

JOURNAL OF FAMILY LAW

Volume Fifteen

1976-77

Number One

THE PILL AND THE CODE

Martin A. Frey*

Ten million women in the United States take birth control pills. Of those taking the pill, one in 66,000 under 35 and one in 25,000 over 35 will die each year from abnormal blood clotting. The rate is almost eight times that for those not on the pill.¹ The risk of fatal heart attacks for women between 30 and 39 is three times higher for those who take the pill than for those who do not. For women over 40, the risk is five times higher.² These are only the fatalities. This does not include those who suffer permanent physical injury.

Strokes and heart attacks comprise only one facet of the pill problem. Because oral contraceptives are not 100% effective, there exists the added risk of unwanted pregnancies. Oral contraceptives also may cause chromosome damage in the consumer which, in turn, may lead to deformed offspring.

* Professor of Law, College of Law, The University of Tulsa; Member, Missouri Bar; B.S.M.E. Northwestern University (1962); J.D. Washington University (1965); LL.M. George Washington University (1966). I would like to thank Ronald Alley, Phyllis H. Frey, Richard W. Maxwell, Carolyn Cloud, J.K. Pedro, and Becky Brown for their assistance. The research for this article was supported in part by funds from the Legal Research Center, Texas Tech University.

¹ Parke, Davis & Co., What You Should Know about "the Pill," February 1973 (prepared by the American Medical Association in cooperation with the American College of Obstetricians and Gynecologists, the Pharmaceutical Manufacturers Association and the Food and Drug Administration, and reprinted by the various pharmaceutical companies and given to physicians for distribution to their patients) [hereinafter cited as What You Should Know about "the Pill"]. For a discussion of the history of the pill, see Barrett, *Product Liability and the Pill*, 19 CLEV. ST. L. REV. 468 (1970); *Liability of Birth Control Manufacturers*, 23 HASTINGS L.J. 1526 (1972).

² NEWSWEEK, Sept. 8, 1975, at 77.

I. PHYSICAL INJURY TO THE CONSUMER

Suppose a woman, after taking oral contraceptives, suffers a stroke, heart attack or other physical side effect. Does the Uniform Commercial Code provide her with a remedy for her physical injury? The Code includes two implied warranties. Section 2-314 defines an implied warranty of merchantability as follows:

- (1) Unless excluded or modified (Section 2-316), 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.
- (2) Goods to be merchantable must be at least such as
 -
 - (c) are fit for the ordinary purposes for which such goods are used;

Section 2-315 defines an implied warranty of fitness for a particular purpose:

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.

Damages for breach of either warranty is not limited to property injury. Section 2-715(2)(b) extends damages to personal injuries as well:

- (2) Consequential damages resulting from the seller's breach include
 -
 - (b) injury to person or property proximately resulting from any breach of warranty.

Although the Code provides for personal injury damages for breach of an implied warranty, the injured consumer's path to recovery is not clear. Seven major obstacles exist: (1) whether the transaction is within the scope of article 2 of the Code so that the warranties are applicable; (2) whether the Code's longer statute of limitations is available; (3) whether the injured consumer is required to comply with the Code's notice requirement; (4) whether the injured consumer must be in both vertical and horizontal privity with the defendant

pharmaceutical company; (5) whether the claim states a breach of a Code warranty; (6) whether the warranties have been disclaimed; and (7) whether contributory negligence or assumption of risk bar the action.³

A. *Scope*

Section 2-102 of the Code defines the scope of article 2:

Unless the context otherwise requires, this Article applies to transactions in goods

If, for example, Ms. Jones is given a free sample of oral contraceptives by her physician and these pills cause a stroke, has she forfeited any possible Code warranty because the "transaction" (her receipt of the pills) was a gift from her physician and not a purchase? If Ms. Smith pays a nominal amount or makes a donation to Planned Parenthood or some other non-profit agency for her examination, prescription, and pills and then suffers a heart attack after taking her pills has she forfeited the Code warranties by receiving "services" along with the "goods"? In both cases, the scope of article 2 determines whether the warranties are available.

1. *Free samples*

At first reading, the term "transactions" in section 2-102 appears to include the broad spectrum of sales, leases and gifts. The term "transactions," however, is misleading. It is seldom used again in article 2;⁴ "sale" is the term used more frequently. Even the short title for article 2 is "sales," not "transactions."⁵

³ Other problems exist as well. For example, what law should be applied? *Oresman v. G.D. Searle & Co.*, 321 F. Supp. 449 (D.R.I. 1971) (federal court jurisdiction based on diversity of citizenship with plaintiffs domiciliaries of Rhode Island, defendant a foreign corporation, and the birth control pills at issue manufactured in a state other than Rhode Island). Is the state's long-arm statute available? *Ratliff v. Cooper Laboratories, Inc.*, 44 F.2d 745 (4th Cir. 1971), *cert. denied*, 404 U.S. 948, *rehearing denied*, 404 U.S. 1006 (1972) (non-birth control drug neither manufactured nor consumed in the state).

⁴ The term "transaction" is used in UNIFORM COMMERCIAL CODE §§ 2-104(1), (3) [hereinafter cited as UCC].

⁵ UCC § 2-101.

The phrase prefacing the statement of scope ("Unless the extent otherwise requires") conveys the full limitation placed on the term "transactions." Most article 2 sections require otherwise. Most are expressed in terms of "contract for sale" or "buyer" or "seller."⁶ The language of 2-314 (implied warranty of merchantability) and 2-315 (implied warranty of fitness for a particular purpose) is no different. Section 2-314 uses the words "contract for their sale" and "seller," and section 2-315 uses "seller," "contracting" and "buyer." There can be little doubt that these warranties arise only in transactions that are sales.⁷

What is a sale? "[T]he passing of title from the seller to the buyer for a price. . ." differentiates a sale from a non-sale.⁸ Whether a transaction is a sale or not has profound significance when the pharmaceutical company gives free oral contraceptive samples to physicians who pass them on to patients. This is precisely the way Ms. Allen, in *Allen v. Ortho Pharmaceutical Corp.*,⁹ obtained her oral contraceptives. Nine days after taking her first free pill, she was hospitalized with a blood clot. When she brought an action against the pharmaceutical company for breach of a Code warranty (2-315), the Federal District Court for the Southern District of Texas readily granted the pharmaceutical com-

⁶ "'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time." UCC §2-106(1). "'Buyer' means a person who buys or contracts to buy goods." UCC §2-103(1)(a). "'Seller' means a person who sells or contracts to sell goods." UCC § 2-103(1)(d).

