in privity of contract with the purchaser.” 209 N.W.2d at 654 (citing, *inter alia*, *Randy Knitwear* for the last proposition). At least one court has used the confusion inherent in such cross-contamination to abolish privity generally. See *Cova v. Harley Davidson Motor Co.*, 182 N.W.2d 800, 808 (Mich. Ct. App. 1970) (concluding on the basis of this confusion that the old terminology of warranty and tort concepts should be eliminated and holding that no privity is required in “products liability” cases).

2. *Common elements and their application*

The *Randy Knitwear* line of cases has some common elements based in its legal history and public policy background. The situation itself is ubiquitous in today's society: nearly every manufacturer uses some form of direct advertisement to the end user to get them to buy the manufacturer's product even if they do not—and are not intended to—do so directly from the manufacturer. The early courts in this line felt that it was an untenable proposition that a manufacturer could make a statement to the consumer with the intent of inducing them to buy a product and then remain invulnerable from suit for damage resulting from the falsehood of that statement. Therefore, these cases generally require that (1) the defendant has made an express public statement, qualifying under the jurisdiction's definition of a warranty; (2) the defendant acted with the intent of inducing remote purchasers to buy its product; and (3) after such purchase, the goods did not live up to that statement.¹⁰¹

What is not common among cases in the *Randy Knitwear* vein is a reliance requirement. Although the defendant's creation of a market for his defective product is one of the driving policy reasons behind the doctrine, the other side of that coin—that the remote purchaser was, in fact, induced to buy—has not been consistently applied

101. See *Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254, 259 (6th Cir. 1960) (reversing a directed verdict for the defendant on the grounds that "the advertising brochure induced him to buy the tires; that he bought in reliance upon the truth of the representations; and that the warranties proved to be untrue to his immediate harm"); see also *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 600-01 (E.D. La. 1998) (holding that manufacturer was not liable because it did not give brochures to plaintiff-homeowner); *Randy Knitwear*, 181 N.E.2d at 402 ("Today, however, the significant warranty, the one which effectively induces the purchase, is frequently that given by the manufacturer through mass advertising and labeling to ultimate business users or to consumers with whom he has no direct contractual relationship."); *Simpson v. Am. Oil Co.*, 8 S.E.2d 813, 815-16 (N.C. 1940) ("Here we have written assurances that were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer The assurances . . . was [sic] an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer. We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended."); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 287 (Tex. Civ. App. 1980) (holding that "privity is not required where a manufacturer induces the purchase by furnishing samples to a middleman, knowing that the middleman will use the samples to induce sales of the product").

across jurisdictions since the adoption of the U.C.C.¹⁰² This is one area of U.C.C. law that does not live up to its name or purpose of uniformity, and we do not attempt a thorough treatment here. We merely provide a brief taste of the confusion among those states that use section 2-313 regarding advertising warranties.¹⁰³

Some courts have interpreted “basis of the bargain” in section 2-313 as a new reliance requirement.¹⁰⁴ The U.C.C. itself addresses reliance, somewhat unhelpfully, in the comments to section 2-313, stating:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.¹⁰⁵

This comment implies that there is simply a rebuttable presumption of reliance that the defendant must overcome.¹⁰⁶ A reasonable observer would find this limitation unhelpful because, despite the comment, some courts have stated that the U.C.C. no longer re-

102. See generally *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 319-21 (S.D. Ill. 2007) (setting out the three basic approaches to reliance versus basis of the bargain).

103. For a much more in-depth discussion of the reliance requirement and U.C.C. express warranties, see Steven Z. Hodaszy, *Express Warranties Under the Uniform Commercial Code: Is There a Reliance Requirement?*, 66 N.Y.U. L. REV. 468 (1991); Wayne K. Lewis, *Toward a Theory of Strict “Claim” Liability: Warranty Relief for Advertising Representations*, 47 OHIO ST. L.J. 671, 686-91 (1986); and Katie McLaughlin, *Another Argument “Pops up” Against Reliance in Express Warranty Law*, 28 J.L. & COM. 95, 96 (2009).

104. See *Sessa v. Riegler*, 427 F. Supp. 760, 766 (E.D. Pa. 1977) (referring to “basis of the bargain” as “essentially a reliance requirement”); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 (D.N.H. 1972) (interpreting “basis of the bargain” to mean “plaintiff has the burden of showing that he acted on the basis of the representations”).

105. U.C.C. § 2-313 cmt. 3 (2002).

106. A similar interpretation can be found in *Kinlaw v. Long Manufacturing N.C., Inc.*, where the court stated that “[t]he element of reliance need not always be expressly alleged. It can often be inferred from allegations of mere purchase or use if the natural tendency of the representations made is such as to induce such purchase or use.” 259 S.E.2d 552, 557 n.7 (N.C. 1979). Other courts have followed this burden-shifting approach as well. See *Keith v. Buchanan*, 220 Cal. Rptr. 392, 398 (Cal. App. Dep’t Super. Ct. 1985) (finding that the seller had not overcome the presumption that the representations were part of the basis of the bargain); *Torres v. Nw. Eng’g Co.*, 949 P.2d 1004, 1015 (Haw. Ct. App. 1997) (concluding that the burden is on the seller to prove that buyer did not rely on seller’s statements); *Bysom Enters. v. Peter Carlton Enters.*, 641 N.E.2d 838, 843 (Ill. App. Ct. 1994) (“[T]he fact that the warranties are in the Purchase Agreement is *prima facie* evidence that they are part of the bargain. The burden of disproving this is upon [the seller].” (internal citations omitted)).

quires reliance on express warranties and sharply differentiates “reliance” from the “basis of the bargain.”¹⁰⁷ The difference between reliance and the basis of the bargain, however, is somewhat less clear.¹⁰⁸ Sometimes even courts specifically holding that reliance is not required will require that the advertisement or brochure have been read.¹⁰⁹

In our case involving the defective copier, Defendant almost certainly made an express warranty through its advertising. In most states, express warranties are defined in section 2-313 of the U.C.C., and that section only requires that there be an “affirmation of fact or

107. See *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261 (Ala. 1983) (“[T]he determining factor in this case . . . is not reliance by the purchaser on the seller’s warranty, but whether it is part of the ‘basis of the bargain.’”) (quoting *Elanco Prods. Co. v. Akin-Tunnell*, 474 S.W.2d 789, 793 (Tex. Civ. App. 1971)).

108. The Court of Appeals of New York in *CBS, Inc. v. Ziff-Davis Publishing Co.* determined that the U.C.C. terminology was a reflection of the general understanding that express warranties were no longer grounded in tort, but in contract:

This view of “reliance” —i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties— reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled.

553 N.E.2d 997, 1001 (N.Y. 1990) (citations omitted). The court here differentiates the two terms not as between “reliance” and something else, but as between two types of reliance. “The critical question is not whether the buyer believed in the truth of the warranted information, . . . but ‘whether [it] believed [it] was purchasing the [seller’s] promise [as to its truth].’” *Id.* at 1000–01 (alteration in original) (quoting *Ainger v. Mich. Gen. Corp.*, 476 F. Supp. 1209, 1225 (S.D.N.Y. 1979)). This interpretation of the U.C.C. term would still require that the plaintiff see the express warranty before purchasing the item.

109. See *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261–62 (Mo. Ct. App. 1976) (noting that “[t]here is no mention of reliance in [section] 400.2-313” but requiring that “the catalogue advertisement or brochure must have at least been read” because it must be part of the basis of the bargain); see also *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 317 So. 2d 493, 495–97 (Ala. Civ. App. 1975) (holding that reliance was not required because “despite the fact that the purchaser did not physically receive a copy of the written expressed warranty an express warranty was, in fact, in existence and [did] inure to the benefit of appellee” but also noting that the purchaser was informed by the retailer’s bill of sale that an express warranty existed). *But see Massey-Ferguson, Inc.*, 432 So. 2d at 1261 (recognizing that reliance, although explicitly not required, was met, at least presumptively, when the court noted that plaintiff knew of the express warranty before the purchase).

