# UNIFORM COMMERCIAL CODE COMMENTARY

The Board of Editors is pleased to announce a major innovation in the *Review's* Uniform Commercial Code service. In 1960, when the Annotation Section was introduced in this publication, the Code had been adopted in only five states, and only Pennsylvania was reporting appellate decisions. Today, however, the Code has been accepted in nearly every state, and the number of cases has multiplied several times. Correspondingly, there are now many publications in which annotations or full reports of Code cases may be found quickly and easily. Since such reporting is not truly the function of a Law Review, the Annotation Section is being replaced by student comments on the most significant contemporary developments; these comments will often focus on issues raised by noteworthy recent cases. This revised format will enable the student writer to present a deeper and consequently more useful analysis. **Uniform Commercial Code Commentary** will now become a regular feature of the *Review*, and it is expected that this change will enable us to provide the legal profession with a more thorough and valuable service.

## SALES

### CONTRACT FORMATION AND THE LAW OF WARRANTY: A BROADER USE OF THE CODE

#### I. Formation of Contracts

An understanding of the underlying policies of the Uniform Commercial Code[1] is essential to proper interpretation of its provisions. Recent litigation involving the formation of contracts presents a recurrent problem in Code interpretation—reconciliation of Code provisions with the common law of contracts. In *E. A. Coronis Associates v. M. Gordon Constr. Co.*,[2] the Appellate Division of the New Jersey Superior Court felt compelled to turn to its common law because the Code apparently offered no solution. Gordon, a general contractor, was about to bid on the construction of two buildings for a state authority. He sought bids from subcontractors, including Coronis, for the structural steel needed for the buildings. Coronis submitted such a bid in writing, and, when Gordon's own bid was announced to be the lowest, he allegedly informed Coronis of this fact. At this point, however, he did not submit a formal acceptance to Coronis, and more than a month passed before he was officially awarded the prime contract. He still did not formally accept Coronis' offer, and, five days after the award date, Coronis informed

[1] All citations are to the 1962 Official Text.
[2] 90 N.J. Super. 69, 216 A.2d 246 (1966).

Gordon that he had to withdraw his bid. Gordon replied that he was holding Coronis to the bid, but Coronis nevertheless refused to perform and Gordon employed another subcontractor. When Coronis sued Gordon on three other contracts, the latter counterclaimed for the difference between Coronis' bid and the amount paid to the substitute subcontractor. On the counterclaim, the trial court entered summary judgment for Coronis. On appeal, the judgment was reversed and the case was remanded for a new trial.

The appellate court directed its attention first to section 2-205, the Code's firm offer section; it found, however, that Coronis had no intent to make his offer irrevocable. Without considering the Code any further, the court then turned to the common law doctrine of promissory estoppel.[3] Although promissory estoppel had never been used in a similar situation in New Jersey, the court held that if Gordon could show the requisite elements—promise and detrimental reliance—Coronis' offer would be irrevocable.[4]

In applying the doctrine, the court cited and followed similar cases decided in other jurisdictions.[5] *Coronis* is significant, however, because it is apparently the first case to employ the doctrine where the Code has been in effect.[6] It is submitted, therefore, that before applying promissory estoppel the court should have considered whether its use in a commercial situation is consistent with the general policies of the Code.

In determining the relationship between the Code and the common law, the foremost consideration is that the Code is a legislative act. As such it must take precedence over the common law or any prior conflicting legislative enactments.[7] In addition, the Code is meant to be as complete as possible a set of rules for the regulation of commercial law.[8] It is clear that the Code cannot regulate every phase of every commercial transaction, nor did the

[3] The definition of promissory estoppel cited with approval by the court in *Coronis* comes from Restatement, Contracts § 90 (1932), which states:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

[4] 90 N.J. Super. at 79-80, 216 A.2d at 252-53.

[5] N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963); Air Conditioning Co. v. Richards Constr. Co., 200 F. Supp. 167 (D. Hawaii 1961); Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W.2d 818 (1964); Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821 (1962); Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943); Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 387 P.2d 1000 (1964).

