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The Uniform Commercial Code Provides an Alternative Remedy to Strict Liability in Tort Regarding Injuries Suffered from a Defective Product without Requiring Privity.

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PRODUCTS LIABILITY—Warranties—The Uniform Commercial Code Provides an Alternative Remedy to Strict Liability in Tort Regarding Injuries Suffered From a Defective Product Without Requiring Privity.

Garcia v. Texas Instruments, Inc.,
610 S.W.2d 456 (Tex. 1980).

Richard Garcia, an employee of Mostek Corporation, was injured while moving cartons of sulfuric acid purchased by his employer from Texas Instruments.[1] While transporting a carton containing four one gallon glass containers of acid, Garcia tripped and fell, suffering severe acid burns.[2] Almost four years later Garcia brought suit for damages, alleging that an implied warranty of merchantability arose from the sale of the acid by defendent, Texas Instruments, to Mostek.[3] Garcia alleged he was a third party beneficiary of the implied warranty.[4] Defendent, Texas Instruments, filed a general denial and motion for summary judgment alleging that plaintiff's cause of action was barred by the general two year statute of limitations under article 5526, of the Texas Revised Civil Statutes,[5] and that no implied warranty ran to plaintiff as he was not a party to the sales contract, between Texas Instruments and Mostek.[6] The trial court granted defendant's motion for summary judgment. The Tyler Court of Civil Appeals affirmed the judgment of the trial court.[7] Garcia appealed to the Texas Supreme Court.[8] Held—*Reversed and remanded.* The Uniform Commercial Code provides an alternative remedy to strict liability in tort regarding personal injuries suffered from a defective product without requiring privity.[9]

An action for damages caused by a defective product can be brought on any of three alternative theories:[10] breach of implied warranty, strict lia-

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1. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 457 (Tex. 1980).

2. *Id.* at 457.

3. *Id.* at 457. The plaintiff further contended the acid should have been adequately contained, packaged, labeled, and safe for the use for which it was intended. *Id.* at 457.

4. *Id.* at 457.

5. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1980-1981) (stating action for personal injury shall be commenced within two years).

6. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 457 (Tex. 1980).

7. Garcia v. Texas Instruments, Inc., 598 S.W.2d 24, 25 (Tex. Civ. App.—Tyler), *rev'd*, 610 S.W.2d 456 (Tex. 1980).

8. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 458 (Tex. 1980).

9. *See id.* at 463, 465-66.

10. *See* 1 L. FRUMER & M. FREIDMAN, PRODUCTS LIABILITY § 2, at 1-27, 1-30 (1980); R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:3, at 8-10 (2d ed. 1974).

bility, or negligence.[11] The warranty theory of recovery evolved from a combination of tort and contract law resulting in confusion in both early[12] and modern products litigation.[13] Warranty actions historically sounded in tort,[14] as the theory of warranty was conceived to facilitate the public policy of protecting human life.[15] Buyers, however, eventually began to bring warranty actions founded in contract, and "implied warranties" became recognized as a term of the sales contract.[16] To circumvent the privity requirement of recovery under contract law,[17] tort law came to overlap contract law by imposing an implied warranty of merchantability that ran

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11. *See, e.g.*, Rhoads v. Service Mach. Co., 329 F. Supp. 367, 371 (E. D. Ark. 1971) (negligence action); Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962) (action in strict liability); Tidlund v. Seven-Up Bottling Co., 316 P.2d 656,657 (Cal. Dist. Ct. App. 1957) (breach of warranty action). *See generally* R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:2, at 7 (2d ed. 1974).

12. *See* Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942) (both tort and contract used to create implied warranty running with product to consumer); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960). The confused history of implied warranty led Dean Prosser to describe the action as a "freak hybrid born of the illicit intercourse of tort and contract." *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

13. *Compare* Reid v. Volkswagen of America, Inc., 512 F.2d 1294, 1295-96 (6th Cir. 1975) (recovery under implied warranty for injury sustained from defective seat) *and* Hoffman v. Chance Co., 339 F. Supp. 1385, 1386-87 (M.D. Pa. 1972) (suit under contract warranty theory for injuries received from defective hydraulic aerial platform) *with* Abate v. Barkers of Wallingford, Inc., 229 A.2d 366, 369 (Conn. Super. Ct. 1967) (personal injury suit for defective skate can only be brought in tort) *and* Heavner v. Uniroyal, Inc., 305 A.2d 412, 426-27 (N.J. 1973) (when gravamen of cause of action is personal injury caused by defective product, action lies in tort).

14. *See, e.g.*, Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 78-79 (N.D. Iowa 1958); Ciociola v. Delaware Coca-Cola Bottling Co., 172 A.2d 252, 256 (Del. 1961); Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 614-15 (Ohio 1958). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03 [1], at 3A-51 (1978).

15. *See* Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 614 (Ohio 1958); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942).