These courts are not taking the same approach as New York in differentiating between “reliance” and “basis of the bargain.” *Cf. Randy Knitwear, Inc. v. Am. Cyanamid Co.*, 181 N.E.2d 399, 403–04 (N.Y. 1962). While they are quite explicit in their separation from the former tort-based rules on reliance, they are still quite unclear about the determining factor for deciding that an express warranty has become a “basis of the bargain.” *Id.*

promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain” or “[a]ny description of the goods which is made part of the basis of the bargain.”¹¹⁰ “No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain.”¹¹¹ In our case, all three factors are present: Defendant made representations, promises, and descriptions of his goods in the television ads and sales brochures; Defendant manifested the intent of creating a market for that product; and the contents of those advertisements and brochures turned out to be misrepresentations. Here, also, Plaintiff relied on the advertisements and brochures. Plaintiff likely would not have been able to recover damages if Plaintiff had not proven such reliance.

C. Assignment of Warranties

The third method convened is probably the least “acrobatic” of the non-statutory methods: assignment of warranties is a natural extension of the now-contractual nature of warranty. One would expect that, as part of a contract, the warranties would be just another assignable right the buyer could pass on to a downstream purchaser,¹¹² and most modern jurisdictions consider them alienable so long as there is a contract of assignment.¹¹³

110. U.C.C. § 2-313. Some courts, on the other hand, have read the language “by the seller to the buyer” to foreclose nonprivity third-party suits under section 2-313. *See, e.g.,* Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp., 774 N.W.2d 332, 341–42 (Mich. Ct. App. 2009) (holding that, since “[a]n express warranty may be created only between a seller and a buyer” under section 2-313, a manufacturer could not, as a matter of law, make an express warranty to a nonprivity third party plaintiff). Section 2-313 itself, however, states in the comments that “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.” U.C.C. § 2-313 cmt. 2 (“Beyond [section 2-318], the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.”).

111. U.C.C. § 2-313 cmt. 3.

112. Originally, the rights under a contract were non-assignable, as were all choses in action; however, the common law courts overcame this prohibition through the use of powers of attorney with a covenant not to revoke. 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 74:2 (4th ed. 2003). This concept was not entirely satisfactory due to the legal retention of ownership in the assignor. *Id.* (listing bankruptcy, death, and fraudulent secondary conveyances as difficulties presented by this interpretation). Because of these difficulties, the courts of equity began to recognize assignments for value as an irrevocable right in the assignee, and the courts of law adopted the equity principles wholesale. *Id.* Furthermore, an assignee may assign his assigned rights in a sub-assignment that is as protected as the original assignment. *Id.*

113. *See* Gold’n Plump Poultry, Inc. v. Simmons Eng’g Co., 805 F.2d 1312, 1316 (8th Cir. 1986) (“[A] subsequent purchaser of a warranted article is not automatically entitled to a cause

The alienability of warranties is extremely important, especially in cases involving contractors where the initial buyer and warrantee purchase products with the express intent of passing the products on to the nonprivity owner—the real party in need of the warranty.¹¹⁴ Some courts will often find ways to run warranties to these parties.¹¹⁵ Whereas, other courts will stand hard on privity and ignore the equity of running the warranty to the owner.¹¹⁶ Because of this unknown, the best course is for the drafting lawyers simply to assign the warranties from the original buyer to the new nonprivity owner and for courts to allow for these warranties to run downhill to the party truly in need of it. The biggest question, though—the one that decides just how expansively useful this particular method for running warranties actually is—depends on whether courts require any particular language for an assignment of warranties to be

of action against the original seller for breach of warranty. There must be a contract of assignment of rights to entitle the subsequent purchaser to this cause of action.”); *Parrot v. DaimlerChrysler Corp.*, 108 P.3d 922, 928 (Ariz. Ct. App. 2005) (holding that a vehicle warranty was validly assigned because all of the contractual requirements of an assignment were met), *vacated on other grounds by Parrot v. DaimlerChrysler Corp.*, 130 P.3d 530 (Ariz. 2006); *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 457 (Fla. Dist. Ct. App. 2005) (holding that plaintiff was entitled to enforce rights under Florida law because lessor had assigned its rights, “as evidenced by the language in the leasing agreement stating that, ‘[t]he Vehicle is subject to the standard manufacturer’s express warranty’”); *Collins Co. v. Carboline Co.*, 532 N.E.2d 834, 837 (Ill. 1988) (“We . . . hold that the assignee of a warrantee’s rights under an express warranty, if the assignment is otherwise valid, succeeds to all those rights and thus stands in privity with the warrantor.”); 3 ANDERSON U.C.C. § 2-314:379 (3d ed.) (“A person satisfies the requirement of privity with the defendant when that person is the assignee of the rights of a person who was in privity with the defendant.”). *But see Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co.*, 519 F. Supp. 60, 73–74 (S.D. Ga. 1981) (holding that warranty rights are not assignable in Georgia because Georgia courts had “apparently decided that any assignment of warranties materially changes the risks and burdens of the original seller” under the terms of U.C.C. section 2-210).

114. Another method some parties have tried in this situation is the agency doctrine, arguing, for example, that a contractor is actually purchasing the product as an agent of the nonprivity owner. This is often a particularly acrobatic legal twist for which courts do not often fall, so we will not address it here. *See, e.g., St. Paul Mercury Ins. Co. v. Viking Corp.*, 539 F.3d 623, 626–27 (7th Cir. 2008) (acknowledging that privity would exist if there was an agency relationship, but, under Wisconsin law, no such relationship was present); *IWOI, LLC v. Monaco Coach Corp.*, 581 F. Supp. 2d 994, 1000–01 (N.D. Ill. 2008) (entirely rejecting privity based on an agency theory under Illinois law).

115. *See generally U.S. Pipe & Foundry Co. v. Waco*, 100 S.W.2d 1099 (Tex. Ct. App. 1936) (finding liability using a somewhat unorthodox agency theory).

116. *See, e.g., St. Paul Mercury Ins. Co.*, 539 F.3d at 626–28 (rejecting agency theory and estoppel arguments); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 599–601 (E.D. La. 1998) (rejecting a homeowner’s third-party beneficiary claim under Florida law against siding manufacturer because Florida’s section 2-318 did not encompass the homeowner, foreseeability as to ownership was irrelevant, and the manufacturer did not intentionally solicit the homeowner with advertising).

valid. The dearth of cases directly addressing the subject leads to the conclusion that the subject is generally uncontentious,¹¹⁷ and the cases that appear tend to support the conclusion that warranties are as easily assignable as the remainder of the contract.

For example, in *Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*,¹¹⁸ the court noted that an assignment of “all rights, claims, causes of action, etc.” included warranties made to the original purchaser and sufficiently placed the plaintiff in his shoes to create privity

117. “Dearth of cases” refers to the fact that, in the vast majority of cases regarding assignment of warranties, no reference is made whatsoever to the language of the assignment.

In cases addressing assignment generally, the closest language on point usually focuses on intent over form. See *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass’n*, 898 N.E.2d 216, 230 (Ill. App. Ct. 2008). In *Cincinnati Insurance Co.*, the Illinois Appellate Court noted that, “[g]enerally, no particular form of assignment is required; any document which sufficiently evidences the intent of the assignor to vest ownership of the subject matter of the assignment in the assignee is sufficient to effect an assignment.” *Id.* (quoting *Brandon Apparel Grp. v. Kirkland & Ellis*, 887 N.E.2d 748, 756 (Ill. App. Ct. 2008)). In *Darr v. Structural Systems, Inc.*, the Missouri Court of Appeals also focused on the intent, stating “[a]ny language, however informal or poorly expressed, if it shows the intention of the owner of the property or chose in action to transfer it, clearly and unconditionally, and sufficiently identifies the subject matter will be sufficient to vest the property therein in the assignee.” 747 S.W.2d 690, 693 (Mo. Ct. App. 1988) (quoting *Greater Kan. City Baptist & Cmty. Hosp. Ass’n, Inc. v. Businessmen’s Assurance Co.*, 585 S.W.2d 118, 119 (Mo. Ct. App. 1979)). In *Carlile v. Harbour Homes, Inc.*, the Washington Court of Appeals observed that “[n]o particular words of art are required to create a valid and binding assignment.” 194 P.3d 280, 287 (Wash. Ct. App. 2008). Furthermore, in *Parrot v. DaimlerChrysler Corp.*, the court held that the assignee’s understanding and the assignor’s intent overrode the failure to reference assignment in any way. 108 P.3d at 928. A specific reference to the warranty, however, was clearly sufficient. *Mesa*, 904 So. 2d at 457.