[6] Reynolds v. Texarkana Constr. Co., supra note 5, was decided while the Code was in effect, but apparently the fact situation had occurred before the Code was adopted.

[7] The Code mentions seven such acts which it expressly supersedes: Uniform Negotiable Instruments Act, Uniform Warehouse Receipts Act, Uniform Sales Act, Uniform Bills of Lading Act, Uniform Stock Transfer Act, Uniform Conditional Sales Act, Uniform Trusts Receipts Act. It also mentions several specific areas in which other legislation would be expressly superseded. U.C.C. § 10-102.

[8] The drafters of the Code state in the introductory comment:

> The concept of the present act is that "commercial transactions" is a single subject of the law notwithstanding its many facets.
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> . . . .
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> This Act purports to deal with all phases which may ordinarily arise in the handling of a commercial transaction from start to finish.

drafters have the omniscience to foresee every commercial fact situation and provide specific rules for the regulation of each; they did, however, list in section 1-103 some of the areas of the law that supplement the Code.[9] Moreover, the drafters have allowed for the expansion of the commercial law to accommodate the development of various new commercial techniques by including section 1-102 which states: "This Act shall be liberally construed and applied to promote its underlying purposes and policies."

When sections 1-102 and 1-103 are read in concert with the express policy of regulating as much of commercial law as possible, one principle becomes clear: before a court may turn to its common law it must be sure that no Code section—*liberally construed*—applies to the transaction.

The exact relationship of promissory estoppel to the Code is not clear from the Code itself. Section 1-103 states that "estoppel" is one of the areas to be taken as supplementary to the Code. It is clear, however, that whether promissory estoppel is encompassed by section 1-103 or not, it cannot be used to reach a result different from that reached by a Code section liberally interpreted. Before turning to promissory estoppel, then, the court must look closely to see if a Code section applies. It is submitted that a Code section *does* apply to the *Coronis* fact situation, and that the court was in error in not using it. Section 2-206(1)(a) states that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." It is clear that the bid by Coronis is an offer.[10] The court's failure to find a contract is apparently due to its belief that Gordon did not accept the offer. Under traditional contract theory this conclusion follows. The subcontractor's bid in such a situation was treated as an offer for a bilateral contract; use of the bid did not constitute acceptance.[11] Under section 2-206, however, an offer invites acceptance by any reasonable means whether the contract is to be unilateral or bilateral. According to this section, Gordon's use of Coronis' bid can be treated as an acceptance conditional upon Gordon's being awarded the prime contract. Concededly, this application of section 2-206 seems to present major difficulties. If Gordon had wanted to accept he could have sent a written acceptance. Moreover, if Coronis had wanted to treat the use of the bid as an acceptance he could have stated this clearly. It appears, then, that this application of section 2-206 may be impeding freedom of contract between the parties. On the other hand, several elements inherent in the contractor-subcontractor relationship justify such an application notwithstanding these difficulties.

Generally, before the contractor submits his bid to a government au-

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[9] That section states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to the capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.

[10] See 1 Corbin, Contracts § 24 (1963).

[11] See James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933); Milone & Tucci, Inc. v. Bona Fide Builders, Inc., 49 Wash. 2d 363, 368-70, 301 P.2d 759, 762-63 (1956).