16. *See* Rasmus v. A.O. Smith Corp., 158 F. Supp. 70, 78-79 (N.D. Iowa 1958). The Texarkana Court of Civil Appeals stated that an implied warranty is by its nature a contractual agreement and is collateral to the sales contract. *See* Darr Equip. Co. v. Owens, 408 S.W.2d 566, 569 (Tex. Civ. App.—Texarkana 1966, no writ).

17. Privity of contract traditionally was a prerequisite to recovery under contract law. *See, e.g.*, Foremost Mobile Homes Mfg. Corp. v. Steele, 506 S.W.2d 646, 649 (Tex. Civ. App.—Fort Worth 1974, no writ) (buyer precluded from recovering from manufacturer in absence of contractual privity); Eli Lilly & Co. v. Casey, 472 S.W.2d 598, 600 (Tex. Civ. App.—Eastland 1971, writ dism'd) (buyer could not recover against manufacturer of weed control chemical due to lack of privity); Thermal Supply of Texas, Inc. v. Asel, 468 S.W.2d 927, 929-30 (Tex. Civ. App.—Austin 1971, no writ) (privity of contract required for buyer to recover against seller's distributor of defective air conditioner compressor).

with the product to the ultimate consumer.[18] The intermingling of tort and contract was perpetuated by the judicial evolution of the contractual concept of implied warranty into strict liability in tort.[19]

Section 402A of the Restatement (Second) of Torts[20] imposes liability without fault, or strict liability, on a manufacturer or seller who places a defective product in the market that causes injury to the user or his property.[21] A plaintiff suing in strict liability is not burdened by the traditional barriers to recovery in sales law such as notice,[22] privity,[23] or dis-

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18. *See, e.g.*, Seely v. White Motor Co., 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965) (warranty theory borrowed from sales for consumers benefit); Coca-Cola Bottling Works v. Lyons, 111 So. 305, 307 (Miss. 1927) (implied warranty runs with title); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 620, 164 S.W.2d 828, 833 (1942) (implied warranty not based on contract, but on public policy of life and health).

19. *See* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962). The court in adopting strict liability stated implied warranties could not effectively impose liability on manufacturers of defective products. *Id.* at 901, 27 Cal. Rptr. at 701; *cf.* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) (liability under strict liability is analogous to implied warranty without the notice and disclaimer requirments); Wolfe v. Ford Motor Co., 376 N.E.2d 143, 150 (Mass. App. Ct. 1978) (two bases of liability are identical); Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 494 (1969) (two recoveries are different ways of describing same cause of action), *overruled on other grounds*, 335 N.E.2d 275, 276, 373 N.Y.S.2d 39 (1975).

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

21. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1272 (5th Cir. 1974) (manufacturer of unsafe drug liable regardless of care taken), *cert. denied*, 419 U.S. 1096 (1974); Turner v. General Motors Corp., 584 S.W.2d 844, 852-53 (Tex. 1979) (suit in strict liability even though manufacturer complied with industry standards); Rourke v. Garza, 530 S.W.2d 794, 800 (Tex. 1975) (manufacturer liable for defective scaffolds even though he exercised all possible care).

22. *See* Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 313 (N.J. 1965) (notice requirement of Uniform Sales Act not applicable to strict liability); RESTATEMENT (SECOND) OF TORTS § 402A, Comment m, at 356 (1965) (consumer not required to give notice of injury to seller as sales law requires); *cf.* U.C.C. § 2-607(c)(a) (must give notice within reasonable time or be barred from remedy). Section 402A provides that once tender has been accepted, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy. . . ." RESTATEMENT (SECOND) OF TORTS § 402A (1965).

23. Strict liability cases permit suit absent privity. *See, e.g.*, Codling v. Paglia, 298 N.E.2d 622, 626-27, 345 N.Y.S.2d 461, 467-68 (1973) (bystander recovered against manufacturer); Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867, 868-69 (Tex. 1978) (suit permitted by injured employee of purchaser against manufacturer); RESTATEMENT (SECOND) OF TORTS § 402A, Comment 1, at 354 (1965) (liability sounding in tort does not require contractual relation of privity of contract). The privity requirements of the U.C.C. are set forth in section 2-318, providing that each enacting state is to select one of three stated alternatives. *See* Commercial Truck & Trailer v. McCampbell, 580 S.W.2d 765, 773 (Tenn. 1979) (no privity requirement); U.C.C. § 2-318; *cf.* Foremost Mobile Homes Mfg. Corp. v. Steele, 506 S.W.2d 646, 648 (Tex. Civ. App.—Fort Worth 1974, no writ) (buyer purchasing from dealer cannot sue manufacturer for diminished value of product).

claimer of liability.[24] Contemporaneous with the development of strict tort law, was the codification of sales law into the Uniform Commercial Code.[25] The conflicting co-existence of section 402A and the implied warranties of the U.C.C., both of which provided a redress for a defective product, engendered a heated debate among legal scholars.[26] Some believed the judicial adoption of section 402A was an unjustifiable intrusion by the courts into the legislative arena.[27]