Other cases are a bit less straightforward but somewhat imply the conclusion that no specific language is necessary. See *Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*, 532 So. 2d 710, 711 (Fla. Dist. Ct. App. 1988) (holding that an assignment of “all rights” was sufficient to run a warranty, putting the nonprivity assignee into the shoes of the privity assignor); *Collins Co.*, 532 N.E.2d at 837–40 (holding that a valid assignment runs an express warranty to a nonprivity assignee without noting the necessity of any particular language for the assignment and noting only four substantive exceptions—and not procedural ones—to assignability under the U.C.C.); *U.S. Leasing Corp. v. Comerald Assocs., Inc.*, 421 N.Y.S.2d 1003, 1004 (N.Y. Civ. Ct. 1979) (in which the generic language “all of the rights” was undisputed as transferring warranty rights).

The secondary sources seem to imply the same: there is no particular language necessary to run a warranty to a nonprivity third party. See RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981) (“A contractual right can be assigned” except where the obligor’s duty would be “materially change[d]” or where assignment is forbidden by statute, public policy, or the contract); 6A C.J.S. *Assignments* § 58 (“[N]o particular mode, form, or phraseology is necessary to effect a valid assignment.”); 29 RICHARD A. LORD WILLISTON ON CONTRACTS § 74:32 (4th ed. 2000) (“Even if a promise in a bilateral contract provides for performance of duties involving such personal confidence or skill as to make them incapable of delegation, the rights under the contract may be assigned by the promisor, so long as it performs those duties that cannot be delegated.”).

118. *Ashley Square, Ltd.*, 532 So. 2d at 710.

between plaintiff and defendant.¹¹⁹ Another case held that “the assignee of a warrantee’s rights under an express warranty, if the assignment is otherwise valid, succeeds to all those rights and thus stands in privity with the warrantor.”¹²⁰ The court follows this statement with an analysis of what constitutes a valid assignment under U.C.C. section 2-210, emphasizing that “[t]he UCC, in section 2-210(2), allows only four exceptions to assignability of contract rights.”¹²¹ Further, “[w]hether an assignment of contract rights falls within one of the exceptions of section 2-210(2) is a question to be decided on the facts of a particular case.”¹²² Unfortunately, the court’s certified answer does not indicate the court’s opinion on what sort of warranty assignments would fall into section 2-210’s exceptions.¹²³

The liberal application of contractual assignment law to U.C.C. warranties is the better course here. Allowing assignment of warranties creates major advantages for all parties involved. First, the original seller maintains control of liability. The intermediate seller can only assign to the remote buyer those rights for which he has contracted with the previous seller; therefore, the remote seller can limit his liability through contractual provision, which cannot be expanded by later links in the distributive chain. Through provisions addressing third-party rights, the original contracting parties could set a ceiling for rights against the initial seller that could only be reduced or supplemented by rights against intermediate sellers, and an anti-assignment provision would cut off liability altogether. This allows for the movement of express warranties from the seller to the real party having an interest in that warranty without ever involving the courts. The seller always has the option of disclaiming his warranties; this gives him the option of doing so while allowing the express warranties he does give to make their way to the final buyer without a court’s interference in the contractual relationship.

Our situation with the copier is one of the more common situations in which assignments of warranties are used. Oftentimes, companies will buy a product with the express intention of leasing the product to third parties. Again, as in the case of contractors, the third party is the one in need of the warranty while it is in posses-

119. *Id.* at 711 n.1.

120. *Collins Co.*, 532 N.E.2d at 837.

121. *Id.* at 840 (citations omitted).

122. *Id.*

123. *Id.* at 843.

sion of the product. The courts in both *Parrot v. DaimlerChrysler Corp.* and *Mesa v. BMW of North America, LLC* used references in leasing contracts to the manufacturers' warranties as indications that the contracting parties intended to assign the warranty rights from the lessors to the lessees.¹²⁴ One would hope that when dealing with more sophisticated parties, such as the two businesses in our example, the parties themselves would formulate the contract to assign such warranties explicitly, as a truly dickered term of the agreement. Perhaps this is too much to ask, but, as an ideal situation, the courts are likely to affirm such an agreement if the parties are smart enough to include it.

D. Common Law Third-Party Beneficiary Doctrine

The final "trapeze" that remote purchasers can use to reach remote sellers is the common law third-party beneficiary doctrine. The U.C.C. third-party beneficiary provision specifically indicates in the comments that Alternative A is neutral regarding vertical privity,¹²⁵ and the generally applicable Article 1 indicates that the common law is still pertinent where it is not displaced by the Code.¹²⁶ Because of these factors, many states that have adopted Alternative A allow for the running of U.C.C. warranties to third parties through the use of the state's common law doctrine in addition to its section 2-318 provision.¹²⁷ At least one state has made this allowance explicit in its

124. *Parrot v. DaimlerChrysler Corp.*, 108 P.3d 922, 928 (Ariz. Ct. App. 2005), *vacated on other grounds by*, *Parrot v. DaimlerChrysler Corp.*, 130 P.3d 530 (Ariz. 2006); *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 457 (Fla. Dist. Ct. App. 2005); *see also* *Capitol City Leasing Corp. v. Hill*, 394 So. 2d 1264, 1268 (La. Ct. App. 1981) (holding that lessee "stood in the shoes" of the lessor who had assigned its warranty rights to lessee and could therefore sue on those rights).

125. U.C.C. § 2-318 cmt. 3 (2002).

126. U.C.C. § 1-103(b) (2002). The provision states, in pertinent part, "[u]nless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity . . . supplement its provisions." *Id.* (alteration in original).

127. *See, e.g., In re Masonite Corp.*, 21 F. Supp. 2d 593, 599 (E.D. La. 1998) ("Plaintiff's claims do not fall within the reach of [section 2-318]. However, this statute does not restrict resort to the developing common law principles of beneficiary status. And that is where this analysis must go.") (citations omitted); *Hemphill v. Sayers*, 552 F. Supp. 685, 691 (S.D. Ill. 1982) ("The recognized exceptions to the privity requirement in warranty actions have developed in Illinois according to Official Comment 3, which contemplates that the class of vertical nonprivity plaintiffs may be determined judicially. Those exceptions include: (1) a plaintiff standing in a third-party beneficiary relationship to the seller's sales contract; and (2) a plaintiff who may otherwise sustain a tort action against the seller. Illinois case law reflects that these two departures from the privity requirement were developed as an expansion of the class of vertical nonprivity plaintiffs, as contemplated by Official Comment 3.") (citations omitted); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d

version of section 2-318.¹²⁸ Other courts have used the language in the comment to the express warranty section to do so.¹²⁹ In a recent case, one state extended liability from a remote seller to an end user through an express warranty made to an intermediate purchaser because of broad language in the contract that would encompass any remote purchaser.¹³⁰ Due to this case's novelty both in its home state (where it extended the third-party beneficiary doctrine at the expense of the law of privity) and in its expansive view of common law third-party beneficiary doctrine, we will address it more thoroughly below. But, first, a brief overview of common law third-party beneficiary law is in order.¹³¹

1. A brief overview

Common law third-party beneficiary doctrine is generally based on a single issue: intent.¹³² However, due to a simple, yet profound difference between some common law "intent to benefit" tests and the Restatement (Second) of Contracts, we will divide our coverage of the doctrine into these two major categories so that we may ad-

724, 729-30 (Wash. 1992) (noting that "the Legislature spoke clearly when it defined [section] 2-318 as neutral on vertical privity and left its development to the courts," and thus holding that third-party beneficiary theory ran an implied warranty and an advertising brochure ran an express warranty to Touchet Valley, a nonprivity purchaser).

128. See OKLA. STAT. ANN. tit. 12A, § 2-318(2) (West 2004). The Oklahoma Supreme Court, however, has held that section 2-318 only applies to horizontal privity and that vertical privity is unnecessary to maintain a warranty action in Oklahoma. *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849, 852 (Okla. 1979).

129. See, e.g., *Harris Moran Seed Co. v. Phillips*, 949 So. 2d 916, 922 (Ala. Civ. App. 2006) (citing comment 2 of section 2-313 before applying common law third-party beneficiary theory to run an express warranty to a remote buyer); *Goodman v. PPG Indus., Inc.*, 849 A.2d 1239, 1244-46 (Pa. Super. Ct. 2004) (stating that, according to comment 2, "[section] 2-318 of the Uniform Commercial Code . . . and case law govern the question of who, other than the immediate buyer, may enforce express warranties," and then dismissing the complaint because it did not comport with applicable common law third-party beneficiary theory), *aff'd*, 885 A.2d 982 (Pa. 2005); U.C.C. § 2-313 cmt. 2 (2002).

