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Products Liability–West Virginia Consumer Credit and Protection Act–Definitional Inadequacies

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STUDENT NOTE

PRODUCTS LIABILITY—WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT—DEFINITIONAL INADEQUACIES

In recent years, more than one writer has predicted that the Legislature would have to take the initiative in conforming the law of products liability in West Virginia to contemporary national standards. That prediction has become a reality. The West Virginia Legislature on March 5, 1974, passed the West Virginia Consumer Credit and Protection Act, which could significantly affect products liability law in West Virginia.

Until recently, the general rule throughout the country has been that manufacturers and other sellers of defective products have not been liable for injury to persons having no contractual relation with them. This harsh rule has gradually been modified in many jurisdictions by the creation of numerous exceptions. Most important has been the “inherently dangerous product” exception announced in Thomas v. Winchester. Under Thomas, an injured party not in privity with a negligent seller or manufacturer, could recover if the injury had been caused by an “inherently dangerous product,” such as explosives, poisons, or drugs. Even-

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2 The definition of “products liability” varies greatly. For example, W. Prosser, HANDBOOK OF THE LAW OF TORTS 641 (4th ed. 1971), uses a restrictive definition of the term: “Products liability is the name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract.” For the purpose of this article, a broader definition of the term will be utilized. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2 (2d ed. 1974) [hereinafter cited as HURSH & BAILEY], defines the term as the “liability of a manufacturer, processor, or non-manufacturing seller for injury to the person or property of a buyer or third party by a product which has been sold.”
5 6 N.Y. 397 (1852). West Virginia apparently adopted this position in Peters v. Johnson, Jackson & Co., 50 W. Va. 644, 41 S.E. 190 (1902), with the slight variation that the product had to be only “very dangerous to human life.” Additionally, a nonfood exception was created for chewing tobacco. Webb v. Brown & Williamson Tobacco Co., 121 W. Va. 115, 2 S.E.2d 898 (1939).
6 Peters v. Johnson, Jackson & Co., 50 W. Va. 644, 41 S.E. 190 (1902), involved
tually, the rule was swallowed by the exceptions in the famous case of MacPherson v. Buick Motor Co.; this case, in effect, brought all dangerous-if-negligently-made products within the "inherently dangerous" exception. Since 1916, the MacPherson rule has been consistently liberalized.

The warranty branch of products liability law has also had progressive development. Historically, warranty liability in all states except Louisiana had been governed by either the Uniform Sales Act or the common law. West Virginia was a common law jurisdiction following caveat emptor but had adopted a special implied warranty exception for food, that allowed only the purchaser of unsealed food to recover for breach of warranty. Currently, warranty liability is governed, at least partially, in all states except Louisiana, by the Uniform Commercial Code [hereinafter referred to as the UCC].

Recent trends have enhanced the individual's ability to recover when injured by defective products. Several courts have

drugs, but the court also mentioned poisons, defective scaffolds, defectively repaired gas meters, and hair wash.

7217 N.Y. 382, 111 N.E. 1050 (1916).

8 West Virginia has not specifically accepted the rule announced by MacPherson; however, the Supreme Court of Appeals has stated that MacPherson has not been rejected. Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964). In fact, two federal court decisions, making Erie-educated guesses as to the law in West Virginia, have held that the West Virginia Supreme Court of Appeals would probably adopt the MacPherson rule. Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); General Motors Corp. v. Johnson, 137 F.2d 320 (4th Cir. 1943).


9 The liability in negligence of a manufacturer or other supplier for damage caused by his product is based on the supplier's failure to exercise reasonable care. Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier. Accordingly, an injured person is not required to prove negligence in a warranty based products liability case. 2 L. Frumer & M. Friedman, Products Liability § 16.01(1) (1974).

10 1 CCH Prod. Liab. Rep. ¶ 1010 (1974). Thirteen jurisdictions, including West Virginia, have followed the common law approach.