The purpose of the U.C.C. (Code) was to simplify commercial laws governing business transactions by unifying commercial law under one uniform code.[28] Although article two of the Code appears to be a general compilation of commercial law, a closer reading reveals a focus on the problems surrounding sales of goods to consumers.[29] Warranties of

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24. *See, e.g.*, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 712 (10th Cir. 1974) (under Oklahoma law, parties of equal bargaining ability can agree to disclaim warranties but not strict tort liability); Seely v. White Motor Co., 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965) (cannot disclaim strict liability); RESTATEMENT (SECOND) OF TORTS § 402A, Comment m, at 356 (1965) (consumer's cause of action not affected by any disclaimer).

25. *See* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) (judicial adoption of section 402A); McKisson v. Sales Affiliate, Inc., 416 S.W.2d 787, 789 (Tex. 1967) (adopting strict liability); Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEXAS L. REV. 597, 599-600 (1966) (Texas Legislature enacted U.C.C. in 1965).

26. *See* Franklin, *When World's Collide: Liability Theories and Disclaimers in Defective Products Cases*, 18 STAN. L. REV. 974 (1966); Rapson, *Products Liability Under Parallel Doctrines; Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Wade, *Is Section 402A of the Second Restatement of Torts Preempted By the U.C.C. and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

27. *See* Shankar, *Strict Tort Theory of Product's Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communication Barriers*, 17 WESTERN L. REV. 5 (1965); Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970); Wade, *Is Section 402A of the Restatement of Torts Preempted by the Uniform Commercial Code and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974). The adoption of the U.C.C., for example, predated the adoption of section 402A in most states and had already established a cause of action and remedy for injury caused by a defective product. *Compare* 1964 Tex. Gen. Laws, ch. 721, at 1 (adopting U.C.C.) *with* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967) (applying strict liability) *and* Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 783-84 (Tex. 1967) (adopting strict liability).

28. Reid v. Volkswagen of America, Inc., 512 F.2d 1294, 1296-97 (6th Cir. 1975) (Code favors uniformity among the states in commercial law); TEX. BUS. & COM. CODE ANN. § 1-102(b)(3) (Vernon 1968) (purpose is uniform body of law). *See generally* Shankar, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 WESTERN L. REV. 5, 16-17 (1965).

29. *See* Markle v. Mulholland's, Inc., 509 P.2d 529, 537 (Or. 1973) (special attention given in Code to questions of sales to consumers).

merchantability[30] and fitness,[31] under the U.C.C. for example, are implied by law into every sale of goods.[32]

Injuries to persons and property are dealt with explicity in article two, section 715 of the U.C.C., as an aspect of consequential damages for breach of warranty.[33] To recover under section 2-715, an aggrieved party must notify the breaching party within a reasonable time of the breach.[34] Privity may or may not be an obstacle to recovery, depending upon which of three alternative degrees of the privity requirement the forum jurisdic-

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30. *See* TEX. BUS. & COM. CODE ANN. § 2-314 (Vernon 1968). Section 2-314 provides:

(a) Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(b) Goods to be merchantable must be at least such as

(1) pass without objection in the trade under the contract description; and

(2) in the case of fungible goods, are of fair average quality within the description; and

(3) are fit for the ordinary purposes for which such foods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved, and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the container or label if any.

(c) Unless excluded or modified other implied warranties may arise from course of dealing or usage of trade.

Id.

31. *See id.* § 2-315. Section 2-315 provides:

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

Id. § 2-315.

32. *See, e.g.*, Sinka v. Northern Commercial Co., 491 P.2d 116, 118 (Alaska 1971) (at sale of kerosene implied warranty attached); Berry v. G.D. Searle & Co., 309 N.E.2d 550, 552 (Ill. 1974) (implied warranty suit for oral contraceptive causing stroke and paralysis); Colvin v. FMC Corp., 604 P.2d 157, 160 (Or. Ct. App. 1979) (warranty suit for personal injury sustained from insecticide).

33. TEX. BUS. & COM. CODE ANN. § 2-715(c)(1) (Vernon 1968); *see, e.g.*, Sinka v. Northern Commercial Co., 491 P.2d 116, 118 (Alaska 1971) (U.C.C. provides damages to property and person); Frank's Maintenance, Etc. v. C.A. Roberts Co., 408 N.E.2d 403, 409 (Ill. App. Ct. 1980) (expenses incurred in handling goods are incidental, not consequential damages); Signal Oil & Gas v. Universal Oil Prod., 572 S.W.2d 320, 327-28 (Tex. 1978) (recovery limited to consequential damages proximately caused by breach of warranty).