thority or private concern, he solicits bids from subcontractors and uses their lowest bids in computing his own. If he is awarded the prime contract one of two problems may result. First, there is the *Coronis* situation where the subcontractor revokes his bid. In the second case the general contractor "shops around" to find a lower bid and the first subcontractor tries to bind him to accept his original bid.[12] Some courts have allowed the contractor relief in the first case using promissory estoppel,[13] but they have never allowed the subcontractor relief in the second case.[14] In both situations, the law has given the contractor a preferred position. Although the first situation has produced the litigation of which *Coronis* is representative, the second has presented serious problems which have received too little attention. For example, when the general contractor is awarded the prime contract, he is in an excellent bargaining position.[15] Subcontractors are dependent upon him for business, and unless he feels morally bound to the subcontractor who submitted the original lowest bid, he can, and often will, solicit still lower bids.[16] Any such cost reduction naturally increases the general contractor's profits. Generally, this practice of "bid shopping" has an adverse effect on both the subcontractor and the awarder of the prime contract. The subcontractor must keep his bid open and absorb its expense while the general contractor decides to whom he will award the subcontract. Although courts have indicated that if the general contractor shops, the subcontractor's bid is no longer irrevocable,[17] this presents a very difficult problem of proof. Therefore the subcontractor must often keep men and equipment committed to an offer which may not be accepted. To counter bid shopping, the subcontractors often resort to puffing their bids to allow room to be "shopped down."[18] In addition, they often unite to form bid depositories which prohibit member subcontractors from undercutting the lowest bidder.[19] The awarder of the prime contract is affected because bid shopping may often result in less satis-

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[12] See Schultz, The Firm Offer Puzzle: A Study of Business Practices in the Construction Industry, 19 U. Chi. L. Rev. 237, 284-85 (1952) [hereinafter cited as Schultz]. In this study questionnaires were submitted to contractors and subcontractors to determine their practices in a bidding situation.

[13] See cases cited note 5 supra.

[14] See Williams v. Favret, 161 F.2d 822 (5th Cir. 1947); Milone & Tucci, Inc., v. Bona Fide Builders, Inc., supra note 11.

[15] Schultz 284-85.

[16] Schultz found that the greater percentage of the contractors (65 out of 78) felt bound to give the subcontractor the job. However, the rest (13 out of 78) felt free to pick any other subcontractor. Id. at 260. Out of the subcontractors a greater percentage (75 out of 88) felt bound to do the job even if there was an unexpected rise in material cost. Out of the subcontractors who felt bound, 70 stated that they felt so for moral or ethical reasons. Id. at 267-68. The practice of bid shopping has been declared unethical by a number of industry associations. See, e.g., American Institute of Architects, Handbook of Architectural Practice, bk. III, at 702 (1958).

[17] See, e.g., Drennan v. Star Paving Co., supra note 5, at 415, 333 P.2d at 760.

[18] Note, 39 N.Y.U.L. Rev. 816, 823 (1964).

[19] See generally Schueller, Bid Depositories, 58 Mich. L. Rev. 497 (1960). Bid depositories have created numerous antitrust problems. See Christiansen v. Mechanical Contractors Bid Depository, 1964 Trade Cas. 79488 (D. Utah). For state antitrust action, see People v. Inland Bid Depository, 233 Cal. App. 2d 851, 44 Cal. Rptr. 206 (1965).

factory performance by the contractor.[20] To alleviate the problem when a state or municipal authority is awarding the prime contract, some states have required that when he submits his bid, the general contractor must also submit a list of the subcontractors he plans to use.[21] In order to subsequently change any of the subcontractors named, the general contractor must show good cause. Although this legislation protects the awarding authority, it does not supply the subcontractor with a remedy in his own name. Nor is any protection afforded if the prime contract is not being awarded by a government authority.

In examining the commercial practices of the bidding situation, one fact becomes striking: both contractor and subcontractor feel morally and ethically bound to the latter's bid when it has been used by the contractor in computing his own.[22] It is only natural, therefore, to find a contract at this point. It is submitted, moreover, that such a use of section 2-206 comports with the draftsmen's intent to provide a statute which could realistically recognize and accommodate the intent and practices of the parties.

Practically speaking, the proposed use of section 2-206 offers many advantages. First, the solution comes from the Code and follows its liberal policies by giving effect to the intent and practices of the parties. Second, it equalizes the parties' bargaining power by confining the bargaining process to the contract formation stage. Third, it allows the general contractor to find the lowest bid at the outset. The third advantage is significant in that the benefit from the lack of "puffing" will at least partly accrue to the awarding authority. It must be noted at this point that section 2-206 is by no means a panacea; it does not solve problems as much as it minimizes them. The parties are placed in a more equal bargaining position to render less one-sided the unfavorable impact of the problems inherent in the situation.