⁷ Some cases have expanded the scope of article 2 to cover leases. Compare *Fairfield Leasing Corp. v. U-Vend, Inc.*, 14 UCC REP. SERV. 1244 (N.Y. Sup. Ct. 1974), *Owens v. Patent Scaffolding Co.*, 354 N.Y.S.2d 778 (Sup. Ct. 1974), and *Smith v. Sharpsteen*, 13 UCC REP. SERV. 609 (Okla. Ct. App. 1973), with *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974), *Bona v. Graefe*, 264 Md. 69, 285 A.2d 607 (1972), and *Leasco Data Processing Equip. Corp. v. Starline Overseas Corp.*, 346 N.Y.S.2d 288 (App. T. 1973). See *Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 U. ILL. L. FORUM 446, 459; *Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). This expansion, while not within the literal meaning of "sale," is consistent with the concept of bargained-for exchange (implied warranties for price). The free sample cases which are gifts do not include an exchange (the price paid) for the pills.

⁸ UCC § 2-106(1).

⁹ 387 F. Supp. 364 (S.D. Tex. 1974).

pany's motion for summary judgment on the ground that it did not receive payment and therefore the transaction was not a sale and could not support the warranty action. The plaintiff attempted to characterize her situation as a "transaction in goods" . . . based on the expectation of future profits. . . ." The court responded in traditional common-law contracts language. Was there consideration for the pharmaceutical company's performance (giving the samples)? If consideration were present, it would have been in the form of a promise from the plaintiff or her physician. There was no promise of future sales, although this may have been the motive for dispensing the samples. Without a promise, there could be neither a benefit to the pharmaceutical company (the only benefit would be fortuitous, if any) nor a detriment to the injured consumer. Thus, there was no consideration for the pharmaceutical company's performance—dispensing the samples. Without consideration there could be no contract. The court refused to extend article 2 warranties beyond those transactions where there is an exchange: the warranties for the price.

While public policy requires that the injured consumer be provided a remedy for damages caused by the manufacturer, regardless of the circumstances under which she received the drug, she must look to the law of torts rather than the law of commercial transactions. The risk is clear. Free samples will place the injured consumer beyond the scope of the article 2 warranties.

2. *Sale of goods or services*

The scope of article 2 is limited to transactions in goods (2-102). Both the 2-314 and 2-315 warranties call for a sale of goods rather than a sale of services. The goods-service distinction (often referred to as the sale-service distinction) is important when the consumer deals with a clinic that both prescribes and sells oral contraceptives. The question becomes: has the clinic freed itself from the Code warranties by performing a service as well as making a sale of goods? *Berry v. G.D. Searle & Co.*¹⁰ considered this issue. *Berry* was

¹⁰ 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

a warranty action against both Searle, the manufacturer of Enovid, and the Planned Parenthood Association of Chicago, the agency that prescribed and sold Enovid to Ms. Berry. Planned Parenthood argued that the Code's warranties applied only to transactions that were predominantly sales of goods. It claimed to be primarily a service organization which maintained a staff of physicians to give birth-control advice. It maintained that the dispensation of birth-control pills was only an ancillary function. In deciding the *Berry* case, the Illinois Supreme Court relied on *Cunningham v. MacNeal Memorial Hospital*,¹¹ a case involving an action for strict liability in tort against a hospital for supplying contaminated blood to a patient as part of the hospital's ancillary services. The *Cunningham* court had held that "to assert that the transfusion of whole blood by a hospital into a patient, for which a charge is made, does not give rise to implied warranties because no 'sale' is involved, is in our judgment simply unrealistic." The *Berry* court, in rejecting Planned Parenthood's argument, said "The same conclusion is appropriate in this case."

Illinois may be unique in permitting a breach of Code warranty action to be brought against a hospital or clinic that dispenses oral contraceptives along with advice and prescriptions. Most states support the position that supplying blood to a patient by a hospital is not a sale of goods but a service.¹² The same holding should apply to the supply of pharmaceutical items since only the commodity has changed.

¹¹ 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

¹² *McDaniel v. Baptist Memorial Hospital*, 469 F.2d 230 (6th Cir. 1972) (Tennessee); *Shepard v. Alexian Bros. Hospital, Inc.*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); *Lovett v. Emory Univ., Inc.*, 116 Ga. App. 277, 157 S.E.2d 923 (1967); *Schuchman v. Johns Hopkins Hospital*, 9 UCC REP. SERV. 637 (Md. Sup. Ct. 1971); *Florulli v. Schrag*, 14 UCC REP. SERV. 343 (N.Y. Sup. Ct. 1974); *Hoffman v. Misericordia Hospital*, 439 Pa. 501, 267 A.2d 867 (1970) (non-code warranties applicable); *cf. Cutler v. General Elec. Co.*, 4 UCC REP. SERV. 300 (N.Y. Sup. Ct. 1967) (pace-maker); *Dorfman v. Austenal, Inc.*, 3 UCC REP. SERV. 856 (N.Y. Sup. Ct. 1966) (surgical pin); *contra, Schmaltz v. St. Luke's Hospital*, 33 Colo. App. 351, 521 P.2d 787 (1974). Many of these decisions were based on state Code variations. *Rostocki v. Southwest Fla. Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973), illustrates the effect of a statutory variation.