34. TEX. BUS. & COM. CODE ANN. § 2-607 (Vernon 1968); *see, e.g.*, Branden v. Gerbie, 379 N.E.2d 7, 9 (Ill. App. Ct. 1978); Redfield v. Mead Johnson & Co., 512 P.2d 776, 781 (Or. 1973); San Antonio v. Warwick Club Ginger Ale Co., 248 A.2d 778, 782 (R.I. 1968).

tion has enacted.[35] Another requirement for a claimant bringing suit under the U.C.C. is that an action must be commenced within four years of the breach.[36] Furthermore, it is possible under the U.C.C. for contracting parties to agree to limit damages.[37] Limitation of damages for personal injury, however, is prima facie unconscionable.[38]

After Texas' adoption of the U.C.C.[39] and section 402A of the Restatement (Second) of Torts,[40] concepts of implied warranty and strict liability continued to be intertwined and confused in numerous Texas cases.[41]

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35. The drafters of the Code, in section 2-318, provided three degrees of privity from which the enacting state could choose. The alternatives are:

> ALTERNATIVE A: A seller's warranty . . . extends to any natural person who is in the family or household of his buyer or who is a guest in his home . . . .
>
> ALTERNATIVE B: A seller's warranty . . . extends to any natural person who may reasonably be expected to use, consume or be affected by the goods . . . .
>
> ALTERNATIVE C: A seller's warranty . . . extends to any person who may reasonably be expected to use, consume or be affected by the goods . . . .

U.C.C. § 2-318. *Compare* Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 978 (D. Alaska 1973) (plaintiff did not recover due to lack of privity) *with* Berry v. G. D. Searle & Co., 309 N.E.2d 550, 556 (Ill. 1974) (no privity requirement between ulitimate buyer and manufacturer) *with* Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765, 773 (Tenn. 1979) (bystander able to recover in absence of privity requirement). Texas legislators chose not to select a specific alternative, but rather deleted all alternatives leaving the determination to common law development. *See* Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEXAS L. REV. 597, 601-02 (1966); Titus, *Restatement (Second) of Torts, Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 761 (1970).

36. TEX. BUS. & COM. CODE ANN. § 2-725 (Vernon 1968); *see, e.g.*, Peeke v. Penn Central Trans. Co., 403 F. Supp. 70, 72 (E.D. Pa. 1975); Redfield v. Mead, Johnson & Co., 512 P.2d 776, 777 (Or. 1973); Rufo v. Bastion-Blessing Co., 207 A.2d 823, 825-26 (Pa. 1965).

37. *See, e.g.*, Spurgeon v. Jameson Motors, 521 P.2d 924, 926 (Mont. 1974) (limited warranty on used equipment); Weisz v. Parke-Bernet Galleries, Inc., 351 N.Y.S.2d 911, 916 (App. Term 1974) (per curiam) (disclaimer of warranty of correctness in art auction catalogue); TEX. BUS. & COM. CODE ANN. § 2-316 (Vernon 1968) (words or conduct tending to negate or limit warranty shall be construed wherever reasonable); *cf.* Chaq Oil Co. v. Gardner Mach. Corp., 500 S.W.2d 877, 878 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (under Texas law no implied warranty of merchantability exists if buyer knows goods have been used).

38. TEX. BUS. & COM. CODE ANN. § 2-719(c) (Vernon 1968); *see* Collins v. Uniroyal, Inc., 315 A.2d 16, 18 (N.J. 1974) (unconscionable to exclude damages for personal injury); Ford Motor Co. v. Moulton, 511 S.W.2d 690, 693 (Tenn. 1974) (personal injury limitation unconscionable), *cert. denied*, 419 U.S. 870 (1974).

39. 1965 Tex. Gen. Laws, ch. 721, at 1 (codified at TEX. BUS. & COM. CODE ANN. §§ 1.01-9.507 (Vernon 1968).

40. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789 (Tex. 1967); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 783-84 (Tex. 1967).

41. *See, e.g.*, Darryl v. Ford Motor Co., 440 S.W.2d 630, 633 (Tex. 1969); Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825, 826-27 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); Proctor & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773, 778-79 (Tex. Civ.

When a defective product caused injury to person or property, the claimant was faced with several conflicting problems. For example, depending on the cause of action, a suit under strict liability might preempt an action under warranty, and visa versa.[42] Additionally, Texas courts had generally demanded privity exist for a suit under the U.C.C., while, rejecting it in strict liability suits.[43] A further conflict between the U.C.C. and strict liability is the statute of limitations which is two years for tort;[44] whereas, a plaintiff has four years to bring a U.C.C. based suit.[45] Attempting to untangle the confusion, the Texas Supreme Court in *Nobility Homes of Texas, Inc. v. Shivers*,[46] restricted the scope of strict liability by precluding recovery for economic loss and holding that such economic loss was recoverable under the U.C.C.[47] Furthermore, the supreme court in *Signal Oil & Gas v. Universal Oil Prods.*,[48] held that when damage is incurred by the product itself, as well as surrounding property, recovery

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App.—Dallas 1967, writ dism'd).