12 1 CCH Prod. Liab. Rep. ¶ 1020 (1974). All states except Louisiana have adopted the UCC. In West Virginia, the following UCC sections are relevant to the present discussion: W. Va. Code Ann. § 46-2-313 (1966) (express warranties); Id. § 46-2-314 (1966) (implied warranty of merchantability); Id. § 46-2-315 (1966) (implied warranty of fitness); Id. § 46-2-316 (1966) (exclusion or modification of warranties); Id. § 46-2-318 (1966) (third party beneficiaries of warranties).
rejected the privity of contract requirement in actions for breach of implied warranty, and at least one court has held that certain types of disclaimers are unconscionable as a matter of law. All of these developments have helped the injured user recover for his losses caused through the use of defective products. West Virginia has not followed this progressive trend.

Although all of these developments have aided injured persons, none has helped as much as the adoption of strict liability in tort for products liability cases. First adopted in California, the doctrine states: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." When this doctrine is joined with the abolition of privity, it makes the manufacturer liable to those injured by the product without regard to negligence. Some courts

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14 Frequently injuries from products involve a person not in a contractual relationship with the manufacturer or seller of the product. For example, when a loaf of bread is bought at a grocery store, the only contractual relationship is that between the actual buyer and the store proprietor. Only the buyer and the retailer are parties to the sale, and, thus, only they are in privity of contract. 1 CCH Prod. Liab. Rep. ¶ 1190 (1974).


19 Strict tort liability as used in this note is the imposition of liability requiring neither proof of negligence nor proof of breach of warranty, coupled with a relaxation of the privity requirement. Strict warranty liability as used in this note is imposition of liability requiring proof of breach of warranty, but not proof of negligence, coupled with a relaxation of the privity requirement.
have even extended this doctrine to innocent bystanders injured by
the product.  

The policy justification for strict tort liability was stated by
Justice Traynor in Escola v. Coca-Cola Bottling Co. The ability
to pay for the damage caused by a defective product is often too
burdensome for the person injured; however, the risk and cost of
the injury can be insured by the manufacturer and distributed
among the customers as a cost of doing business.

The trend in the United States is clearly toward strict tort
liability. Twenty-seven jurisdictions have definitely adopted strict
tort liability as the controlling law, and in no state has the rule
been rejected by the court of last resort. The supreme courts ofour states have adopted strict warranty liability. Only one

\[21\] Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965);
\[22\] Id. at 453, 150 P.2d 436 (1944) (concurring opinion).
\[23\] Id. at 462, 150 P.2d at 441. Justice Traynor also stated other justifications
for imposition of strict liability: "Even if there is no negligence, however, public
policy demands that responsibility be fixed wherever it will most effectively reduce
the hazards to life and health inherent in defective products that reach the mar-
ket." Id., 150 P.2d at 441. Additionally, Justice Traynor noted that the injured
person is often not in a position to refute evidence of the manufacturer, since he is
not familiar with the manufacturing processes.

\[24\] Strict tort liability has been definitely accepted in:

- Alaska
- Arizona
- California
- Connecticut
- Hawaii
- Illinois
- Indiana
- Iowa
- Kentucky
- Louisiana
- Mississippi
- Missouri
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- Oregon
- Pennsylvania
- Rhode Island
- South Dakota
- Tennessee
- Texas
- Washington
- Wisconsin
- District of Columbia


\[25\] Id. at 760.

\[26\] Delta Oxygen Co. v. Scott, 238 Ark. 634, 383 S.W.2d 885 (1964); Manheim
v. Ford Motor Co., 201 So. 2d 440 (Fla. 1967); Corprew v. Geigy Chem. Corp., 271
N.C. 485, 157 S.E.2d 98 (1967); Springfield v. Williams Plumbing Supply Co., 249
S.C. 130, 153 S.E.2d 184 (1967). In addition, six states have enacted strict warranty
liability by statute: Arkansas, Maine, Maryland, Massachusetts, Tennessee, and
state—West Virginia—has failed to express a position on strict liability. Although the West Virginia court has failed to act as to strict liability, the Legislature has, with this Act, made an attempt to assist the forgotten consumer.