One major disadvantage in the implementation of section 2-206 stems from a possible lack of communication of "acceptance." The contractor may never inform the subcontractor that his bid was used, and such use may be difficult to prove. Conceptually this problem does not seem to defeat a recovery by the subcontractor; as offeror he sets the requirements of communication and, therefore, he may waive them.[23] If he does not, however, lack of

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[20] See Hearings on S. 1644 Before a Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955). California seems to have had the most problems with "bid shopping." Cal. Gov't Code § 4101 states:

> The legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefit of fair competition among prime contractors and subcontractors and lead to insolvencies, loss of wages to employees and other evils.

[21] E.g., Mass. Gen. Laws Ann. ch. 149, § 44f (1961). See Cal. Gov't Code §§ 4101-07.

[22] See supra note 16.

[23] Even then it is not the notification which creates the contract, but lack of notification ends the duty. Moreover the offeror may effectively waive notification either before or after the time when it would otherwise be due. Restatement (Second),

such communication of acceptance will defeat a general contractor's action against him. The subcontractor may show that he was not notified by the general contractor and that notification came through no other means. Practically speaking, then, this rule has the effect of forcing the contractor to notify if he wants to bind the subcontractor. The impact of this problem is further diluted by the fact that, as a general practice, subcontractors are notified of the use of their bids.[24] As to public construction contracts, moreover, there is no problem in those states where the contractor must list the subcontractors used. In sum, then, this problem is limited to those cases where a contractor does not care if he can bind the subcontractors and he is also willing to perjure himself. Even if this occurs, however, the proposed use of section 2-206 has in part served its purpose. If the subcontractor receives no communication of acceptance, he does not have to keep men and equipment ready to perform; he knows that he is not bound to perform. If, on the other hand, he chooses to attempt to bind the general contractor, he is fully aware of the burden of proof which confronts him. Thus it would seem that even in the small minority of cases where it might substantially fail, the application of section 2-206 will afford the subcontractor far greater protection than he had before. What is more important, however, is that in the majority of cases it is a far more satisfactory solution to the problems of construction bidding. Protection is provided for all parties concerned rather than for the general contractor alone.

## II. Warranties

The warranty sections of the Uniform Commercial Code[25] are primarily applicable to sales contracts. In the official comment to section 2-313, however, the drafters express the view that warranties need not be limited to sales; rather they should be applied wherever the circumstances are appropriate. This apparently means that even where no sale is involved, if the elements are present which would create the need for warranties in a sales transaction, then express and implied warranties should be given effect according to rules analogous to the Code. If any particular aspect of the transaction does not fit an analogous Code rule, then new rules may be developed to meet the peculiarities of the situation. An important Code guideline in this process is the drafters' statement that the purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.[26] In this respect, commercial practices and the expectations of the parties are of critical importance. These considerations can obviously differ as one moves from a sale to a different kind of transaction, and it is therefore necessary to make an independent determination of what the parties have in essence agreed to exchange.

In their development of warranty law for non-sale cases, courts in gen-

Contracts § 56, comment c (Tent. Draft Nos. 1 & 2, 1964). See 1 Corbin, Contracts § 67 (1963).