42. *Compare* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 10 (S.D. Tex. 1976) (suit allowed to be brought under U.C.C. for personal injuries as consequential damages for breach of warranty) *and* Allen v. Ortho Pharmaceutical Corp., 387 F. Supp. 364, 368-69 (S.D. Tex. 1974) (personal injury action caused by defective oral contraceptive can be brought as breach of warranty under Code) *with* Holifield v. National Cylinder Gas Div. of Chemetron Corp., 542 S.W.2d 218, 222 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (court refused right to bring action under Code for personal injury because such an injury is grounded in tort and should be brought under strict liability). If the cause of action is for injury to the product itself, suit cannot be brought in strict liability. *See* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 80-81 (Tex. 1977).

43. *Compare* Olsen v. Royal Metals Corp., 392 F.2d 116, 118 (5th Cir. 1968) (no privity of contract required in Texas for maintaining suit on implied warranty) *and* Roberts v. General Dynamics Convair Corp., 425 F. Supp. 688, 690 (S.D. Tex. 1977) (absence of privity did not preclude plaintiff from bringing suit for breach of implied warranty) *with* Eli Lilly & Co. v. Casey, 472 S.W.2d 598, 599 (Tex. Civ. App.—Eastland 1971, writ dism'd) (buyer could not recover against manufacturer of weed control due to lack of privity) *and* Therman Supply of Texas, Inc. v. Asel, 468 S.W.2d 927, 929-30 (Tex. Civ. App.—Austin 1971, no writ) (privity of contract required for buyer to recover against seller's distributor for defective air conditioner compressor).

44. TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1980-1981); *see* Metal Structures Corp. v. Plains Textiles, Inc., 470 S.W.2d 93, 98 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); Robertson v. Texas & N.O.R. Co., 122 S.W.2d 1098, 1100 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

45. TEX. BUS. & COM. CODE ANN. § 2-725 (Vernon 1968); *see* Roberts v. General Dynamics Convair Corp., 425 F. Supp. 688, 690 (S.D. Tex. 1977); Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 10 (S.D. Tex. 1976).

46. 557 S.W.2d 77 (Tex. 1977).

47. *See id.* at 80. Strict liability properly encompasses suits for injury to person or property but does not apply to economic loss. *Id.* at 80. Economic loss is injury to the product itself. *See* Mid-Continent Air Craft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 311 (Tex. 1978).

48. 572 S.W.2d 320 (Tex. 1978).

may be had under either strict liability or section 2-715 of the U.C.C.[49] On the issue of privity, Texas courts required privity in all U.C.C. based warranty suits[50] until the *Nobility Homes* case when the supreme court abandoned the privity requirement in suits for economic loss.[51]

The Texas Supreme Court in *Garcia v. Texas Instruments, Inc.*[52] endeavored to further clarify the uncertain roles of strict liability in tort and implied warranty under the Uniform Commercial Code in products litigation.[53] The court conceded that although a suit for personal injuries based on an implied warranty theory may well present procedural problems,[54] the U.C.C., nevertheless, provides an alternative remedy to strict liability for injuries suffered from a defective product.[55] The *Garcia* court further reasoned that the adoption of section 402A of the Restatement (Second) of Torts did not nullify the existing U.C.C. provisions for personal injuries based on implied warranties.[56] The U.C.C. provides a statutory remedy for personal injuries, and hence, a plaintiff instituting a products suit has a choice between either theory of recovery.[57] Additionally, the supreme court held that privity of contract is no longer a requirement for a U.C.C. implied warranty action for personal injuries.[58] Considering the policy reasons which prompted the rejection of privity as a prerequisite to suit in strict liability, the *Garcia* court abandoned the privity requirement in personal injury actions based on the U.C.C.[59] Fi-

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49. *Id.* at 325.

50. *See, e.g.*, Cloer v. General Motors Corp., 395 F. Supp. 1070, 1972 (E.D. Tex. 1975); Allen v. Ortho Pharmaceutical Corp., 387 F. Supp. 364, 369 (S.D. Tex. 1974); Veretto v. Eli Lilly & Co., 369 F. Supp. 1254, 1255 (N.D. Tex. 1974). *But see* Roberts v. General Dynamics Convair Corp., 425 F. Supp. 688, 690-91 (S.D. Tex. 1977) (privity not required in personal injury suit based on U.C.C.).

51. Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977). The court rationalized that disposing with privity would avoid wasteful litigation. *See id.* at 83.

52. 610 S.W.2d 456 (Tex. 1980).

53. *See id.* at 460-63.

54. *See id.* at 461. The court spoke of the possible barriers to suit that the Code provides; such as, notice (§ 2-607), privity (§ 2-318), and disclaimers of warranty (§ 2-316). *See id.* at 461.

55. *See id.* at 462.

56. See id. at 462; TEX. BUS. & COM. CODE ANN. §§ 2-316, -607, -719 (Vernon 1968); *cf.* Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391, 427 (1972) (to permit section 402A to govern in a situation where the Code expressly provides for same is judicial encroachment into area given legislature).