B. Statute of Limitations

The statute of limitations may bar the injured consumer's path should she delay in seeking redress. The Code (2-725(1)) imposes a four-year limitations period.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .¹³

Can the injured consumer rely on this four-year period or does the two-year tort statute apply? Judicial response is by no means uniform. Some courts take the position that the nature of the cause of action is determined by the predominant characteristic of the action and not by the form in which the action was brought. Since the predominant characteristic of the warranty action is products liability, an area of tort law, the action is characterized as sounding in tort, and the Code's four-year statute of limitations is therefore inapplicable.¹⁴

Another group of courts holds that it does not matter whether the action would be characterized at common law as tort or contract. What is important is that the Code, by its warranty provisions (2-313, 2-314, 2-315, 2-318) and by its damages provisions (2-714, 2-715), creates a statutory action with a strict liability design. This recognizes the existence of two separate causes of action: strict liability in tort, and implied warranty provided by the Uniform Commercial Code.¹⁵

¹³ UCC § 2-725(1). Some states have increased the limitations period: Mississippi (6 years), Oklahoma (5 years), South Carolina (6 years), Wisconsin (6 years).

¹⁴ *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1361-62 (Okla. 1974) (automobile collision) is typical. Prior to the Oklahoma Supreme Court's decision in *Kirkland*, the 10th Circuit Court of Appeals, in *Nichols v. Eli Lilly & Co.*, 13 UCC REP. SERV. 6 (10th Cir. 1973), a birth control pill case, held the Code's statute of limitations was controlling. When *Kirkland* was decided, the Tenth Circuit withdrew its previous opinion and held that the warranty action was barred by the two-year statute of limitations. *Nichols v. Eli Lilly & Co.*, 501 F.2d 392 (10th Cir. 1974).

The dissent in *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776, 781 (1973) (birth control pills), strenuously argued for one cause of action and the shorter limitations period.

¹⁵ *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974); *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776 (1973). Under this view, each

For a statutory action, the Code provides a specific limitation period (2-725(1)) and courts need not look outside the Code.¹⁶ Some courts, however, have developed legislative intent arguments to justify using the Code's limitation period. The applicability of each argument depends on the statutory structure within the state.

Oregon statutes for example, provide a general two-year statute of limitations:

Actions at law shall only be commenced within the periods prescribed by this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. . . .¹⁷

The Oregon Supreme Court, in *Redfield v. Mead, Johnson & Co.*,¹⁸ found that the Code's four-year statute of limitations was such "a different limitation . . . prescribed by statute." The court said:

When the [two] statutory provisions are read together, the legislative intent is clear. The legislature has provided a cause of action for personal injuries for breach of warranty [2-314, 2-315, 2-714, 2-715(2)(b)] and has adopted a limitation period made specifically applicable to such actions. The action for breach of

cause of action has its own attributes. For example, tort liability cannot be limited by exclusion of warranties as is possible under 2-316 or expanded by express warranties as is possible under 2-313.

Confusion between the two causes of action can be traced to their historical evolution. Judge Denecke, in his specially concurring opinion in *Redfield v. Mead, Johnson & Co.*, *supra* had this impression of the historical development of the Code warranties:

Courts extend the basis for liability in products liability cases beyond negligence. In making the extension they borrowed the concept and terminology of "implied warranty" from the law of sales in order to keep within known legal remedies. . . . This, however, created new problems because implied warranty in the law of sales had some impediments which were regarded as ill-suited to a remedy for personal injuries. The requirement of privity and the necessity of notice of breach were two such impediments. The courts eventually freed the remedy of these contractual incidents by evolving the tort of strict liability. . . .

At the same time that the tort of strict liability was evolving from the contractual remedy of implied warranty, the drafters of the Uniform Commercial Code were slightly enlarging the implied warranty remedy for personal injuries.

¹⁶ *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776 (1973).

¹⁷ ORE. REV. STAT. § 12.010 (1973).

¹⁸ 266 Ore. 273, 512 P.2d 776 (1973).

warranty is clearly one for which "a different limitation is prescribed by statute". . . and thus is not governed by the provisions of [the general statute of limitations].¹⁹

Not all states have a general statute of limitations with the convenient phrase "except where a different limitation is prescribed by statute." Illinois, for example, has a general statute of limitations which reads:

Actions for damages for an injury to the person. . . shall be commenced within two years next after the cause of action accrued.²⁰

Prior to the adoption of the Code in 1961, Illinois applied this general two-year statute of limitations to all personal injury actions regardless of whether the form of the action was tort or implied warranty. With the adoption of the Code, the Illinois Supreme Court in *Berry v. G.D. Searle & Co.*²¹ said that it was no longer sufficient to examine only the general statute of limitations, but that the entire statutory scheme now must be considered. The court held that sections 2-315, 2-318, 2-715(2)(b), 2-719(3), and 2-725(1) clearly demonstrated the legislative intent to create a statutory cause of action for breach of implied warranty to afford consumer protection to those who sustain personal injuries resulting from product deficiencies. This remedy was distinct from, and in addition to, that existing in strict tort liability. Each remedy, therefore, had its own statute of limitations.

While the availability of the Code's statute of limitations carries with it the advantage of a longer limitations period, it carries disadvantages as well. One undesirable feature involves the calculation of when the cause of action will accrue. The injured consumer's cause of action for breach of a Code warranty will ordinarily accrue when the seller tenders delivery of the goods. Section 2-725(2) provides:

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made. . . .

¹⁹ *Id.* at 274-75, 512 P.2d at 777-78.

²⁰ ILL. REV. STAT. ch. 83, §15 (1966).