130. See *Harris Moran Seed Co.*, 949 So. 2d at 920-25. Alabama has adopted Alternative B, but the form of U.C.C. section 2-318 is irrelevant to this discussion so long as the jurisdiction's courts allow for the application of common law third-party beneficiary theory to warranties, in addition to U.C.C. section 2-318.

131. Several states' generally applicable third-party beneficiary doctrines are, in fact, statutes. See 13 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 37:5 (4th ed. 2000) (noting California, Virginia, and West Virginia, in particular). However, because these statutes should operate essentially the same regarding the intentions of the parties (depending on the direction the judicial interpretation took in that state), we do not address them separately here.

132. See generally Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1376-84 (1992); Monserud, *supra* note 6.

dress this difference separately.¹³³ Under the common law intent-to-benefit test, the court focuses on the intent of the contracting parties generally and, sometimes specifically, on what the promisor actually promised to do.¹³⁴ The test is most often stated as a need to establish that the contracting parties intended, at the time of contracting, to directly benefit the third party.¹³⁵ Otherwise, the third party is an “incidental beneficiary” of the contract and has no right to sue on it.¹³⁶ The Restatement (Second) of Contracts, however, has both an introductory intent-to-benefit clause and a second clause, focusing on the intent of the promisee to directly benefit the third party.¹³⁷

133. The majority common law position is to focus on the promisee’s intent, as in the Restatement (Second) of Contracts. See LORD, *supra* note 131, § 37:8; Eisenberg, *supra* note 132, at 1378. However, because the question of whose intent is the main focus of our discussion, we will use the clearer rules of the Second Restatement to set against the promisor focus of other jurisdictions.

134. See *Harris Moran Seed Co.*, 949 So. 2d at 923–25 (focusing primarily on the promisor’s intent to benefit the third party); *Koenig v. S. Haven*, 597 N.W.2d 99, 104 (Mich. 1999) (“[Michigan Composite Laws section 600.1405] states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation ‘directly’ to or for the person.”); *Lonsdale v. Chesterfield*, 662 P.2d 385, 389–90 (Wash. 1983) (“If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person The ‘intent’ which is a prerequisite of the beneficiary’s right to sue is ‘not a desire or purpose to confer a particular benefit upon him,’ nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him.”) (quoting *Vikingstad v. Baggott*, 282 P.2d 824, 825–26 (Wash. 1955)); Harry G. Prince, *Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts*, 25 B.C. L. REV. 919, 926–41 (1984).

135. See *F.W. Hempel & Co. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983) (“The rule is settled in this state that, if a contract be entered into for a direct benefit of a third person not a party thereto, such third party may sue for breach thereof.” (quoting *Carson Pirie Scott & Co. v. Parrett*, 178 N.E. 498, 501 (Ill. 1931)); *Weathers Auto Glass, Inc. v. Alfa Mut. Ins. Co.*, 619 So. 2d 1328, 1329 (Ala. 1993) (holding that a third-party beneficiary in Alabama “must establish that the contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to an incidental, benefit upon the third party.”); *Goodell v. K.T. Enters., Ltd.*, 394 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1981) (holding that *Better Baked* was a third-party beneficiary because “the precontract dealings of the parties, the contract itself, and the subsequent dealings between the parties show that the clear intent and purpose of the contract was to directly and substantially benefit *Better Baked*”); *McMurphy v. State*, 757 A.2d 1043, 1049 (Vt. 2000) (“The determination of whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, is based on the original contracting parties’ intention.”); *Grams v. Milk Prods., Inc.*, No. 03-0801, 2004 WL 1418010, at *2 (Wis. Ct. App. June 17, 2004) (“To be a third-party beneficiary of a contract, the contract must intentionally be entered into for the direct benefit of the third party.” (citing *Mercado v. Mitchell*, 264 N.W.2d 532 (Wis. 1978))); Prince, *supra* note 134, at 933–37.

136. See, e.g., *Carson Pirie Scott & Co.*, 178 N.E. at 501 (“The test is whether the benefit to the third person is direct to him . . . arising from the contract. If direct, he may sue on the contract, if incidental he has no right of recovery thereon.”).

137. See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (“[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appro-

The intended beneficiary “acquires a right by virtue of a promise;”¹³⁸ whereas, an incidental beneficiary—a residual category made up of all unintended beneficiaries—has no rights.¹³⁹ Despite this difference, the following case discussion illustrates a useful tool in either jurisdiction type.

a. *Harris Moran Seed Co. v. Phillips*

In 1998, Harris Moran Seed Company sold tomato seeds designated as “Mountain Fresh” to an independent dealer from North Carolina called Clifton Seed Company.¹⁴⁰ During the 1999 season, the Phillipses, in business as Phillips Tomato Farms, decided to plant Mountain Fresh tomatoes, based not on any direct advertising from Harris Moran but on the results of field trials from Auburn University and good reports from other farmers.¹⁴¹ They informed Haynes Plant Farm of their intention; Haynes ordered Harris Moran’s seeds from Clifton, grew them into seedlings, and sold 96,000 plants to the Phillipses.¹⁴² The first two plantings went as planned. The last four plantings, however, produced undersized, misshapen tomatoes that were entirely unmarketable.¹⁴³ The Phillipses informed Haynes Plant Farm and Harris Moran.¹⁴⁴ The latter sent a representative to the Phillipses’ fields, who then recalled the plants in the fall of 1999.¹⁴⁵ Initial tests had not returned any off-type fruit, but later testing showed that 14% of the seeds were not Mountain Fresh tomatoes because of a defect in the hybridization process.¹⁴⁶ The Phillip-

appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”). However, this refers to the objective circumstances and not the subjective intentions of the contracting parties, allowing for unintended “intended beneficiaries.” See LORD, *supra* note 131, § 37:8.

Subsections (1)(a) and (1)(b) are essentially the creditor and donee categories from the Restatement (First) of Contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmts. b & c. The Restatement (First) of Contracts focused entirely on the intent of the promisee to repay a debt (creating a creditor beneficiary) or to give a gift (creating a donee beneficiary). See RESTATEMENT (FIRST) OF CONTRACTS § 133 (1932); Eisenberg, *supra* note 132, at 1373–74.

138. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. a.

139. See *id.* § 302(2), cmt. a; see also Prince, *supra* note 134, at 980–90.

140. Harris Moran Seed Co. v. Phillips, 949 So. 2d 916, 918 (Ala. Civ. App. 2006).

141. *Id.*

142. *Id.* at 919.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

ses sued all parties involved, but, ultimately, the only defendant that went to trial was Harris Moran Seed Company.¹⁴⁷ The trial court granted Harris Moran's motion for judgment as a matter of law for all claims except for the breach of express warranty claim on the contract between Harris Moran and Clifton Seed Company—to which the Phillippses argued they were third-party beneficiaries.¹⁴⁸ After trial, the jury returned a verdict for the farmers in the amount of \$55,000. Harris Moran appealed.¹⁴⁹

The appeals court first determined that the affirmation that the seeds were "Mountain Fresh tomatoes" was, in fact, an express warranty and noted that it was undisputed that Harris Moran had breached that express warranty to Clifton Seed Company.¹⁵⁰ The issue on appeal was whether the Phillippses could recover on that breach as third-party beneficiaries of the contract.¹⁵¹ The court's analysis began by noting that the Phillippses were not in vertical privity with Harris Moran.¹⁵² The court then undercut the traditional power of that statement in the next sentence, stating, "[i]n an appropriate case, . . . straightforward traditional third party beneficiary analysis can be successfully used to impose liability on a warrantor not in privity with a purchaser."¹⁵³ The court continued to lessen the impact of the lack of vertical privity by including quotations from several commentators and the Alabama comment to section 2-313, stating that "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."¹⁵⁴ After thoroughly undercutting the traditional privity barrier with commentary, the court made an interesting move: it shifted suddenly in its analysis to observe that economic loss cannot be recovered on an implied warranty theory.¹⁵⁵ Although seemingly out of place at first,

147. *Id.* at 918. One defendant was never served, and Haynes Plant Farm and its owner were dismissed pursuant to the contractual provision between the plant farm and the Phillippses limiting the time for bringing suit. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 921.

151. *Id.* at 921-22.

152. *Id.* at 922.

153. *Id.* (internal quotation marks omitted) (quoting LORD, *supra* note 131, § 37:39, at 259-60).

154. *Id.* (quoting ALA. CODE § 7-2-313 (1975)).