57. *See* Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 463 (Tex. 1980); TEX. BUS. & COM. CODE ANN. §§ 2-715, -719 (Vernon 1968).

58. *See* Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 465 (Tex. 1980); TEX. BUS. & COM. CODE ANN. § 2-318 (Vernon 1968).

59. *See* Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 465 (Tex. 1980); *cf.* RESTATEMENT (SECOND) OF TORTS § 402A Comment 1, at 354 (1965) (any user or consumer may

nally, the court concluded that when a personal injury suit is based on a breach of warranty, the U.C.C.'s four year statute of limitations, and not the two year tort statute of limitations, should apply.[60]

The Texas Supreme Court in *Garcia* affirmed the viability of an alternative remedy to strict liability in personal injury suits.[61] The legislature's enactment of the U.C.C. evidenced a clear intent to create a self-contained body of law governing commercial transactions with an independent cause of action for damages, including personal injury.[62] In light of the legislative intent, a failure by the courts to recognize the U.C.C.'s remedies for personal injuries, would affect a judicial preemption in the legislative arena.[63]

The supreme court's recognition of a remedy for *all* injuries sustained from a defective product may prevent an unjust result for the plaintiff who incurs both economic loss, property loss, and personal injury from a faulty product. Prior to *Garcia*, a plaintiff seeking recovery for all three types of damages would be forced to sue under the Code for economic loss to the product itself,[64] seek alternative remedies for any property damage,[65] and be restricted to section 402A for his personal injuries.[66]

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bring suit in the absence of privity).

60. *See* Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 465 (Tex. 1980); TEX. BUS. & COM. CODE ANN. § 2-725 (Vernon 1968).

61. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 463 (Tex. 1980); *see* Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 710, 727-28 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (objective of U.C.C. to provide body of law for all aspects of commercial transactions); 1965 Tex. Gen. Laws, ch. 721, at 1 (codified at TEX. BUS. & COM. CODE ANN. §§ 1.101-9.507 (Vernon 1968)).

62. *See, e.g.*, Sinka v. Northern Commercial Co., 491 P.2d 116, 118 (Alaska 1971) (Code provides a comprehensive scheme); Gardiner v. Philadelphia Gas Works, 197 A.2d 612, 613-14 (Pa. 1964) (legislative intent to create complete cause of action); Pacific Prod., Inc. v. Great Western Plywood, Ltd., 528 S.W.2d 286, 291 (Tex. Civ. App.—Fort Worth 1975, no writ) (object is to replace scattered legislation with comprehensive set of rules).

63. *See* Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT L. REV. 391, 427 (1972) (to permit section 402A to govern in situation where U.C.C. has provided for same is a judicial encroachment into area given legislature). *See generally* Shankar, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communication Barriers*, 17 WESTERN L. REV. 5, 16-17 (1965); Titus, *Restatement (Second) of Torts Section 402A And The Uniform Commercial Code*, 22 STAN. L. REV. 713, 761 (1970).

64. *See* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 78 (Tex. 1977) (suit for damage to product itself is breach of implied warranty under U.C.C.); Melody Homes Mfg. Co. v. Morrison, 445 S.W.2d 825, 826-27 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (price of trailer house was economic loss and improperly brought in strict liability).

65. *See* Signal Oil & Gas Co. v. Universal Oil Prod., 572 S.W.2d 320, 325 (Tex. 1978) (plaintiff suffering economic loss and loss to surrounding property has a choice between tort or contract remedies); TEX. BUS. & COM. CODE ANN. § 2-715(2) (Vernon 1968) (injury to

Furthermore, such a plaintiff would be faced with different statutes of limitations for his losses,[67] although all his injuries clearly come within the purview of "consequential damages" under the U.C.C.[68]

The *Garcia* court[69] has gone a step further than many jurisdictions by abandoning the privity requirement for a personal injury suit under the U.C.C.[70] In contrast to the *Garcia* court's decision, the argument advanced against relaxing the privity requirement is that it would further blur the lines distinguishing recovery under section 402A and the U.C.C.[71]

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person or property); RESTATEMENT (SECOND) OF TORTS § 402A (1965) (provides remedy for injury to plaintiff's person or his property).

66. *Cf.* Tyler v. R.R. Street & Co., Inc., 322 F. Supp. 541, 542-43 (E.D. Va. 1971) (personal injury actions must be brought in tort); Heavner v. Uniroyal, Inc., 305 A.2d 412, 426-27 (N.J. 1973) (when essence of suit is personal injury it will be an action in tort no matter how expressed); Holifield v. National Cylinder Gas Div. of Chemetron Corp., 542 S.W.2d 218, 222 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (refused to allow plaintiff to bring suit under U.C.C. as personal injury suit is grounded in tort).