²¹ 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

The Code's limitation statute in some cases could result in barring a plaintiff's cause of action before any injury has occurred. Some tempering of result exists in those jurisdictions which recognize the theory of strict liability in tort as formulated in the Restatement (Second) of Torts § 402A. With this theory available, a plaintiff who is injured more than four years after the sale of the defective product, although barred from recovery in a breach of warranty action pursuant to the Code, will nevertheless have two years to bring an action based on strict tort liability, provided she can show that the defective product was unreasonably dangerous as required under 402A.²²

If a court recognizes the co-existence of causes of action arising from the same facts and based on strict tort liability and the UCC, it becomes important that plaintiff's pleadings are framed in Code terms rather than in the terms of traditional strict tort liability.²³

C. *Notice of the Breach*

Is notice of the alleged breach an essential element of the plaintiff's case? The Code expressly calls for notice of the breach of warranty in section 2-607(3)(a):

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

While the Code states that notice is required, courts are in disagreement about whether lack of notice is detrimental to the plaintiff's cause of action. New York carved a group of cases from the Code's notice requirement. Those cases held that 2-607 did not apply in situations involving goods sold for human consumption. The New York courts held that the reason for the notice rule had no relevant application to the

²² Redfield v. Mead, Johnson & Co., 266 Ore. 273, 512 P.2d 776, 778-79 (1973).

²³ Cf. *Id.* at 275, 512 P.2d at 778. To compute the running of the statute of limitations, exclude the first day and include the last. Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (the inclusion of the last day saved the injured consumer from being barred). For a discussion of when the statute of limitations begins to run, see Allen v. Ortho Pharmaceutical Corp., 387 F. Supp. 364 (S.D. Tex. 1974).

circumstances of a case involving goods sold for human consumption. That section apparently has to do with the sales of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee. To require a complaint which, whatever its nomenclature of form, is really grounded on tortious elements, to indicate a notice of rejection or claim of damage within a reasonable time on account of defect of edible goods in a retail transaction, would strain the rule beyond a breaking point of sense or proportion to its intended object.²⁴

The Illinois Supreme Court rejected this argument of the inapplicability of notice to goods sold for human consumption.²⁵ The court tied its interpretation of 2-607 to 2-725. A statute of limitations, it reasoned, is designed to afford an opportunity to prepare a defense. The acceptance of 2-725(1) as the appropriate limitation period for actions involving personal injuries predicated on Code liability substantially extends the filing period for such actions beyond the traditional two-year limitation period. The court believed that the notification procedure was therefore proper if such theory of liability was advanced. The court reasoned that to hold otherwise might permit a defendant to be confronted with stale claims, thereby preventing the marshaling of evidence for a defense. It would also foster a selective disregard of various requirements set forth in the Code based solely upon the nature of the action. If the Code is the basis of recovery, a plaintiff will not be permitted to fulfill only certain requirements while ignoring others, the Illinois court said. The plaintiff who benefits from the longer statute of limitations should be obliged to provide notice of the alleged breach within a reasonable time after discovery.²⁶

²⁴ *Fischer v. Mead Johnson Laboratories*, 41 App. Div. 2d 737, 341 N.Y.S.2d 257, 259 (1973), quoting *Kennedy v. F.W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y.S. 121, 122 (1923). In *Fischer* the time between the cause of action and notice was at least 3 years.

²⁵ *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

²⁶ See *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776 (1973) (notice essential to plaintiff's case).

D. Privity of Contract

Privity of contract is the time-honored phrase describing the relationship between contracting parties. When a warranty is breached, the buyer may sue his or her immediate seller: they are in "privity." May the buyer also proceed up the marketing chain and sue the manufacturer of the goods? If "vertical privity" is required, the buyer cannot sue beyond his or her immediate seller.

"Horizontal privity" does not contemplate climbing the marketing chain but rather involves the horizontal plane of buyer and his or her immediate seller. May someone other than the buyer stand in the buyer's shoes and sue the buyer's immediate seller [or the remote manufacturer]? If "horizontal privity" is required, only the buyer can sue.

Section 2-318 addresses the question of horizontal privity (*i.e.*, who can sue) but not vertical privity (*i.e.*, who can be sued):

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.²⁷

Comment 3, by expressing neutrality towards developing case law, invites judicial abolition of vertical privity.

1. Vertical privity

A consumer who purchases oral contraceptives from a pharmacy which has bought from a pharmaceutical company is faced with a vertical privity problem if she brings a

²⁷ UCC § 2-318. In 1966, section 2-318 was amended in the Official Text and three alternatives replaced the former 2-318. The 1962 version became alternative A. Alternative A, the most widely enacted version of 2-318, permits a buyer or any member of his or her family, household or a household guest to sue the seller for personal injuries. Alternatives B and C permit any contemplated user to sue the seller. Comment 3, by remaining neutral on case law development, invites extension of the class who can sue. Some courts have extended the class. *E.g.*, *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973); *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974).

breach of Code warranty action against the pharmaceutical company. She is attempting to move up the distribution chain against a party with whom she has not contracted. Since 2-318 is neutral on vertical privity, the injured consumer must consider developing case law.

States have dealt with vertical privity with varying results. A dichotomy exists based on whether the injury or the form of action controls the nature of the suit. Illinois and Texas are excellent illustrations. Neither requires privity in strict tort liability actions. There the similarity ends. The Illinois Supreme Court in *Berry v. G.D. Searle & Co.*²⁸ emphasized the similarity between tort and implied warranty liability and extended the abolition of the privity requirement to implied warranty actions as well. When given a similar opportunity to abrogate the vertical privity requirement, the Federal District Court of the Southern District of Texas in *Allen v. Ortho Pharmaceutical Corp.*²⁹ refrained, stating that while the causes of action for strict tort liability and Code warranties may co-exist and liability may be sustained under either, the elements of an action should depend on the legal theory on which the action rests and not on the type of injury that underpins the cause of action.³⁰

At times, statutory variations aid the courts in abolishing vertical privity. Rhode Island added a sentence to 2-315:

As to foodstuffs or drinks sold for human consumption in sealed containers, there is an implied warranty that the goods shall be reasonably fit for such purpose, and such warranty shall extend from the seller and the manufacturer or packer of such goods to the person or persons described in § 6A-2-318 of this chapter.³¹

²⁸ 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

²⁹ 387 F. Supp. 364 (S.D. Tex. 1974).