The West Virginia Consumer Credit and Protection Act is long and complicated, encompassing eight articles most of which relate to credit transactions. Article six, entitled "General Consumer Protection," eliminates several statutory and case law barriers that have traditionally blocked consumer recovery. Section 46A-6-107, prohibiting disclaimers, voids any attempt by a merchant to exclude, limit, or modify any warranty, express or implied, or any remedy for breach of warranty with respect to goods that are intended to become the subject of a consumer transaction. Additionally, section 46A-6-108 insures that no action by a consumer for negligence or breach of warranty will fail for lack of privity between the consumer and the other party, nor shall an action against any person bar the bringing of an action against another. Because of poor legislative drafting, however, the joint effect of these two sections is not entirely clear.

28 Other states have either passed statutes enacting strict liability or have judicial decisions announcing or inferring a particular position. Until the West Virginia Legislature passed the Consumer Credit and Protection Act, West Virginia's only recognizable position was that W. VA. CODE ANN. § 46-2-318 (1966) had slightly removed the privity barrier.

27 W. VA. CODE ANN. § 46A-6-107 (Cum. Supp. 1974) provides:
Notwithstanding any other provision of law to the contrary with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall:
(1) Exclude, modify, or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose; or
(2) Exclude, modify or attempt to limit any remedy provided by law including the measure of damages available, for a breach of warranty, express or implied.
Any such exclusion, modification or attempted limitation shall be void.

26 W. VA. CODE ANN. § 46A-6-108 (Cum. Supp. 1974) provides:
Notwithstanding any other provision of law to the contrary, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.
Of the two sections, the one placing restrictions on disclaimers of warranties has fewer major deficiencies. There are two types of warranties—express and implied. The practice in West Virginia has been to disclaim or modify these warranties where practical. As earlier indicated, a number of jurisdictions have disallowed certain warranty disclaimers of consumer products as unconscionable or against public policy. The West Virginia court has not followed those cases and has generally held disclaimers to be valid. Recovery was denied in Payne v. Valley Motor Sales, a pre-UCC case, because of a disclaimer in the sales contract. Another West Virginia case, decided after the UCC was adopted, recognized that disclaimers were an affirmative defense that had to be set forth affirmatively in the pleadings. As a result, West Virginia consumers have been unable to maintain actions for breach of warranty because of the validity of the disclaimers. Seemingly better days lie ahead for the consumer because of the Act's limitation on disclaimers. The extent of the new-founded protection, however, will depend considerably upon the meaning given to the words “merchant” and “consumer transaction” within the context of this section.

The Act provides that no merchant shall exclude or modify any implied or express warranty. The term “warranty” is clearly and adequately defined in the Act, but the term “merchant” is not defined at all. “Merchant” is defined in the UCC; however, nothing in the Act permits the inference that the UCC's definition is applicable. The National Consumer Act [hereinafter referred to

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23 Id. §§ 46-2-314, -315 (1966).
24 See note 16 supra.
   “Warranty” means express and implied warranties described and defined in sections three hundred thirteen, three hundred fourteen and three hundred fifteen, article two, chapter forty-six of this Code and expressions or actions of a merchant which assure the consumer that the goods have described qualities or will perform in a described manner.
28 Id. § 46-2-104(1) (1966):
   “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
as the NCA), from which this disclaimer provision was apparently taken, does not make this mistake, and clearly defines the term "merchant." As used in the NCA, "merchant" is broad enough to include a retailer, manufacturer, lessor, and any assignee of, or successor to, such person. This approach clarifies the code section and removes the possibility of restrictive judicial interpretation.