24 Schultz 259-61.

25 U.C.C. §§ 2-313 to -318.

26 U.C.C. § 2-313, Comment 4.

eral have not attempted to analogize widely from the law of sales.[27] Where they have done so, moreover, they have not done so consistently.[28] An area which demonstrates these inconsistencies, as well as an outright refusal to apply analogous Code rules, is that of service contracts. Although express warranties in a service contract are generally enforceable,[29] nearly every court treating the subject has refused to find *implied* warranties.[30] In many cases, where the governing sales law would have given effect to an implied warranty, courts have developed complex rules to distinguish between service contracts and the sale of goods in order to determine whether the warranty should be imposed.[31] In a recent case, *Aegis Prods., Inc. v. Arriflex Corp.*,[32] the Appellate Division of the New York Supreme Court refused to imply a warranty in a service case. Plaintiff brought a movie camera to defendant for repairs. The improperly functioning part was a recording device which, when it operated properly, showed the number of exposures taken per second. After defendant had repaired the camera and returned it to plaintiff, it was still faulty; plaintiff's motion picture was ruined by defective timing. In a per curiam opinion, the court followed settled New York law which provides that warranties are implied only in sales contracts and that plaintiff's remedy for unsatisfactory service is an action for negligence. Several courts, including the *Aegis* court, have stated this rule as though it were self-evident.[33] These courts have ignored for too long, however, the development of an adequate law of warranty for the non-sale transaction.

There are two major types of service contracts, each requiring its own analysis. The first of these is the "pure" service contract in which goods are not involved. This category is made up primarily of cases wherein professional advice or opinion is the performance for one side of the transaction. The second type of service contract, to be called the "hybrid," is like the first in that advice, opinion, or applied skill are present. Unlike the first type, however, goods are in some way involved in this contract. In some cases, these goods may pass from the servicer to the customer as would, for example, the replacement parts used in the performance of an auto repair contract. In other cases, the goods are used by the servicer as, for example, the paint and other materials used in the performance of a house painting contract. The reason for dividing service contracts into these two categories is to clarify the proper limits of analogies drawn from the sales cases. In the commercial sales situation, goods always pass from the seller to the buyer. The

27 See Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963), in which the court determined that even if a hair dye used was defective, it was essentially part of a contract of service and therefore carried no implied warranty.

28 See Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954). But see Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923).

29 See, e.g., Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940).

30 See, e.g., Foley Corp. v. Dove, 101 A.2d 841 (D.C. Munic. Ct. App. 1954). See Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 664-65 (1957).

31 See id. at 663, listing four kinds of tests used by courts.

32 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966).

33 See, e.g., Premco Drilling, Inc. v. Maillet Bros. Builders, 3 Conn. Cir. 519, 218 A.2d 542 (1965); Perlmutter v. Beth David Hosp., supra note 28.

issue thus presented is whether a warranty should be implied as to the goods transferred or used in the performance of a service. If so, the second question will be whether a warranty can be implied as to the service itself. In answering these questions, it is necessary to examine the rationale of the traditional rule.

One difference becomes striking when the pure service contract is compared with a sale. In the pure service contract, the end result sought by the customer is not what is bargained for in the contact. What he seeks is a favorable outcome—a solution to his problem. What is bargained for is the knowledge and skill of the servicer as applied to the problem. For example, in an attorney-client situation, although the client seeks a legal benefit or avoidance of a legal risk, he actually bargains for the applied knowledge and skill of the attorney. It is clear that the reason for this dichotomy is that the attorney, in the exercise of the utmost degree of care, cannot always produce the benefit sought. In a sales contract, however, this factor does not appear to be present. In the exercise of the utmost degree of care, the percentage of cases in which the production of defective goods cannot be controlled is negligible. In a service contract, then, it would seem that since the benefit sought is not bargained for and often cannot be produced, an implied warranty would be an intolerable burden upon the servicer. In essence, this is a statement that even where the servicer is in no way at fault, the risks are too great that the desired benefit will not be secured. With this in mind, however, there may be an exception, even in the pure service contract. If the possibility is very slight that the benefit sought will not result, the case may be more nearly like a sale. For example, in a contract to adjust the carburetor of a car, it is unlikely that the job will not be done properly if due care is used. In fact, in this contract the expectations of the parties may be that the performance bargained for by the customer is not the mechanic's applied skill but the end result—a properly-tuned carburetor. Even in this contract, however, many variables may be introduced which will increase the possibility that the benefit cannot be produced. Thus it would seem that the situations justifying the imposition of such an implied warranty are few. Because there are so few, and because the few may be so difficult to identify and distinguish, it may well be that the traditional rule should not be changed as to the service itself.