³⁰ The Texas Legislature ignored the Official Text's alternatives to 2-318 and enacted a substitute:

This chapter does not provide whether . . . the buyer . . . may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These are left to the courts for their determination.

TEX. BUS. & COMM. CODE § 2-318 (1968). While this statute differs from that in Illinois, the dichotomy in results is not based on statutory distinctions but rather on whether the court emphasizes the type of injury or the form of the action.

³¹ GENERAL LAWS OF R.I. § 6A-2-315 (1969).

Relying on this provision, Rhode Island excepted foodstuffs and drinks sold for human consumption in sealed containers from the general vertical privity requirement.³² In *Oresman v. G.D. Searle & Co.*,³³ the Federal District Court of Rhode Island extended the exception to include unfit drugs. The court reasoned that both are intended for human consumption and both pose a special danger to purchasers if consumed.³⁴

2. *Horizontal privity*

A consumer other than the purchaser may confront a horizontal privity problem if she brings a breach of Code warranty against the pharmacy or whoever else was the last seller in the chain. Some horizontal privity problems are dispelled by 2-318. For example, the "person who is in the family or household of his buyer or who is a guest in his home" need not be concerned with horizontal privity "if it is reasonable to expect that such person may. . . consume . . . the goods." Thus horizontal privity has been abrogated in situations where a family member of a house guest "borrows" a supply of oral contraceptives prescribed to the purchaser when the transaction takes place in the purchaser's home.³⁵

Horizontal privity problems in oral contraceptive cases have not found their way into the reporters. Coupling the probability of "borrowing" a prescription drug (especially

³² *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 241 A.2d 619 (1968).

³³ 321 F. Supp. 449 (D.R.I. 1971).

³⁴ The *Oresman* court relied on the RESTATEMENT (SECOND) OF TORTS § 402A, Comment(b), which placed foods and drugs in the same category (products intended for "intimate bodily use" including everything intended for internal human consumption, whether or not it has nutritional value) and *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), a Salk vaccine case, where the California court extended the waiver of the vertical privity requirement from goods to include drugs.

³⁵ Federal law prohibits dispensing oral contraceptives without prescription. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 353 (1972). Some pharmaceutical companies print this caution on their packaging of refills. *E.g.*, Searle & Co. (Ovulen-21) (Dem/ulen). Others do not. *E.g.*, Parke-Davis Laboratories (Loestrin). All are required to note on the accompanying flyer "Do Not Take This Drug Without Your Doctor's Continued Supervision." 21 C.F.R. § 312.501 (1974).

since a month's supply and not one pill must be borrowed) with the probability against physical injury resulting from the drug, the likelihood of an injured non-purchaser is remote. Also, since 2-318 covers the normal situations where borrowing might occur, the issue for all practical purposes does not arise.

E. Breach of Warranty

What constitutes a breach of warranty? Section 2-314 (2)(c) provides that "Goods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used. . . ." For the pill to be merchantable, must it do more than prevent conception? Must it also be free from dangerous side effects? Some goods are unmerchantable because of the side effects³⁶ they produce.

Even with side effects, oral contraceptives may be merchantable under the theory that "If the product conforms to the quality of other brands in the market, it will normally be merchantable."³⁷ Since all oral contraceptives on the market cause the same side effects, brands conform in quality. With cancer-causing cigarettes having been held merchantable,³⁸ stroke and heart attack-causing oral contraceptives may be merchantable as well. If oral contraceptives are merchantable, the injured consumer cannot claim breach of warranty.

If there were an appellate opinion which affirmed a judgment for an injured consumer, then the unmerchantability of oral contraceptives could be inferred. But none of

³⁶ In *Holowka v. York Farm Bureau Cooperative Ass'n*, 2 UCC REP. SERV. 445 (Pa. C.P. 1963), Malathion, an insecticide, was purchased by a dairy farm to rid its alfalfa of boll weevils. The alfalfa was then harvested and fed to cattle. The residue left in the alfalfa killed some of the cattle. The court held that if the farmers were able to prove that the Malathion residue did in fact kill their livestock, they would be entitled to damages for breach of a Code warranty. "[T]he use of material which as a by-product causes death or injury to property is a classic example of a breach of warranty that the material was safe to use." *Id.* at 448.

³⁷ J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 293 (1972).

³⁸ *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir.), *cert. denied*, 397 U.S. 911 (1969) (pre-Code case; all cigarettes cause cancer).

the cases affirm a judgment for the injured consumer. Some side with the pharmaceutical company;³⁹ others reverse and remand to the trial court for further proceedings.⁴⁰ It is impossible to ascertain from the limited number of reported cases whether the consumer has been able to demonstrate that the pill was unmerchantable.

Not only must the injured consumer establish that the oral contraceptives were unfit for the ordinary purposes for which they were used, she also must establish that the breach of warranty was the cause "in fact" and the "proximate cause" of her heart attack or stroke.⁴¹

³⁹ *Nichols v. Eli Lilly & Co.*, 501 F.2d 392 (10th Cir. 1973)(statute of limitations); *accord*, *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974)(pharmaceutical company's motion for summary judgment granted: no sale of goods; no privity of contract).

⁴⁰ *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974); *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776 (1973); *see Fischer v. Mead Johnson Laboratories*, 41 App. Div. 2d 737, 341 N.Y.S.2d 257 (1973).

⁴¹ J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 296 (1972). One causal problem relates to the statistical probability for injury due to the pill. Women may suffer heart attacks and strokes whether or not they use oral contraceptives. The pill only increases the rate at which these events occur. Must the injured consumer establish that her stroke was not the one in eight which still would have occurred had she not taken the pill? This issue has not reached the reported decisions. It would seem, however, that the causal chain must be established with more information than merely the higher incidences of heart attack and stroke due to the pill.