This problem should be remedied by the West Virginia Legislature in order to resolve any unnecessary uncertainty. The UCC definition of "merchant" may be adopted; it is broad enough to include a seller or a manufacturer. A more restrictive definition of "merchant" would be inconsistent with current commercial practices in the UCC and would give the buyer limited protection and opportunity to recover. There is precedent for using the UCC definition for the term "merchant." The Maryland anti-disclaimer act utilizes the term "seller" and "manufacturer" within the context of the UCC, and Massachusetts has a statutory provision similar to that of Maryland. The Legislature might alternatively consider adopting the definition used by the NCA, which would offer the greatest protection to the consumer but is less in harmony with the initial legislative enactment than the UCC definition. Since the section is a limitation upon a UCC-created disclaimer, it seems logical that the terms used in the section be consistent with other UCC definitions. In addition, litigation under the UCC, expanding or contracting interpretation of the term "merchant," would apply equally to the new section. Nonetheless, as the West

34 National Consumer Law Center, National Consumer Act (1970) [hereinafter cited as NCA]. The NCA was drafted by the National Consumer Law Center, Boston College Law School, Brighton, Massachusetts.

35 NCA § 1.301(23) provides:

"Merchant" means a person who regularly advertises, distributes, offers, supplies or deals in real or personal property, services, money or credit in a manner which directly or indirectly results in or is intended or designed to result in, lead to or induce a consumer transaction. The term includes but is not limited to a seller, lessor, manufacturer, arranger of credit, and any assignee of or successor to such person. The term also includes a person who by his occupation holds himself out as having knowledge or skill peculiar to such practices or to whom such knowledge or skill may be attributed by his employment as an agent, broker or other intermediary who holds himself out as having such knowledge or skill.

36 See note 35 supra.


Virginia Act is now written, no one is certain who is precluded from disclaiming warranties.

Similar confusion exists regarding the phrase "consumer transaction." Both the Maryland and Massachusetts statutes use the phrase "sale of consumer goods" in lieu of "consumer transaction," and both states define the phrase "consumer goods" as the UCC does. This approach is founded upon a rational basis. First, it provides more certainty as to what goods are involved. Secondly, it exempts sales of goods that are primarily to be used in the operation of other businesses and establishments. This approach is consistent with the UCC's position that limitation of consequential damages where the loss is commercial is not prima facie unconscionable. Finally, it attempts to avoid additional uncertainty as to when a "transaction" occurs by using the word "sale."

The NCA avoided the problem by defining "consumer transaction" as a transaction in which one or more of the parties is a consumer. This approach is superior to the Massachusetts or Maryland approach because it avoids the ambiguity of "sale" and "consumer goods," leaving only the term "transaction" to be interpreted by the courts in light of changing social demands and requirements. Either one of these methods would be vastly superior to the provision as it currently exists.

Overall, the best solution for eliminating the current confusion is for the Legislature to make two additions to the Act. First, the term "merchant" should be defined exactly as it is in the UCC. Secondly, "consumer transaction" should be defined as the NCA defines the phrase. These two additions would provide the certainty that businessmen need to adequately plan and institute necessary steps to protect the consumer and himself. These additions would also allow the consumer to readily recognize a void disclaimer when it appears. These advantages would accrue without compromising the original intent of the Act and without any interference to the other provisions of the Act.

Section 46A-6-108 provides that no action by a consumer for negligence or breach of warranty shall fail because of a lack of

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41 The UCC states that goods are "'consumer goods' if they are used or bought for use primarily for personal, family or household purposes." W. VA. CODE ANN. § 46-9-109(1) (1966).
42 Id. § 46-2-719.
43 NCA § 1.301(13).
44 See note 35 supra.
privity between the consumer and the other party. This section also suffers from definitional inadequacies—not because of a failure to define terms, but as the result of the poor definition of "consumer." "Consumer" is defined in an earlier section of the Act as "a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan." As defined, "consumer" is appropriate for the first five articles of the Act that deal exclusively with credit transactions but inappropriate when used in the consumer protection section. Obviously, the Legislature did not intend to abolish privity only for consumers who buy on an installment plan.