155. It is interesting to note that not one of the six cases the court cited for this proposition addresses a third-party beneficiary theory and whether it could be used to put a remote pur-

with the connection between economic loss and warranty theory now established, the court brought it quickly back around by noting that privity rules are less restrictive when it comes to express warranties.¹⁵⁶

Now that the reader had been softened up to the idea that third-party beneficiary theory can run express warranties to nonprivity purchasers, the court began to build a framework out of Alabama law to support the conclusion. Because Alabama courts had not addressed the question specifically,¹⁵⁷ the court looked to any indication from the Alabama Supreme Court as to how it would address the problem. As luck would have it, the high court had recently addressed a similar situation in *Bay Lines, Inc. v. Stoughton Trailers, Inc.*¹⁵⁸

In *Bay Lines*, a manufacturer of panels for truck trailers warranted to a trailer manufacturer that the panels would not “delaminate” for ten years, expressly limiting that warranty to “the original equip-

chaser into privity regarding an implied warranty. Only one case, *Rampey v. Novartis Consumer Health, Inc.*, mentions third-party beneficiary theory, and the court in that case explicitly avoids the question because it was raised for the first time on appeal. See 867 So. 2d 1079, 1092 (Ala. 2003). Nothing in *Harris Moran Seed Co.* precludes such an extension.

156. *Harris Moran Seed Co.*, 949 So. 2d at 922 (quoting Monserud, *supra* note 6, at 137). Hawkland’s statement is accompanied by a *Randy Knitwear*-like example, which would not apply in this situation, and the majority of citations are to similar situations. See, e.g., *Fundin v. Chicago Pneumatic Tool Co.*, 199 Cal. Rptr. 789, 793–94 (Cal. Ct. App. 1984) (holding that express warranty counts could be sustained on direct representation grounds, but that implied warranty counts failed for lack of contractual privity); *Mitchell v. VLI Corp.*, 786 F. Supp. 966, 970 (M.D. Fla. 1992) (noting that implied warranty without privity has been replaced by strict liability but the existence of an express warranty is still a question for the jury); *Szajna v. Gen. Motors Corp.*, 474 N.E.2d 397, 401 (Ill. App. Ct. 1985) (finding a valid warranty between nonprivity parties under the definition of express warranty but not for implied warranties, which still requires privity of contract), *rev’d in part*, *Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760, 770 (Ill. 1986) (holding that the Magnuson-Moss Act extended the “privity” created by the express warranty to the implied warranty).

Only one of the cited cases falls entirely outside of the *Randy Knitwear* mold. See *Dravo Equip. Co. v. German*, 698 P.2d 63, 65–66 (Or. Ct. App. 1985) (holding that, while implied warranties required privity in purely economic loss cases, express warranties did not because they are fashioned to the warrantor’s liking and therefore should extend to the defendants unless limited by the warrantor).

It appears that Hawkland’s statement, while true, is overly generic and allows the Alabama court in *Harris Moran* to extend that statement to facts beyond the law on which that statement was originally based. However, there is even more of a reason to extend the express warranty in *Harris Moran* than in the cited *Dravo* case because, in *Harris Moran*, not only has the warrantor not expressed an intent to limit the warranty, but also it has expressed, according to the court, an unambiguous intent to extend it to the ultimate consumer.

157. *Harris Moran Seed Co.*, 949 So. 2d at 923.

158. 838 So. 2d 1013 (Ala. 2002).

ment purchaser.¹⁵⁹ Bay Lines, buyer of several of the trailers made from the panels, brought suit for, *inter alia*, breach of express warranty, after the panels delaminated.¹⁶⁰ The Supreme Court of Alabama held, based on the express language in the contract, that Bay Lines, not being the original equipment purchaser, could not assert a claim under the warranty.¹⁶¹ The court continued, stating:

Moreover, “[a] party claiming to be a third-party beneficiary of a contract must establish that the contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to an incidental, benefit upon the third party.” Bay Lines presented no evidence indicating that Crane knew, when it sold the panels to Stoughton, that Bay Lines was a purchaser of Stoughton’s products, or that Crane intended to protect future customers of Stoughton, such as Bay Lines, when it warranted its products to Stoughton. Bay Lines, therefore, cannot rely on the warranty to support its claim against Crane.¹⁶²

The court in *Harris Moran Seed Co.* focused on the emphasized language, presumably reasoning that if the dispositive language for the plaintiff in *Bay Lines* was met by the circumstances in the instant case, the Phillipses would then qualify as intended, third-party beneficiaries.¹⁶³ The remainder of the court’s third-party beneficiary analysis is comprised of evidentiary support for the proposition that Harris Moran (HMSC) did indeed intend to protect future customers of Clifton, such as the Phillipses, when it warranted its seeds to Clifton.

The court begins with its weakest point—foreseeability¹⁶⁴—but, instead of using it as a persuasive factor, the court uses it to indicate the contracting parties’ knowledge that would have gone into their contracting.¹⁶⁵ It is of course foreseeable that end users would be harmed by a defective product, and the court admits that knowledge of that fact alone does not confer third-party beneficiary status; however, it *is* a factor in determining whether the contracting

159. *Id.* at 1015–17.

160. *Id.* at 1014–15.

161. *Id.* at 1018.

162. *Id.* at 1018–19 (alteration in original) (emphasis added) (citation omitted).

163. See *Harris Moran Seed Co. v. Phillips*, 949 So. 2d 916, 923–25 (Ala. Civ. App. 2006) (basing the remainder of its analysis on this proposition although never explicitly stating it).

164. *Id.* at 923.

165. *Id.*

parties intended to benefit the end user with their agreement.¹⁶⁶ And the agreement in this case was replete with references to “end user,” “customer,” and “buyer or user.”¹⁶⁷ The court sets out several such instances, including the limitation of liability provisions and the merger clause.¹⁶⁸ Another section of the contract requires “Clifton Seed Company to ‘resell the Product in compliance with all applicable labeling laws’ and to ‘give . . . buyers and other transferees explicit and specific notice, prior to the sale or transfer, of the HMSC Limitation of Warranty and Liability.’”¹⁶⁹ The court found that not only had the parties had end users in mind, but also had contractually required that they be notified of the “exclusive express warranty” in question.¹⁷⁰ The requirement to resell in compliance with labeling laws becomes important in the subsequent section. There, the court notes “[a] further manifestation of HMSC’s intent to protect and benefit the end users of its products”; namely, the references in the warranty to the Federal Seed Act.¹⁷¹ That Act, the court finds, is meant to protect the end user from purchasing the wrong seed.¹⁷² Presumably, the requirement that Clifton follow that statute indicates a further intention to protect third-party end users. Based on this “substantial evidence,” the court concluded that Harris Moran did in fact intend to protect future buyers, holding that the trial court did not err in submitting the breach of warranty claim to the jury.¹⁷³

166. *Id.*

167. *Id.* at 923–24.

168. *Id.* at 924.

169. *Id.*

170. *Id.* (citation omitted). The court never addresses whether the plaintiffs had actual knowledge of the warranty, nor does it address whether that would have made a difference. It is likely that the court never considered the question because the language of the third-party beneficiary case law in Alabama only speaks to the knowledge and intentions of the contracting parties. See discussion *infra* Part II.D.1.b.ii. Also, the U.C.C. provisions on express warranties presume reliance unless proven otherwise. See discussion *supra* Part II.B.2. Therefore, it is likely that an express warranty can run to a third party who is entirely ignorant of that warranty until litigation.

171. *Harris Moran Seed Co.*, 949 So. 2d at 925.