Even though there are factors present in the pure service contract which are inconsistent with an implied warranty, such factors do not seem to be present with respect to the goods in the hybrid service contract. This is especially true in a case where goods are transferred to the customer as, for example, replacement parts.

Although it seems that a warranty should be implied as to the goods in a hybrid service contract, it must be designed to allow for the service element which ought not to be warranted. In the hybrid service contract, some *use* of the goods by the servicer is the applied knowledge and skill bargained for. As to the *selection* of goods, however, different considerations arise. Realistically, the applied skill and knowledge of the servicer is not involved in the selection of which goods to use. Like a merchant selecting which goods to sell, the servicer's selection is almost mechanical. The ability of the customer to prevent any loss resulting from defects in the goods used is no greater than the buyer's ability to do so in a sales contract. In many service contracts, the customer plays such a minor role in the selection of the goods that he is less able than a buyer to prevent the loss. There is, moreover, no inherent difference in their ability to bear the loss. The extent of the loss, or the dangers inherent in the defect, are not decreased simply because a service contract is involved. Thus it would seem, analogizing from the Code, that a warranty should be implied as to the goods. The customer should be protected from the same defects he would be protected from if he were a buyer. As to the selection of what type or size of goods to be used, however, applied skill and knowledge is again the crucial factor. That is, in a contract to wire a house, if an electrician chooses a wire size which turns out to be too small, no liability should exist for breach of implied warranty. If, however, the electrician selects a brand X wire which turns out to be *defective,* this should constitute a breach of implied warranty as to the wire, even though the electrician selected it.

Considering the analogous Code warranty rule, it is submitted that warranties should be implied in service contracts with respect to any goods involved. The main advantage to such a solution is that it results in warranty law which can be consistently applied to goods regardless of the nature of the underlying transaction. As a practical matter, this solution will give a remedy to the customer where before he often had none. For example, in *Aegis*, if he could show that a defect was present in a part replaced by defendant and that the picture had been ruined by this defect, plaintiff would recover under the proposed solution. If such a defect did cause the harm, then plaintiff's burden of proof would be considerably lighter than if he were limited to an action for negligence. The camera is in plaintiff's control and he is in an excellent position to determine and prove the cause of the harm. The distinctions drawn between goods and services may, in some instances, complicate plaintiff's burden of proof, however. Unique problems of proximate cause may be presented when the harm appears to result from defective goods and an error in the servicer's judgment. On balance, however, it would seem that these problems are outweighed by the advantage to be gained—namely the development of a consistent law of warranty which would provide the customer with a more realistic remedy.

Lease or bailment contracts provide another area in which, although sales are not involved, the Code can be used analogously to construct a consistent body of warranty law. In a significant recent decision, the Supreme Court of New Jersey held that strict tort liability and implied contractual warranties were appropriate theories upon which to base a remedy in a lease of defective goods. In *Cintrone v. Hertz Truck Leasing and Rental Serv.*,[34] the plaintiff's employer leased nine trucks from defendant, a company in the business of renting motor vehicles to the public. Under a service clause in the contract, defendant was obligated to perform periodic inspections and was primarily responsible for maintenance. Additionally, whenever the driver

[34] 45 N.J. 434, 212 A.2d 769 (1965).

of a defective truck brought it in for fuel, he would report the defect, and defendant would make the necessary repairs. Allegedly, plaintiff filed a number of these defect reports regarding the brakes of the truck he was driving. The truck was not repaired, however, and when the brakes subsequently failed, the truck hit a bridge and plaintiff was injured.