There are two types of privity in the UCC. "Horizontal privity" limits the extent that third parties benefit from the warranties buyers receive from sellers. In the UCC, as adopted in West Virginia, these beneficiaries are individuals in the family or household of the buyer or guests in his home. "Vertical privity" refers to the typical manufacturer-distributor-retailer situation and involves the question of whether a seller's warranty, given to his buyer, extends to one who purchases from this buyer. The UCC takes a neutral position on the scope of vertical privity; the Consumer Credit and Protection Act, however, alters this neutrality. Lack of privity is no longer a defense between a "consumer" and the party against whom the claim is made. For example, if M, an automobile manufacturer, sells an automobile to D, a dealer, an implied warranty of merchantability, unless disclaimed, accompanies that vehicle. When D resells the vehicle to B, a consumer, an implied warranty of merchantability passes to B. Under the UCC, B can readily recover from D for breach of that warranty.

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48 Id. § 46A-3-202(1). The essence of this definition is that a person must incur debt before he is a consumer for purposes of this Act.
47 The definition of "consumer" is crucial to the efficient operation of the Act. As NCA § 1.301(8), Comment 1 states: "This is probably the most important definition in the entire Act. One definition after another and one substantive provision after another ties in to the concept of 'consumer'."
crucial issue involving "vertical privity" is whether $B$ can sue $M$ for breach of his warranty. As stated above, the UCC is neutral on this matter, leaving the decision to developing case law.\footnote{As this article was going to press, the West Virginia Supreme Court of Appeals handed down its decision in Dawson v. Canteen Corp., No. 13476 (W. Va., filed Feb. 25, 1975). This decision purportedly abolished the privity requirement in an action for breach of an express or implied warranty in West Virginia. On its facts the opinion abolished only "vertical" privity leaving the issue of "horizontal" privity to be controlled by W. VA. CODE ANN. § 46-2-318 (1966). This case has serious shortcomings in that it fails to adequately explain the relationship between W. VA. CODE ANN. § 46A-6-108 (Cum. Supp. 1974), and the holding in the case. No attempt is made to critically analyze the holding of the case, but it logically appears that the best approach to the entire problem area is still for the Legislature to adopt the recommended definition of "consumer" as suggested in this article. This solution would eliminate the privity problem with respect to both "horizontal" and "vertical" privity and any future privity problems in negligence-based actions. It would also prevent the piecemeal approach suggested by the court in this decision.} Presumably, under the anti-privity section, if $B$ purchased the goods for personal use on an installment plan or other appropriate credit arrangement, he would be a "consumer" within the meaning of the Act and could sue $M$ for breach of his warranty. But if $B$ paid cash, he is not a "consumer" within the meaning of the Act, and therefore, could not recover. Such an arbitrary distinction is arguably unconstitutional as a violation of equal protection; the Legislature certainly did not intend such an absurd result.\footnote{Support for the approach taken by the Legislature can be found in NATIONAL CONSUMER LAW CENTER, MODEL CONSUMER CREDIT ACT (1973) [hereinafter cited as CCA]. The CCA is a model for consumer protection prepared by the National Consumer Law Center, Boston, Massachusetts. CCA §§ 2.503, .504 are virtually identical to W. VA. CODE ANN. §§ 46A-6-107, -108 (Cum. Supp. 1974), with one major exception. Instead of using the phrase "consumer transaction" as the West Virginia Act does, the CCA utilizes "consumer credit transaction." The effect of this is to clearly abolish privity and disclaimers as to credit transactions only. Relying upon the CCA as authority, it can be persuasively argued that the West Virginia Legislature intended to take the same approach. However, there are several reasons supporting an opposite viewpoint. First, the CCA deals exclusively with credit transactions; the West Virginia Act does not. Secondly, the West Virginia Act is patterned after the NCA which does not make such a distinction. Thirdly, within an Act that involves both cash and credit transactions there is no rational basis for making such a distinction. At best, the only logical reason why the CCA refers to "consumer credit transactions" is because the CCA deals exclusively with credit; to involve cash transactions for the purpose of that section only would have destroyed the continuity of the CCA. It seems apparent that when the Legislature enacted article six, entitled "General Consumer Protection," it meant to protect more than consumers who buy on the installment plan. Compare W. VA. CODE ANN. §§ 46A-6-101 to -7-116 (Cum. Supp. 1974), with CCA § 2.503, .504 and NCA §§ 3.301, .306.}
present definition of "consumer" to the anti-privity section totally frustrates any constructive use of the consumer protection article.