172. *Id.*

173. *Id.* In the end, however, it was a Pyrrhic victory. By making themselves third-party beneficiaries of the contract, not only were the Phillipses allowed the privilege under the contract to bring suit for breach of express warranty, but they were also required to submit to the provisions of the contract limiting the express warranty. *Id.* at 930–31. In those provisions, the parties agreed to prohibit incidental and consequential damages. *Id.* at 925–26. The court affirmed the verdict, but the judgment awarding damages was reversed and remanded with instructions to enter an award of damages consistent with the liability limitations. *Id.* at 933.

b. Necessary elements for *Harris Moran* to be persuasive

Harris Moran Seed Company v. Phillips, as mentioned earlier, is interesting in two ways: it does not require that the third party be known to the contracting parties, only that it be intentionally benefited; and it does not require the third party to have knowledge of the express warranty upon contracting. We first address the important factual elements of the case before diving more extensively into the legal environment necessary for the case to be most persuasive.

i. *Factual elements*

The most obviously necessary factual elements are the ones that are most basic to the claim itself. There must be an express warranty made by one contracting party to the other that has now been breached by the warranting party.¹⁷⁴ The breach of warranty must cause consequential, economic-loss damages to a third party, who did not contract with the warranting party regarding those goods.¹⁷⁵ Possibly under *Harris Moran*, the third party could recover without ever having knowledge of the express warranty until litigation.¹⁷⁶

When it comes to the nature of the contract itself, the factual necessities are a bit less obvious. The court in *Harris Moran* determined that the Phillipses were an intended third party based most strongly on the fact that the contract referred extensively to categories encompassing the Phillipses.¹⁷⁷ These references to the third party seem to be the only *necessity* among the evidentiary support provided by the court.¹⁷⁸ The secondary manifestations of intent that the court notes – foreseeability and the Federal Seed Act – appear to be neither necessary nor entirely sufficient alone, but the existence, and especially incorporation, of a statute that not only makes further reference to, but is also expressly intended to protect, the third party in question would seem to provide strong support.¹⁷⁹ Lastly, it does

174. *Id.* at 923.

175. *Id.* at 924–25.

176. See discussion *supra* note 170.

177. *Harris Moran Seed Co.*, 949 So. 2d at 924–25.

178. *Id.*

179. Cf. *Mercado v. Mitchell*, 264 N.W.2d 532, 538 (Wis. 1978) (reading a city ordinance – the primary purpose of which is the assurance of a meaningful remedy for injured persons – into a liability-policy insurance contract and holding that the parties protected by the ordinance were third-party beneficiaries).

not appear to uniquely affect the holding that the case involved farmers or agricultural products.¹⁸⁰

ii. Legal elements

For the *Harris Moran* court's reasoning to be persuasive, the jurisdiction must require privity, but not be so bound by the precepts of classical contract theory to prohibit recovery of economic loss from a remote manufacturer as a third-party beneficiary. The Alabama third-party beneficiary doctrine does comport for the most part with general third-party theories.¹⁸¹ The courts generally state the test:

180. *But cf.* *Loeb & Co. v. Schreiner*, 321 So. 2d 199, 201-02 (Ala. 1975) (holding that the U.C.C. definition of "merchant" does not generally encompass farmers).

181. *See* *F.W. Hempel & Co. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983) (quoting "the seminal and still vital Illinois authority as to third[-]party beneficiaries," *Carson Pirie Scott & Co. v. Parrett*, 178 N.E. 498, 501 (Ill. 1931) ("The rule is settled in this state that, if a contract be entered into for a direct benefit of a third person not a party thereto, such third party may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, he may sue on the contract; if incidental he has no right of recovery thereon.")); *Sazerac Co. v. Falk*, 861 F. Supp. 253, 257 (S.D.N.Y. 1994) ("New York law follows the Restatement (Second) of Contracts § 302 (1979) in allowing a third party to enforce a contract if that third party is an intended beneficiary of the contract."); *Goodell v. K.T. Enters., Ltd.*, 394 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1981) (holding that *Better Baked* was a third-party beneficiary because "the precontract dealings of the parties, the contract itself, and the subsequent dealings between the parties show that the clear intent and purpose of the contract was to directly and substantially benefit *Better Baked*"); *Koenig v. City of S. Haven*, 597 N.W.2d 99, 104 (Mich. 1999) ("[Michigan Composite Laws section 600.1405] states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation 'directly' to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract."); *Anderson v. Olmsted Util. Equip., Inc.*, 573 N.E.2d 626, 631 n.5 (Ohio 1991) ("Section 302 of the Restatement and the 'intent to benefit' test require, in general terms, that in order for a third-party beneficiary to have enforceable rights under a contract, circumstances surrounding the promise between the promisor and promisee must indicate that the promisee intended to benefit the third party, and the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary."); *McMurphy v. Vermont*, 757 A.2d 1043, 1049 (Vt. 2000) ("The determination of whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, is based on the original contracting parties' intention."); *Lonsdale v. Chesterfield*, 662 P.2d 385, 389-90 (Wash. 1983) ("If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person The 'intent' which is a prerequisite of the beneficiary's right to sue is 'not a desire or purpose to confer a particular benefit upon him,' nor a desire to advance his interests, but an *intent that the promisor shall assume a direct obligation to him.*") (quoting *Vikingstad v. Baggott*, 282 P.2d 824, 825-26 (Wash. 1955)); *Grams v. Milk Prods., Inc.*, No. 03-0801, 2004 WL 1418010, at *2 (Wis. Ct. App. June 17, 2004) ("To be a third-party beneficiary of a contract, the contract must intentionally be entered into for the direct benefit of the third party." (citing *Mercado v. Mitchell*, 264 N.W.2d 532 (Wis. 1978))); RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

To recover under a third-party beneficiary theory, the complainant must show: (1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; (2) that the complainant was the intended beneficiary of the contract; and (3) that the contract was breached.¹⁸²

Stated another way, the third-party beneficiary “must establish that the contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to an incidental, benefit upon the third party.”¹⁸³ It appears from the law and the *Harris Moran* court’s application that only the contracting parties are important, and it is irrelevant whether the third party, in fact, knew of the warranty itself. Under the *Harris Moran* analysis, the court focuses on the contractual requirements to inform remote buyers of the warranty only as an indication of the initial seller’s intent to benefit third parties, not as an indication of reliance.¹⁸⁴ Some states, however, in order to retain the purely contractual nature of the express warranty and to allow warrantors to maintain control of their own liability, require that the third party know the details of the express warranty in question.¹⁸⁵ These states, however, do not appear to be in the majority; and, in those states (such as Alabama) only requiring intent by the contracting parties, the *Harris Moran* reasoning can be quite persuasive as we will demonstrate.

2. Possible future application

Imagine for a moment that our story in the Introduction took place in Florida or Wisconsin. Florida and Wisconsin courts still re-

182. *Sheetz, Aiken & Aiken, Inc. v. Spann, Hall, Ritchie, Inc.*, 512 So. 2d 99, 101-02 (Ala. 1987).

183. *Weathers Auto Glass, Inc. v. Alfa Mut. Ins. Co.*, 619 So. 2d 1328, 1329 (Ala. 1993).

184. *See Harris Moran Seed Co. v. Phillips*, 949 So. 2d 916, 924 (Ala. Civ. App. 2006) (discussing only intent and citing only to cases regarding whether contracts anticipated third parties, both immediately after quoting the contractual notification provision).

185. *Goodman v. PPG Indus., Inc.*, 849 A.2d 1239, 1246 (Pa. Super. Ct. 2004) (“Thus, in order to preserve the unique character of express warranties, we hold that third parties may enforce express warranties only under circumstances where an objective fact-finder could reasonably conclude that: (1) the party issuing the warranty intends to extend the specific terms of the warranty to the third party (either directly, or through an intermediary); and (2) the third party is aware of the specific terms of the warranty, and the identity of the party issuing the warranty.”). Interestingly enough, Pennsylvania has completely abolished the privity requirement when extending all types of warranties to remote buyers in the distributive chain; however, because of the policy reasons expressed above, the court imposed this particular limitation upon express warranties.

quire parties to be in privity of contract to bring suits on express warranties,¹⁸⁶ but, in both states, privity can be “finessed by a proxy.”¹⁸⁷ The common law third-party beneficiary laws in both states are also substantially similar to Alabama law; these laws require that, at the time of contracting, the parties to the contract intend to bestow a direct benefit on a third party.¹⁸⁸ From there, the court would simply need to search the evidence to determine whether there was intent to benefit directly. In *Harris Moran*, the court mentioned foreseeability but, as noted earlier, probably not as much for its individual persuasiveness as for its indication of knowledge of the third party by the contracting parties.¹⁸⁹ In most common commercial transactions in modern economies, it will be

186. *St. Paul Mercury Ins. Co. v. Viking Corp.*, 539 F.3d 623, 626 (7th Cir. 2008); *T.W.M. v. Am. Med. Sys., Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995).