67. *Compare* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 10 (S.D. Tex. 1976) (personal injury suit caused by propane truck barred by Texas' two year statute of limitations) *and* Holifield v. National Cylinder Gas Div. of Chemetron Corp., 542 S.W.2d 218, 222 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (personal injury sustained due to defective oxygen cylinder barred by two year tort statute of limitations) *with* Matlack Inc. v. Butler Mfg. Co., 253 F. Supp. 972, 975 (D. Pa. 1966) (breach of warranty for defective product is governed by four year statute of limitations) *and* Simmons v. Clemco Indus., 368 So. 2d 509, 511 (Ala. 1979) (must bring consequential damage suit within four year statute of limitation under U.C.C. section 2-725).

68. *See, e.g.,* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 11 (S.D. Tex. 1976) (injury to person is consequential damages recoverable under the Code); Mid-Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 312 (Tex. 1978) (U.C.C. is comprehensive remedy for injuries received from defective product); TEX. BUS. & COM. CODE ANN. § 2-715 (Vernon 1968) (injuries to person or property proximately resulting from breach of warranty).

69. Garcia v. Texas Instruments, Inc., 610 S.W.2d 456, 465 (Tex. 1980); *accord,* Roberts v. General Dynamics Convair Corp., 425 F. Supp. 688, 691 (S.D. Tex. 1977); Simmons v. Clemco Indus., 368 So. 2d 509, 513 (Ala. 1979); Commercial Truck & Trailer Sales v. McCampbell, 580 S.W.2d 765, 773 (Tenn. 1979).

70. Several states allow a plaintiff to bring an action under the U.C.C. when there is privity of contract, but designate the cause of action as tort when there is not privity. *Compare* Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976, 977 (D. Alaska 1973) (no recovery for personal injury due to lack of privity) *and* Sinka v. Northern Commercial Co., 491 P.2d 116, 118 (Alaska 1971) (existence of privity, personal injury suit maintainable); *compare* Helvey v. Wabash County REMC, 278 N.E.2d 608, 609-10 (Ind. Ct. App. 1972) (suit maintainable when plaintiff in privity with defendant) *with* Withers v. Sterling Drug Inc., 319 F. Supp. 878, 882 (S.D. Ind. 1970) (only party to contract may bring personal injury suit under U.C.C.); *compare* Mahalsky v. Salem Tool Co., 461 F.2d 581, 584 (6th Cir. 1969) (interpreting Ohio law) (personal injury suit barred due to lack of privity) *with* Val Decker Packing Co. v. Corn Prod. Sales Co., 411 F.2d 850, 854 (6th Cir. 1969) (interpreting Ohio law) (actionable suit when parties in privity).

71. *See, e.g.,* Maynard v. General Elec. Co., 486 F.2d 538, 540 (4th Cir. 1973) (interpret-

In *Roberts v. General Dynamics Convair Corp.*,[72] a Texas federal district court rendered a well-reasoned retort to this argument.[73] The *Roberts* court observed, "to waive the privity requirement in a personal injury case where the warranty arises in 'tort' while retaining it where the warranty arises in 'contract' is to perpetuate a formalistic distinction at the expense of the public policy considerations repeatedly emphasized by the Texas Supreme Court."[74] The Texas court abolished privity as a requirment for recovery in a suit on implied warranty when economic loss results.[75] An inequitable and convoluted result would occur if a party not in privity to a contract was allowed to recover economic loss sustained from a defective product, while barring his suit for personal injuries because he was not in privity.[76]

The practical effect of the *Garcia* holding will be to subject manufacturers and sellers to liability for personal injuries for a longer limitation period, thereby resulting in a larger body of prospective plaintiffs.[77] Some courts have equated strict liability with U.C.C. warranty liability;[78] how-

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ing West Virginia law); Becker v. Volkswagon of America Inc., 125 Cal. Rptr. 326, 330-31 (Ct. App. 1975); Garcia v. Texas Instruments, Inc., 598 S.W.2d 24, 29 (Tex. Civ. App.—Tyler), *rev'd*, 610 S.W.2d 456 (Tex. 1980).

72. 425 F. Supp. 688 (S.D. Tex. 1977).

73. *See id.* at 691.

74. *Id.* at 691.

75. *See* Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 81 (Tex. 1977). Ironically, the court reasoned that the requirement of privity was unduly harsh in light of the absence of a privity requirement for a personal injury suit under strict liability. The court stated that economic loss could be as devastating as a personal injury. *Id.* at 81; *cf.* Signal Oil & Gas v. Universal Oil Prod., 572 S.W.2d 320, 330 (Tex. 1978) (court would liberally interpret terms to find privity).