Defendant was held liable on two theories—strict liability in tort and breach of implied warranty. In reaching this result, the court enumerated several factors common to both leases and sales of motor vehicles. Among those listed were the risk of harm to the lessee or purchaser, the danger to the public in general, and the lessee's or purchaser's reliance on the fitness of the vehicle. The court reasoned that since it was these common elements which led to the application of implied warranties and strict liability in the sales area, they should likewise lead to the same results in the lease transaction. In choosing strict liability as the theory upon which the primary responsibility of the lessor is founded, the court apparently followed the earlier New Jersey cases of *Henningsen v. Bloomfield Motors, Inc.*[35] and *Santor v. A. M. Karagheusian, Inc.*[36] The rationale of these cases is that strict tort liability protects the consumer from the often inappropriate technicalities of the law of sales warranty.[37] It is not clear, however, that the considerations in *Cintrone* are the same as in its predecessors. Both *Henningsen* and *Santor* were decided under the obsolete Uniform Sales Act which severely limited the consumer's remedy by burdening it with technical rules of privity and notice.[38] With the Code in effect, however, it is not self-evident that the doctrine of strict liability is necessarily preferred to that of implied warranty in every lease situation. A consideration of this matter leads directly to a consideration of the scope of the Code's warranty sections.

In official comment 2 to section 2-313, the drafters expressly state that Code warranties are not limited to sales contracts, but they may arise in other appropriate circumstances such as "bailments for hire." Also, the Code presents no privity rules which would impede such an application of the Code. In fact, many of the previous privity obstacles of the Uniform Sales Act are expressly repudiated.[39] Section 2-318 provides that a warranty

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[35] 32 N.J. 358, 161 A.2d 69 (1960).

[36] 44 N.J. 52, 207 A.2d 305 (1965).

[37] See Henningsen v. Bloomfield Motors, supra note 35; Ketterer v. Armour & Co., 200 Fed. 322, 323 (S.D.N.Y. 1912); James, Products Liability, 34 Texas L. Rev. 192, 197 (1955).

[38] It is instructive to examine some differences in the relevant sections of both statutes. The Uniform Sales Act requires notice to the seller within a reasonable time after the buyer knows or ought to know of the breach. Uniform Sales Act § 49. This requirement is also present in the Code. U.C.C. § 2-607(3). The Sales Act permits disclaimer of any warranty. Uniform Sales Act § 71. The Code also permits disclaimers but only if worded properly, placed conspicuously and, in some cases, signed separately. U.C.C. § 2-316. However, once a warranty is given, the power to limit remedies is also inhibited. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. U.C.C. § 2-719(3). The Sales Act limits warranties to buyer and seller. Uniform Sales Act § 15. On the other hand, the Code essentially has no privity requirements. U.C.C. § 2-318, Comment 3.

[39] U.C.C. § 2-318 and Comment 3. The Code takes a neutral stand on liberalizing

may extend to any natural person in the family or household of the buyer. Although an employee is not specifically mentioned in section 2-318, some courts have treated him as a member of the "industrial family."[40] In the official comments to sections 2-313 and 2-318, moreover, the draftsmen expressly renounce any intent that these sections should be construed in any way as limiting the "developing case law" of which *Cintrone* is representative.

Two facts in *Cintrone* not only justify the use of the Code's warranty sections here, but seem to demand it. First the lessee is not a consumer but a merchant. When a merchant enters the situation, many of the primary reasons for the application of strict tort liability must be reexamined.[41] Strict tort liability cannot be disclaimed;[42] yet merchants must be able to bargain and shift the responsibility for defects in leased goods. Under section 2-316 of the Code, however, the parties may, with certain limitations, exclude or modify warranties.[43] The second important fact in the case also points to the inability to shift responsibility. In *Cintrone*, used trucks were involved in the lease, and it may be that since the lessee knew of this fact, he was willing to bear the added risk of their failure. In this respect then, warranty law is more appropriate than strict tort liability. Where a merchant is involved, moreover, notice provisions are generally not burdensome, as a businessman can be expected to be more aware of these requirements than a consumer.