Logically, the best way to correct this situation is to give the term "consumer" a different definition for article six only.\(^4\) One of the most liberal definitions of "consumer" applied in any act is that contained in the proposed Federal Consumers Products Liability Act.\(^5\) That act defines "consumer" as any natural person, including a bystander, who uses, consumes, or is affected by use of a consumer product.\(^6\) If the term "consumer" were so defined in the West Virginia Act, the result would be strict warranty liability.\(^7\) The Act discloses a legislative policy to follow some form of strict warranty liability and leaves the door open to strict tort liability if the court should so decide.\(^8\) Other jurisdictions have taken a similar approach.\(^9\)

Recent actions by the Virginia courts and legislature should give some guidance in the interpretation of the West Virginia anti-privity statute. In 1961, two attempts were made in the Virginia Supreme Court of Appeals to attack the privity requirement. One nonfood case held that privity was required to recover for breach of an implied warranty by an employee in a personal injury case against the seller of a tagline to the plaintiff's employer.\(^10\) In another case, the Virginia court held that privity was required for recovery in a negligence case in which the product was not inher-


\(^{57}\) To a large extent, any state that has adopted the UCC has a form of strict warranty liability. When used in this note, however, strict warranty liability means more than adoption of the UCC. A significant relaxation of the privity requirement is also required. See notes 19, 25 supra.

\(^{58}\) The imposition of strict tort liability is usually a step-by-step process. This process has frequently followed a definite pattern: (1) the elimination of the privity requirement with respect to foods and beverages; (2) the rejection of privity where sellers have advertised their products; (3) the abandonment of privity and the extension of warranty liability to cover the sale of any product; and (4) the extension of warranty liability resulting in acceptance of the strict liability in tort doctrine. 1 CCH PROD. LIAB. REP. ¶ 4050 (1974).

\(^{59}\) See note 25 supra.

ently dangerous. In response to these decisions, the Virginia legislature passed an anti-privity statute. It was the intention of the Virginia drafters to make the new law applicable to both vertical and horizontal privity and to include only the limitation of foreseeability as a restraint on the Act's coverage. One commentator has indicated that the approach taken by Virginia was to legislatively adopt strict warranty liability. The keystone of this approach is section 2-314 of the UCC, which imposes upon sellers a duty to deliver merchantable goods. Thus the general conclusion is that in Virginia a seller or manufacturer has a duty to sell or produce merchantable goods, and any individual injured because of a breach of this warranty can recover against anyone in the distributive chain without proof of fault so long as his injury was foreseeable.

The West Virginia Legislature apparently attempted to adopt a similar approach. The anti-privity section of the Act was taken verbatim from the NCA, and the NCA comment supports the argument that the West Virginia definition of "consumer" is a mistake and that the section seeks to take a position somewhat similar to that taken by Virginia. The NCA comment states: "This section is designed clearly and succinctly to 'topple the citadel of privity' once and for all." As enacted in West Virginia, the section does not come close to achieving that ideal. The NCA defines "consumer," but the definition obviously applies to "vert-