76. *Compare* Roberts v. General Dynamics Convair Corp., 425 F. Supp. 688, 690-91 (S.D. Tex. 1977) (applying four year statute of limitation for breach of warranty in personal injury suit) *and* Morton v. Texas Welding & Mfg. Co., 408 F. Supp. 7, 10 (S.D. Tex. 1976) (court applied four year statute of limitation for contract instead of two year tort statute) *with* Metal Structures Corp. v. Plain Textiles, Inc., 470 S.W.2d 93, 98 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.) (article 5526 runs for two years from date injury occurs) *and* Robertson v. Texas & N.O.R. Co., 122 S.W.2d 1098, 1199 (Tex. Civ. App.—San Antonio 1938, writ ref'd) (two year tort statute of limitations applied in personal injury actions).

77. *Compare* Uniform Laws Ann. § 2-318 (alternative A) (Vernon 1968) (warranty extends to any person in family or household of buyer or guest in his home) *with id.* (alternative C) (warranty to any person who may reasonably be expected to use, consume, or be affected by product).

78. *See, e.g.*, Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965) (liability under strict liability is analogous to implied warranty without notice and disclaimer requirements); Wolf v. Ford Motor Co., 376 N.E.2d 143, 150 (Mass. App. 1978) (two bases of liability are identical); Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 494 (1969) (strict liability and implied warranty are different ways of describing same cause of action), *overruled on other grounds*, 335 N.E.2d 275, 373 N.Y.S.2d 39

ever, the *Garcia* decision will not subject sellers to four years of the unforeseeable and unlimited liability of strict liability because the Code provides built-in protections for the manufacturer.[79] First, the statute of limitations begins to run from the date of sale, not the date of injury, thus preventing many injured parties from bringing suit under the Code.[80] Secondly, a seller's liability is limited by the restrictive language of the implied warranty sections.[81] For instance, to incur liability for breach of an implied warranty of merchantability, the breaching party must be a seller "with respect to goods of that kind,"[82] and the goods must have been employed for the "ordinary purposes for which such goods are used."[83] Finally, in the event a seller does breach a warranty, he must be notified within a reasonable time or the injured party waives his claim.[84]

In *Garcia v. Texas Instruments, Inc.*, the supreme court has taken the *Nobility Homes* case to its logical conclusion; henceforth, a plaintiff, in the absence of privity, may seek a full recovery under the U.C.C. for personal injuries. As a result, the roles of strict liability and implied warranty appear further confused. A manufacturer, without the benefit of a contractual relationship, will now be susceptible to liability under the

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(1975).

79. *See* TEX. BUS. & COM. CODE ANN. §§ 2-314, -315 to -316, -607 (Vernon 1968). *See generally* Note, *Products liability: Tort Or Contract*, 21 N.Y. LAW F. 587, 611 (1976). For instance, contracting parties may exclude, modify, or limit liability under the Code, although liability for personal injuries may not be excluded. *See, e.g.*, Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709, 713-14 (10th Cir. 1974) (interpreting Oklahoma law) (contracting parties can agree to disclaimer of warranties, but not strict tort liability); Seely v. White Motor Co., 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965) (parties under the Code can disclaim liability, but cannot disclaim strict liability); TEX. BUS. & COM. CODE ANN. §§ 2-316, -719 (Vernon 1968) (parties may agree to modify or limit warranty under the U.C.C.).

80. *See, e.g.*, Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425, 431 (E.D. Pa. 1978) (date of sale determinative); Peeke v. Penn Central Transp. Co., 403 F. Supp. 70, 72 (E.D. Pa. 1975) (personal injury actions arising from breach of implied warranty must be brought within four years of date of sale, not date of injury); Owens v. Patent Scaffolding Co., 14 U.C.C. Rep. 610, 612 (N.Y. App. 1974) (suit commenced within one year of injury, but recovery barred as action started four years and seven days after equipment delivered).

81. TEX. BUS. & COM. CODE ANN. §§ 2-314 to -315 (Vernon 1965). *See, e.g.*, Brunswick Corp. v. Steel Warehouse Co., 309 F.2d 297, 299 (7th Cir. 1962) (no implied warranty with goods sold "as is"); McMeeken v. Gimbel Bros., Inc., 223 F. Supp. 896, 899 (W.D. Pa. 1963) (no implied warranty without buyer's reliance on seller's judgment); Vitro Corp. of America v. Texas Vitrified Supply Co., 376 P.2d 41, 48 (N.M. 1962) (no implied warranty of fitness when buyer requested brand name pipe as there was no reliance).

82. TEX. BUS. & COM. CODE ANN. § 2-314(a) (Vernon 1968).

83. *Id.* § 2-314(b)(3).

84. *Id.* § 2-607(e); *see, e.g.*, Berry v. G.D. Searle & Co., 309 N.E.2d 550, 555 (Ill. 1974); Redfield v. Mead Johnson & Co., 512 P.2d 776, 781 (Or. 1973); San Antonio v. Warwick Club Ginger Ale Co., Inc., 248 A.2d 778, 782 (R.I. 1968).

U.C.C. for a tortious injury to unknown third parties as well as being susceptible to strict liability in tort. Formalistic distinctions between tort and contract theories of recovery, however, should succumb to the substance and intent of the law allowing an injured party full recovery.

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