Section 2-715(2)(b) states: "Consequential damages resulting from the seller's breach include . . . (b) injury to person . . . proximately resulting from any breach of warranty." Comment 5 to that section explains:

Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

In the pill situation, the defect in the goods is known to the consumer. Since instructions accompanying each month's supply of pills warns that the ingredients in the pill may cause severe side effects, the question of whether it is reasonable for the consumer to use the pills without inspection is irrelevant. But since the consumer would discover the defect prior to use, is it accurate to say that the injury would not proximately result from the breach of warranty? It must be remembered that the pharmaceutical companies intend for the consumer to purchase and consume the pills in their defective condition; otherwise they would not continue marketing them. This is not a question of the manufacturer marketing goods that it believes are marketable and the consumer discovering their unmarketability and

Section 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purposes 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 . . . an implied warranty that the goods shall be fit for such purpose.

Under the fitness warranty, does an oral contraceptive have to do more than prevent conception? Planned Parenthood, in *Berry v. G.D. Searle & Co.*,⁴² suggested that since the injured consumer did not allege that Enovid, the oral contraceptive, did not prevent conception and since contraception was the reason for which it was purchased, the consumer did not allege a breach of warranty under the Code. The Illinois Supreme Court responded that "[t]o accept this general proposition based upon the present record would be palpably contrary to the intent of the Code."⁴³ The implication is that the pill must do more than prevent conception. It must not carry with it the possibility of severe side effects.

Which warranty should be used? Some cases have been brought on the merchantability warranty⁴⁴ and others on the fitness warranty.⁴⁵ Is there a difference between being fit for the ordinary purposes for which such goods are used and being fit for a particular purpose? With oral contraceptives, the ordinary purpose and the particular purpose would be the same.⁴⁶

using them anyway. It would only be unreasonable for a woman to consume the pills if she knows that she has had blood clots and should not use oral contraceptives. *See also* UCC § 2-314, Comment 13.

⁴² 56 Ill. 2d 548, 309 N.E.2d 550 (1974).

⁴³ *Id.* at 555.

⁴⁴ *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776 (1974) (judgment for the manufacturer reversed and case remanded for further appropriate proceedings).

⁴⁵ *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974) (pharmaceutical company's motion for summary judgment granted: cause of action barred by the tort statute of limitations since article 2 was inapplicable—no sale—and by no vertical privity with the pharmaceutical company); *Oresman v. G.D. Searle & Co.*, 321 F. Supp. 449 (D.R.I. 1971) (manufacturer's motion for summary judgment for lack of vertical privity denied); *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (judgment for the manufacturer based on the statute of limitations was reversed and the case remanded for further proceedings). In *Oresman v. G.D. Searle & Co.*, 388 F. Supp. 1175 (D.R.I. 1975), the jury returned verdicts in favor of the plaintiffs and judgment was entered on the verdicts.

⁴⁶ *Accord*, UCC § 2-315, Comment 2.

Caution must be exercised. The implied warranty for fitness for a particular purpose may not apply to the pharmacy. This warranty is inapplicable because the buyer is not relying on the pharmacy-seller's skill or judgment. Rather, she is relying on the skill and judgment of her physician, the person who chooses the prescription.⁴⁷ The same logic may be applicable to the pharmaceutical company as well. If true, the injured consumer's cause of action is limited to the implied warranty of merchantability.

F. Disclaimer

The implied warranties of merchantability (2-314) and fitness for a particular purpose (2-315) expressly provide that each may be disclaimed. Both can be disclaimed "by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . ." ⁴⁸ If such a term of ordinary commercial usage is not used, the warranties can still be disclaimed but the disclaimer must meet certain requirements. The disclaimer of an implied warranty of merchantability must mention merchantability and must be conspicuous, if in writing. The disclaimer of an implied warranty of fitness must be in writing and conspicuous, although it may be in general language.⁴⁹

Each month's supply of oral contraceptives comes with a small flyer giving directions for use and the following warning:

The oral contraceptives are powerful and effective drugs which can cause side effects in some users and should not be used at all by some women. The most serious known side effect is abnormal blood clotting which can be fatal.

Safe use of this drug requires a careful discussion with your doctor. To assist him in providing you with the necessary infor-

⁴⁷ UCC § 2-315, Comment 1; *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965)(MER/29).

⁴⁸ UCC § 2-316 (3)(a).

⁴⁹ UCC § 2-316(2). A warranty of fitness can be disclaimed by language such as "There are no warranties which extend beyond the description on the face hereof." *Id.*

mation, (Firm Name) has prepared a booklet written in a style understandable to the drug user. This provides information on the effectiveness and known hazards of the drug including warnings, side effects and who should not use it. Your doctor will give you this booklet if you ask for it and he can answer any questions you may have about the use of this drug.

Notify your doctor if you notice any unusual physical disturbance or discomfort.⁵⁰

There is no reference to "as is," "with all faults" or other common commercial terms synonymous with disclaimer. Nor is there a mention of merchantability. Also, there is no general language attempting to disclaim the implied warranty of fitness for a particular purpose. This statement is a warning, not a disclaimer.

G. *Contributory Negligence and Assumption of Risk*

Another remnant of the intertwined history of strict tort liability and warranty liability is the carry over of the tort concepts of contributory negligence and assumption of risk into warranty actions. Contributory negligence and assumption of risk are defenses to a warranty action in some courts but not in others. "[O]ne court's assumption of risk may be another's contributory negligence and vice versa."⁵¹

While the warning that accompanies each month's supply of pills is not a disclaimer, does it bar the injured consumer's action? When she reads the warning and then proceeds to use the pills, knowing they can cause severe physical injury and even death, has she assumed the risk or acted in a manner that constitutes contributory negligence?

This issue may be framed in terms other than assumption of risk or contributory negligence. The warning may relate to merchantability or fitness for a particular purpose.

⁵⁰ This warning is prescribed by the Federal Food and Drug Administration and accompanies all birth control pills. 21 C.F.R. § 310.501 (1974).