The federal courts in these cases based their holdings on state cases that relied exclusively on the authority of prior law without further argument for retaining privity. *See T.W.M.*, 886 F. Supp. at 844; *St. Paul Mercury Ins. Co.*, 539 F.3d at 626. Following these lines of case law back, the only arguments in favor of applying the privity doctrine are generally that the rules of contract apply and therefore no suit can be brought without privity. *See Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 582 F. Supp. 208, 215 (E.D. Wis. 1984) (citing *Barlow v. DeVilbiss Co.*, 214 F. Supp. 540, 543 (E.D. Wis. 1963) (citing *Cohan v. Associated Fur Farms*, 53 N.W.2d 788, 791 (Wis. 1952) (citing *Prinsen v. Russos*, 215 N.W. 905, 906 (Wis. 1927) (citing *Peterson v. Gales*, 210 N.W. 407, 409 (Wis. 1926) (citing similar precedent from other jurisdictions)); *Elizabeth N. v. Riverside Grp., Inc.*, 585 So. 2d 376, 378 (Fla. Dist. Ct. App. 1991) (citing *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So. 2d 689, 692 n.3 (Fla. Dist. Ct. App. 1979)).

Granted, there is some argument in *Navajo Circle* that privity of contract is still useful in implied warranty cases because products liability tort actions are better suited to such cases where privity is unavailable. 373 So. 2d at 692 (citing *Strathmore Riverside Villas Condo. Ass’n, Inc. v. Paver Dev. Corp.*, 369 So. 2d 971, 973 (Fla. Dist. Ct. App. 1979) (referring specifically to warranties regarding real estate and noting the possibility of “unforeseen ramifications” should the change be made judicially rather than legislatively)).

187. *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 599 (E.D. La. 1998) (applying Florida law); *accord Abramowski v. Wm. Kilps Sons Realty, Inc.*, 259 N.W.2d 306, 308 n.3 (Wis. 1977) (noting that a contract cannot be enforced by a person not a party to it unless the contract was made for the third party’s benefit); *Grams v. Milk Prods., Inc.*, No. 03-0801, 2004 WL 1418010, at *2-4 (Wis. Ct. App. June 17, 2004) (applying third-party beneficiary doctrine to an implied warranty).

The *Masonite* court cites to another Florida case to support limitation of third-party beneficiary theory. *See In re Masonite*, 21 F. Supp. 2d at 599 (citing *Fla. Bldg. Inspection Servs., Inc. v. Arnold Corp.*, 660 So. 2d 730, 731 (Fla. Dist. Ct. App. 1995)). That case does indicate a general policy toward the limitation of third-party beneficiary theory, but it also deals specifically with tort and not abrogating the economic loss rule. *Fla. Bldg. Inspection Servs., Inc.*, 660 So. 2d at 731. Although third-party beneficiary in contract would probably be limited in its expansion as well, third-party recovery in contract for economic loss has been previously allowed in Florida. *Goodell v. K.T. Enters., Ltd.*, 394 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1981).

188. *See cases cited supra* note 181 and accompanying text.

189. *See discussion supra* Part II.D.1.a. Florida law has also been held to state that foreseeability does not confer third-party beneficiary status. *In re Masonite*, 21 F. Supp. 2d at 600. However, this would not prohibit a court from using it as a factor under the *Harris Moran* analysis.

obvious, if not inevitable, that the manufacturer's direct buyer will not be the end user of the product so we can often assume that the warrantor knew, or at least should have known, of the third parties that would benefit from the express warranties that he made.

More importantly, however, in any contractual interpretation, is what the contract itself says. The *Harris Moran* court put particular focus on the instances in the contract in which the contracting parties explicitly referenced end users, customers, and buyers generally, as well as the contract's reference to the Federal Seed Act, which was designed to protect those same buyers. Such an indication in the contract of not only the contracting parties' knowledge of the third parties, but also their intent to control the third parties' rights under the contract *in a very specific way*, assumes that the third parties will have rights under the contract. Furthermore, the term "end user" — and the term "customer" to a lesser extent — necessarily indicates one who will be directly benefitted by the contract. This indication becomes all the more inherent to the term when referring to warranty provisions that will only be effective if applicable to the third-party end user.

In our case, the contract itself references the third-party end users, limiting their warranty rights to the express limited warranty. Such language indicates to some degree that Defendant knew of the inevitability of Plaintiff and intended him to be benefitted by the warranty provision.¹⁹⁰ The particular language, its context, and the number of references will all bear upon the court's determination of the contracting parties' intent, but it should be irrelevant that the particular third party is unknown at the time of contracting¹⁹¹ and that the unknown third party is also unaware of the warranty.¹⁹² Also important is the contractual reference to statutes, particularly

190. See *supra* pp. 51-52.

191. This is particularly true in Wisconsin where courts have allowed class beneficiaries in other contexts. See *Mercado v. Mitchell*, 264 N.W.2d 532, 538 (Wis. 1978); cf. *Altevogt v. Brinkoetter*, 421 N.E.2d 182, 186-88 (Ill. 1981) (noting that, while a third-party beneficiary could fall into a class of intended beneficiaries of the contract, such was not the case in a homeowners' suit on breach of implied warranty of habitability and breach of the warranty to build the house in "a reasonably workmanlike manner"). But cf. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 730-31 (Wash. 1992) (stating third-party beneficiary theory regarding an implied warranty of merchantability as requiring the manufacturer to know the third-party's "identity, its purpose, and its requirements").

192. But cf. *Touchet Valley Grain Growers, Inc.*, 831 P.2d at 731 (using the broad language that "[r]ecovery for breach of an express warranty is contingent on a plaintiff's knowledge of the representation," but in the context of a *Randy Knitwear* running of U.C.C. warranties through direct advertising that could limit it to those facts (citing *Baughn v. Honda Motor Co.*, 727 P.2d 655, 669 (Wash. 1986)) (a *Randy Knitwear*-style case)).

statutes enacted with the intent to protect a class of people, which includes the plaintiff.¹⁹³ As there are not likely to be statutes specific enough to the sale of copiers to be referenced in a contract, this aspect of *Harris Moran* will be unlikely to assist our Plaintiff. But, as noted earlier, with sufficient language in the contract, lack of a reference to outside statutory language should not harm him by creating an insufficient claim to third-party beneficiary status.

In states that have adopted the Second Restatement's conception of third-party beneficiary theory, one quirk of the law must be addressed. Imagine that our Plaintiff lives not in Florida or Wisconsin, but instead in New York. New York law still requires privity for express warranties,¹⁹⁴ and New York most likely allows for common law third-party beneficiary doctrine to run U.C.C. warranties.¹⁹⁵

193. Again, Wisconsin courts could be particularly susceptible to this reasoning as one of their own has already used similar reasoning in another context. See *Mercado*, 264 N.W.2d at 538.

194. *Carcone v. Gordon Heating & Air Conditioning Co.*, 623 N.Y.S.2d 679, 680 (N.Y. App. Div. 1995) (taking it as a given that the well-settled doctrine of privity applied where not superseded by statute).

The New York Court of Appeals has stated that "a cause of action for breach of warranty is a contractual remedy—a remedy which seeks to provide the parties with the benefit of their bargain. It is, in essence, a remedy designed to enforce the agreement, express or implied, of the parties and to place them, should one of the parties fail to perform in accordance with the agreement, in the same position they would have been had the agreement been performed." *Martin v. Julius Dierck Equip. Co.*, 374 N.E.2d 97, 99–100 (N.Y. 1978), *superseded by statute*, N.Y. U.C.C. LAW § 2-318 (McKinney), *as recognized in* *Brown v. Neff*, 603 N.Y.S.2d 707, 709 (N.Y. Sup. Ct. 1993) (noting that, because of New York's version of U.C.C. section 2-318, *Martin* no longer applied to personal injury cases). Therefore, a plaintiff not in privity does not have a breach of warranty claim, but instead can only have a negligence or strict liability claim. *Id.*; *cf. Brown*, 603 N.Y.S.2d at 709 (noting no breach of warranty cause of action for personal injury). The court points out that this does not "raise again the 'citadel of privity,'" but instead removes the distortions from pre-strict products liability attempts to place liability on those putting defective products into the stream of commerce. *Martin*, 374 N.E.2d at 100.