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62 Va. Code Ann. § 8.2-318 (1965) provides: 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.
67 NCA § 3.304, Comment 1.
68 Id.
69 NCA § 1.301(8). "'Consumer' means a person other than an organization who seeks or acquires (a) business equipment for use in his business, or (b) real or
tical privity” only; it does not include third party beneficiaries. The net effect of the NCA approach is to leave “horizontal privity” as defined in the UCC\textsuperscript{70} and to legislatively abolish “vertical privity.” The NCA approach gives consumers satisfactory protection if a jurisdiction has adopted alternative “B” or “C” in section 2-318 of the UCC. But West Virginia has adopted alternative “A,” the most restrictive alternative available. Assuming the Legislature will take corrective action, and assuming further that nothing justifies a definition of “consumer” that discriminates arbitrarily between a consumer incurring debt and one paying cash, the Legislature has only two possible alternatives. It can define “consumer” as the NCA does, thereby abolishing “vertical privity” and leaving “horizontal privity” as limited in the UCC. Alternatively, the Legislature can enact, as did the Virginia Legislature, a progressive definition of “consumer” that both abolishes “vertical privity” and expands “horizontal privity.”\textsuperscript{71}

The better approach would be to adopt a progressive definition of “consumer,” thereby eliminating the entire privity problem. A suggested definition that is neither too restrictive nor too expansive would be: “consumer” means, in addition to anyone who seeks or acquires consumer goods, any natural person who may reasonably be expected to use, consume, or be affected by the use of such consumer goods. This definition is consistent with the general tenor of the West Virginia Consumer Credit and Protection Act and would serve two distinct functions. First, it would give West Virginia a workable system of strict warranty liability.\textsuperscript{72} The

\textsuperscript{70} Uniform Commercial Code § 2-318.


most important warranty in the UCC is the implied warranty of merchantability. The new Act expands the coverage of the warranty of merchantability to include the concept that all goods must conform in all material respects to applicable state and federal statutes and regulations that establish standards of quality and safety.33 Defining "consumer" as the NCA does would also create strict warranty liability, but its coverage would be limited to those persons presently protected by section 2-318 of the UCC. The NCA approach would be an improvement, but does not offer the protection that a broader definition could afford.

Secondly, the suggested definition of "consumer" would have considerable impact upon negligence-based actions because the Act abolishes privity in actions based on negligence as well as those based on breach of warranty. As previously indicated, twenty-seven jurisdictions have adopted strict tort liability,74 and eventually the concept will likely receive judicial recognition in other jurisdictions. The West Virginia Legislature, by enacting a progressive definition of "consumer," can set the stage for the acceptance of strict tort liability by the West Virginia court.

If the Legislature will wisely define three terms—"merchant," "consumer," and "consumer transaction," the West Virginia Consumer Credit and Protection Act will have enormous potential for assisting injured consumers. Adoption of the suggestions made herein will provide the injured consumer adequate means to re-

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33 W. Va. Code Ann. § 46A-6-102(b) (Cum. Supp. 1974). "Merchantable" means, in addition to the qualities prescribed in section three hundred fourteen [§ 46-2-314], that the goods conform in all material respects to applicable state and federal statutes and regulations establishing standards of quality and safety for goods and, in the case of goods with mechanical, electrical, or thermal components, that the goods are in good working order and will operate properly in normal usage for a reasonable period of time.

74 See note 23 supra.
cover and hopefully will give the court the opportunity to follow the majority of jurisdictions and adopt strict tort liability. Importantly, adoption of these suggestions will have no impact on the credit sections of the Act; the suggested alterations seek only to clarify ambiguous sections regarding the consumer protection aspects of the Act. Failure of the Legislature to define these terms can only lead to uncertainty and unnecessary confusion. The policy behind the recommended legislative action is fully supported by judicial precedent and by legislative enactments in other states.

Gerard R. Stowers

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75 See the discussion of Dawson v. Canteen Corp., No. 13476 (W. Va., filed Feb. 25, 1975), note 52 supra.