⁵¹ J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 336-37 (1972). Compare *Hinderer v. Ryan*, 7 Wash. App. 434, 499 P.2d 252 (1972), with *Hensley v. Sherman Car Wash Equip. Co.*, 33 Colo. App. 279, 520 P.2d 146 (1974), and *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 126 Ga. App. 471 (1972).

For example, in *Lewis v. Baker*⁵² the consumer was injured by the prescription drug MER/29 (triparanol). The court held that: a drug, properly tested, labeled with appropriate warnings, approved by the Food and Drug Administration, and marketed properly under federal regulation, is, as a matter of law, a reasonably safe product. Accordingly, a person claiming to have suffered adverse effects from using such a drug, unless he can prove an impurity or an inadequacy in labeling, may not recover against the seller for breach of warranty. Under this rationale, since the Food and Drug Administration requires each prescription to be labeled with a warning, there is no Code warranty action available to the injured consumer of oral contraceptives.

The reported cases have not discussed the warning issue because the purchase and injury in these cases predated the warning.⁵³ But even if the warning accompanies all oral contraceptive prescriptions, it is not above challenge. First, the current warning may not bar all actions for breach of warranty. While referring to side effects, the warning discusses only blood clotting. No express warning is made about heart attacks or other side effects. The warning should be held inapplicable to unenumerated side effects. Second, the warning is impotent. While the warning itself is clear, pharmaceutical companies discount the risk.⁵⁴ "Oral contraceptives, like all potent drugs, have some side effects. Fortunately, serious side effects are relatively rare." Third, the warning, unlike the warning accompanying cigarettes, does not present the consumer with a meaningful choice. Cigarettes are luxuries. The smoker can choose not to smoke. Birth control pills are necessities. The user has no option.

⁵² 243 Ore. 317, 413 P.2d 400, 404 (1966); accord, *Leibowitz v. Ortho Pharmaceutical Corp.*, 307 A.2d 449, 457 (Pa. Super. Ct. 1973).

⁵³ The warning dates from 1970. For a discussion of the history of the warning, see *Liability of Birth Control Pill Manufacturers*, 23 HASTINGS L. J. 1526 (1972). In *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974), and *Redfield v. Mead, Johnson & Co.*, 266 Ore. 273, 512 P.2d 776 (1973), the injured consumers alleged no warning, the facts predate 1970, and the courts discussed issues other than the warning.

⁵⁴ "Oral contraceptives, like all potent drugs, have some side effects. Fortunately, serious side effects are relatively rare." What You Should Know About "the Pill," *supra* note 1.

The alternatives—abstention, unwanted pregnancy, abortion, less effective methods of birth control, and permanent birth control (vasectomy and tubal ligation)—are not viable. Finally, public policy demands that oral contraceptives be treated as an exception to the rule that a warning precludes the injured consumer's cause of action. With the threat of overpopulation, the practice of birth control is of national interest. Since the benefits are national, the detriments should be national. The loss should be spread among all consumers, rather than fall upon the individual injured consumer.

II. UNWANTED PREGNANCIES

Traditional family values have been reshaped in the last twenty years.⁵⁵ The deliberately childless family, the married career woman, and the planned one-child family are acquiring acceptability. The unspoken realities of childbearing and childraising and their impact on what a woman may expect of life are now being aired and debated.⁵⁶ Sex is openly discussed in classrooms and elsewhere.⁵⁷ Much of this has been tied to the pill. With the pill has come a new sense of freedom—for men as well as women. The pill has created an expectation that the size of families and the timing of pregnancies can be accurately controlled.

If the pill fails, the chance for recovery under the Code warranties is nil. Pharmaceutical companies do not expressly warrant that oral contraceptives will be absolutely effective. Rather, they say, “[The pills] are almost completely effective in preventing pregnancy.”⁵⁸ Nor does the

⁵⁵ B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

⁵⁶ E. PECK, *THE BABY TRAP* (1971); S. RADL, *MOTHER'S DAY IS OVER* (1973); A. & A. SILVERMAN, *THE CASE AGAINST HAVING CHILDREN* (1971).

⁵⁷ *Cornwell v. State Bd. of Educ.*, 428 F.2d 471 (4th Cir. 1970); *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Sup. 397, 289 A.2d 914 (1971); *Medeiros v. Kiyosaki*, 52 Hawaii 436, 478 P.2d 314 (1970); E. LIEBERMAN & E. PECK, *SEX AND BIRTH CONTROL. A GUIDE FOR THE YOUNG* (1973); D. REUBEN, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX, BUT WERE AFRAID TO ASK* (1969).

⁵⁸ What You Should Know about “the Pill,” *supra* n.1; *accord*, *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D.W. Va. 1971). Therefore, the manufacturers make no 2-313 warranty.

Code impliedly warrant that oral contraceptives will be 100% effective. This statement finds support in *Whittington v. Eli Lilly & Co.*,⁵⁹ where the Federal District Court for the Southern District of West Virginia rejected the pregnant plaintiff's allegation that the pharmaceutical company's implied warranty of fitness was absolute efficacy of the pill. The court said:

The pill is an artificial agent designed to alter the reproductive processes that in the normal course of things, if left undisturbed, provides a means for the propagation of the species. In the very nature of things it cannot be totally and absolutely effective. The undisturbed physiological processes of the female reproductive system in nature do not reach absolute perfection in their functions. And just as perfection is not achieved by nature in these functions, so also it cannot be expected to be achieved by artificial means.⁶⁰

The booklet "What You Should Know About 'The Pill,'" distributed by pharmaceutical companies to physicians for their patients, contains disclaimer language: "[the pills] are almost completely effective in preventing pregnancy." Although this statement may be "language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . .,"⁶¹ it is suspect as a disclaimer since it does not accompany each prescription. But even without a disclaimer, the pill is merchantable and fit for its particular purpose, and the consumer has no cause of action for breach of either implied warranty for an alleged failure to prevent pregnancy.