195. There is a question as to whether warranties can be run at all in New York on a third-party beneficiary theory due to a line of cases based on *Gimenez v. Great Atlantic & Pacific Tea Co.*, 191 N.E. 27, 29 (N.Y. 1934), which stated that courts had never recognized warranties for the benefit of third persons. New York courts also use *Gimenez* for the proposition that third-party beneficiary theory is not available on a warranty claim. See *Parish v. Great Atl. & Pac. Tea Co.*, 177 N.Y.S.2d 7, 28 (N.Y. Mun. Ct. 1958) ("[T]he courts have continually refused to employ the [third-party beneficiary] rule as a means of circumventing the strict privity doctrine . . ."). In 1958, the court in *Parish* cited *Gimenez* as the "biggest roadblock to the actual use in New York of the third party beneficiary rule (by its name) in breach of warranty cases." *Id.* But see *Conklin v. Hotel Waldorf Astoria Corp.*, 161 N.Y.S.2d 205 (N.Y. Mun. Ct. 1957) (stating in dictum that the third-party beneficiary doctrine could probably be used in a warranty of fitness for consumption case). All of these cases, however, are pre-U.C.C., which has made a huge difference in this area of the law. With the legislative mandate for third-party beneficiary theory in sections 2-318 and 2A-216 of the U.C.C. and the judicial expansion of remote seller liability in New York under *Randy Knitwear*, the courts seemed to have relented. See *Uniflex, Inc. v. Olivetti Corp. of Am.*, 445 N.Y.S.2d 993, 995 (N.Y. App. Div. 1982) (extending a

Even when it comes to the law of third-party beneficiaries itself, the focus is still on intent.¹⁹⁶ The interesting difference regarding third-party beneficiary theory in Restatement jurisdictions is whose intent is important.

Unlike third-party beneficiary law in Alabama that focuses more heavily on the intent of the promisor, New York follows the Second Restatement's approach and focuses on the intent of the promisee.¹⁹⁷ This strong focus on the intent of the promisee forces the court to take a slightly different analytical direction than that of the *Harris Moran* court, but the reasoning in that case is still useful. *Harris Moran* stands for the proposition that contracting parties can enter into a contract with the intent of benefiting a third party with a warranty, utilizing language that encompasses the entire class of end users, even if the third party was unaware of the benefit at the time of contracting. This applies regardless of which contracting party we focus on in looking for direct intent.

CONCLUSION

In the end, although many states hold on to the privity requirement in economic loss claims on contractual warranties, they still have not entirely avoided the general trend toward the liberalization of privity rules. Would-be plaintiffs who find themselves labeled as remote buyers have several springboards to hurdle the gap between themselves and that far platform upon which the remote seller stands. Straightforward use of the state's U.C.C. third-party provision is perhaps the easiest method, but, of course, it is only available to one who can apply an advantageous state law. The running of warranties through direct advertisement is another widely useful method, especially in modern economies, where most sellers advertise their products to any and all potential buyers, and courts have tended to hold that those sellers should not get the benefit of making unenforceable warranties. Lastly, one should never forget the

seller's liability to a nonprivity lessee because of language in the contract evidencing the purchaser's intent to benefit the lessee and the seller's agreement to that benefit).

196. See *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991) ("New York law follows the Restatement (Second) of Contracts § 302 (1979) in allowing a third party to enforce a contract if that third party is an intended beneficiary of the contract."); RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

197. *Sazerac Co. v. Falk*, 861 F. Supp. 253, 258 (S.D.N.Y. 1994) ("[I]t is not the intention of the promisor which governs whether an intended third-party beneficiary has enforceable rights under a contract. Rather, it is the expressed intent of the promisee which determines whether the beneficiary is entitled to the benefits of the agreement.").

supplemental applicability of the common law of contract. The simple contract doctrines of assignability and third-party beneficiary rights both provide excellent options. Assignability, in particular, is especially useful because it is likely available in any jurisdiction in which a buyer may find himself. If a buyer has any sort of bargaining power, this option should not be overlooked. Common law third-party beneficiary theory, although not as widely useful, can still effectively run warranties and is perhaps still expanding its scope as the power of privity wanes.

APPENDIX

This appendix provides citations to each state's version of U.C.C. section 2-318, or its closest approximation, as well as any other pertinent statutes. The citations are organized alphabetically by state within groupings corresponding to each of the broader forms discussed in this Article. It should be noted that not all of the uniform versions are, in fact, perfectly uniform, but, even so, only the statutes that were *substantively* non-uniform are provided in full.

ALTERNATIVE A

Alaska

ALASKA STAT. § 45.02.318 (2012).

Arizona

ARIZ. REV. STAT. ANN. § 47-2318 (2012).

Connecticut

CONN. GEN. STAT. ANN. § 42a-2-318 (West 2012).

Florida

FLA. STAT. ANN. § 672.318 (West 2012).

Georgia

GA. CODE ANN. § 11-2-318 (2012).

Idaho

IDAHO CODE ANN. § 28-2-318 (2012).

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Illinois

810 ILL. COMP. STAT. ANN. 5/2-318 (West 2012).

Indiana

IND. CODE ANN. § 26-1-2-318 (West 2012).

Kentucky

KY. REV. STAT. ANN. § 355.2-318 (LexisNexis 2012).

Maryland

MD. CODE ANN., COM. LAW § 2-318 (LexisNexis 2012).

Michigan

MICH. COMP. LAWS ANN. § 440.2318 (West 2012).

Mississippi

MISS. CODE ANN. § 75-2-318 (2011).

Missouri

MO. ANN. STAT. § 400.2-318 (West 2012).

Montana

MONT. CODE ANN. § 30-2-318 (West 2011).

Nebraska

NEB. REV. STAT. U.C.C. § 2-318 (West 2012).

Nevada

NEV. REV. STAT. ANN. § 104.2318 (2011).

New Jersey

N.J. STAT. ANN. § 12A:2-318 (2012).

New Mexico

N.M. STAT. ANN. § 55-2-318 (2012).

North Carolina

N.C. GEN. STAT. ANN. § 25-2-318 (2012).

Ohio

OHIO REV. CODE ANN. § 1302.31 (2011).

Oklahoma

OKLA. STAT. ANN. tit. 12A, § 2-318(1) (West 2012).

Oregon

OR. REV. STAT. § 72.3180 (2012).

Pennsylvania

13 PA. CONS. STAT. ANN. § 2318 (West 2012).

Tennessee

TENN. CODE ANN. § 47-2-318 (2012).

Washington

WASH. REV. CODE ANN. § 62A.2-318 (West 2012).

West Virginia

W. VA. CODE ANN. § 46-2-318 (LexisNexis 2012).

Wisconsin

WIS. STAT. ANN. § 402.318 (West 2012).

ALTERNATIVE B

Alabama

ALA. CODE § 7-2-318 (2012).

Delaware

DEL. CODE ANN. tit. 6, § 2-318 (2012).

Kansas

KAN. STAT. ANN. § 84-2-318 (2012).

New York

N.Y. U.C.C. LAW § 2-318 (McKinney 2012).

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South Carolina

S.C. CODE ANN. § 36-2-318 (2011).

Vermont

VT. STAT. ANN. tit. 9A, § 2-318 (2012).

ALTERNATIVE C**Hawaii**

HAW. REV. STAT. ANN. § 490:2-318 (LexisNexis 2012).

Iowa

IOWA CODE § 554.2318 (2012).

Minnesota

MINN. STAT. ANN. § 336.2-318 (West 2012).

North Dakota

N.D. CENT. CODE § 41-02-35 (2012).

Utah

UTAH CODE ANN. § 70A-2-318 (West 2012).

MODIFIED ALTERNATIVE B**Colorado**

COLO. REV. STAT. ANN. § 4-2-318 (West 2012).

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Rhode Island

R.I. GEN. LAWS § 6A-2-318 (2012).

A seller's or a manufacturer's or a packer's warranty, whether express or implied, including but not limited to a warranty of merchantability provided for in § 6A-2-314, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller or a

manufacturer or a packer may not exclude or limit the operation of this section.

South Dakota

S.D. CODIFIED LAWS § 57A-2-318 (2012).

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Wyoming

WYO. STAT. ANN. § 34.1-2-318 (2012).

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

NON-UNIFORM VERSIONS

Arkansas

ARK. CODE ANN. § 4-86-101 (West 2012).

The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.

ARK. CODE ANN. § 4-2-318 (West 2012) (Alternative A).

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

California

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CAL. CIV. CODE § 1559 (West 2012).

A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

Maine

ME. REV. STAT. ANN. tit. 11, § 2-318 (2011).

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods for breach of warranty, express or implied, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods.

Massachusetts

MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 2012).

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

New Hampshire

N.H. REV. STAT. ANN. § 382-A:2-318 (2012).

Lack of privity shall not be a defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, even though the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods. A manufacturer, seller, or supplier may not exclude or limit the operation of this section.

Texas

TEX. BUS. & COM. CODE ANN. § 2.318 (West 2011).

This chapter does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.

Virginia

VA. CODE ANN. § 8.2-318 (2012).

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June 29, 1962.