One other factor must be acknowledged here as unique to the lease situation—its length. In *Citrone*, for example, the lease was for two years. In itself, this element does not help a court to choose between the alternatives of warranty and strict liability. It is a factor, however, in analyzing the transaction insofar as it is similar to or differs from a sale. Suprisingly enough, it is the ***short*** lease which is most conducive to the application of strict liability. Since one does not usually buy things for very short periods of time, this kind of lease has no corresponding sales transaction. It is in the short-term lease, however, that the lessee may need the most protection. The lessee who wants a truck for a day or a weekend is unlikely to spend a great deal of time shopping for it. He simply rents *a* truck.[44] If the lessor were able to disclaim all warranties in such a case, the lessee would be sorely disadvantaged. In these cases it may be preferable to simply acknowledge that they are atypical and thus require a different warranty rule designed to deal with the particular situation. Indeed, the differences may be so fundamental that strict liability in tort would be more appropriate. Such a recognition would enable the courts to apply rules which fit both situations, rather than to stretch an inappropriate rule to an unreceptive fact pattern.

privity rules beyond those stated in § 2-318. Four states: Alabama, Colorado, Virginia, and Wyoming, have modified § 2-318 to expressly liberalize the rules of this section. Willier & Hart, Uniform Commercial Code Reporter-Digest 1-100 to -101 (1966).

40 See, e.g., Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960).

41 See Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

42 See Henningsen v. Bloomfield Motors, supra note 35; Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

43 See note 38 supra.

44 See Farnsworth, supra note 30, at 673-74.

The second holding on which the court rests its decision in *Cintrone* is that the leasing arrangement creates an implied promissory warranty for the duration of the lease. In effect the court is stating that the lessor is liable for any defect that arises during the lease whether or not it was present at the time of the leasing. This is a departure from the sales situation where the buyer must prove that the defect was present at the time of the sale. The basis for finding an implied promissory warranty is not clear from the opinion. It would appear that such a holding would be based on the fact that Hertz retained effective control by repairing defects each day. The court states, however, that the service agreement had no effect on the presence of the implied warranty.[45]

The effect of the implied warranty seems to be to shift to the lessor the burden of proving that some intervening force created the defect, whereas in the sales case a burden would rest with the buyer to show that there had been no such intervention. Absent a service contract, there does not seem to be any reason for shifting this burden in the lease situation. The placement of burden of proof in the sales area generally coincides with the exercise of greater control.[46] That is, in the sales case, the buyer has the burden of showing that the defect existed at the time of the sale or, in effect, that it was not created by some intervening force. It would be fundamentally unfair for the seller to be liable for a defect which developed after leaving his control. The buyer has the burden of proof on this matter because he has control of the goods and is in the best position to know or find out the relevant facts.[47] In the lease contract the same situation is present. The lessee is in the best position to discover what caused the defect and should have the burden of proof on that matter. When the service contract is added, however, the effective control may be shifted back to the lessor. He is then in the best position to determine the cause of the defects. In *Cintrone*, where the service contract is involved, the burden of showing the presence of some intervening force is placed on the lessor. Although this placement seems to be correct, it should not be taken as authority for the placement of burdens when no service contract is present.

The decision in *Cintrone* is significant because of the court's recognition that the applicability of warranty law should be determined by factors that create the need for warranty law and not by the presence or absence of a sale. It is also clear, however, that in deciding to apply warranty law the similarities and distinctions between the sales and non-sales cases must be analyzed thoroughly. The sales warranty cannot be transferred bodily to the lease case. Due recognition must be given to the differences between the two, and the warranty rule must be amended accordingly. Only in this way can a consistent and effective set of warranty rules be developed.

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[45] 45 N.J. at 451, 212 A.2d at 778.

[46] See Prosser, Torts § 97, at 681-84 (3d ed. 1964).

[47] See Tiffin v. Great Atl. & Pac. Tea Co., 20 Ill. App. 2d 421, 156 N.E.2d 249 (1959), aff'd, 18 Ill. 2d 48, 162 N.E.2d 406 (1959); Casagrande v. F. W. Woolworth Co., 340 Mass. 552, 165 N.E.2d 109 (1960).