III. DEFORMED OFFSPRING

Perhaps some justification can be found for denying a warranty action to a consumer who takes the pill and suffers physical injury. She knew or should have known that these side effects were possible. Also some justification may be

⁵⁹ 333 F. Supp. 98 (S.D.W. Va. 1971)(pharmaceutical company's motion for summary judgment granted). See Barrett, *Damages for Wrongful Birth*, 21 CLEVE. ST. L. REV. 34 (1972).

⁶⁰ *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98, 100-01 (S.D.W. Va. 1971).

⁶¹ UCC § 2-316(3)(a).

found for denying a warranty action to a consumer who takes the pill for contraceptive purposes and the pill fails to perform that function. She knew or should have known that the pill was not perfect. When the injury is to children, however, sympathies must lie with them.

One court has permitted deformed offspring to proceed against a pharmaceutical company. In *Jorgensen v. Mead Johnson Laboratories, Inc.*, Ms. Jorgensen discontinued her use of Oracon birth control pills and became pregnant. She gave birth to Mongoloid twins. The twins brought an implied warranty action against the pharmaceutical company, alleging that the pills altered the chromosome structure of their mother so as to produce their Mongoloid deformity. Mead Johnson, the defendant, moved to dismiss, alleging that the complaint failed to state a cause of action in favor of the minor plaintiffs. The Federal District Court for the Western District of Oklahoma sustained the motion.⁶² On appeal, the Tenth Circuit vacated the judgment of dismissal and remanded the cause for further proceedings.⁶³ The circuit court held that the pleadings should not have been construed as being limited to effects or developments before conception, that the case should not have been viewed from the standpoint of alleged effects on the mother, who was not suing, but from that of the twins and the injury allegedly inflicted on them. The court reasoned that the cause of action need not await legislative action since, not only have the Oklahoma courts recognized basic warranty principles, but the right to sue for prenatal injury has generally evolved from court decision. The problem of the injuries is one of cause in fact and proximate cause.⁶⁴

⁶² 336 F. Supp. 961 (W.D. Okla. 1972).

⁶³ 483 F.2d 237 (10th Cir. 1973).

⁶⁴ *Burleson v. Mead Johnson & Co.*, 331 F. Supp. 710 (N.D. Tex. 1971), a pre-Code case, was a breach of warranty action brought by the mother of a deformed offspring. The district court sustained the pharmaceutical company's motion to dismiss on the ground that the action was barred by the statute of limitations. After losing this round, the deformed offspring himself filed an action. *Burleson v. Mead Johnson & Co.*, 463 F.2d 180 (5th Cir. 1972). The Fifth Circuit affirmed the trial court's summary judgment for the pharmaceutical company. "The unequivocal uncontroverted evidence of Mrs. Burleson's obstetrician, gynecologist, and attend-

IV. CONCLUSION

An injured consumer will find her breach of Code warranty action nearly impossible to maintain. Since she relied on her physician and not the pharmacy or pharmaceutical company, an action for breach of implied warranty (2-315) may not be available.⁶⁵ An action for breach of an implied warranty of merchantability (2-314 (2)(c)) may be likewise unavailable since a pill that conforms to the quality of other brands on the market may be merchantable. If the pill is unmerchantable, then the warning, although not a disclaimer, generally will bar recovery for prescription drugs. Beyond that, the consumer must establish that the breach of warranty was the cause in fact and the proximate cause of her injury. Should she conquer these obstacles, she is still barred from suit in those states requiring vertical privity of contract because she has not dealt with the pharmaceutical company.

The injured consumer has little control over such hazards. Her only hope is that she will find herself in a jurisdiction amenable to her position. Even here, the following pitfalls must be avoided:

(1) She should not accept free samples from her physician. In such a case, Code warranties are inapplicable because the transaction is not a sale but a gift. Implied warranties extend only to sales.

(2) She should not fill her prescription at the place where it is prescribed. Because such a transaction will likely be classified as a sale of services, and since implied warranties extend only to sales of goods, Code warranties may be inapplicable.

(3) She should not delay suit beyond the period specified in the shorter tort statute of limitations (*i.e.*, generally 2 years from the time of injury). If she waits, she may find

ing pediatrician, together with the other evidence, ruled out Oracon as a cause of the birth defects suffered by the plaintiff." *Id.* at 181.

⁶⁵ If the consumer buys from an agency that also prescribes the pill, the reliance problem is replaced by the sales-service problem. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (2-315 warranty).

that the period has expired because her jurisdiction has held the longer Code statute inapplicable.

(4) She should not delay giving notice of the breach, since waiting beyond a reasonable time may bar the action.

(5) She should purchase her pills from a pharmacy which has a broad financial base, and she should sue both the pharmacy and the pharmaceutical company. The lack of vertical privity which bars action against the pharmaceutical company would not bar it against the pharmacy.

Courts should be more receptive to the injured consumer's claim. In balancing the interests of seller and consumer, numerous factors support additional consumer protection. The product was put into the stream of commerce by the pharmaceutical companies. Despite knowledge of defects, they continue to promote their products. Mere addition of an ineffectual warning should not absolve the seller of liability. Finally, since birth control is essential in dealing with the population explosion—a problem national in scope—the risk should be spread nationally, either among all users of the pill or all users of pharmaceutical products.

Regardless of whether a woman has a cause of action for breach of an implied warranty, stepped-up research is imperative. Can the pill be made safe? Are other methods, such as the male pill, ultrasound treatments, or a reversible vasectomy, viable alternatives?

The woman carries the brunt of the reproductive process. She suffers the inconvenience and pain of carrying the child, pain and possible death during childbirth, the onerous burden of childraising, and the responsibility and side effects of birth control. Furthermore, she is likely to be denied a cause of action, at least under the implied Code warranties, if injured by oral contraceptives. A more unbalanced scheme would be difficult to find.