Florida's Privity Rule:
Are Express Warranties Meaningless in the Sunshine State?
By John W. Reis

Joe Lawyer files suit in Florida against Big Car Company for breach of the express four-year warranty issued by Big Car Company on the vehicle. Plaintiff, Mr. Buyer, bought the car new at a Big Car Company car dealer called Dealer. The car caught fire in the garage a year later and burned down the house from a clear product defect that later becomes the subject of a recall on the vehicle. Big Car Company's lawyers file a motion to dismiss, claiming that the express written warranty is not enforceable because Joe Lawyer failed to allege that Buyer was "in privity" with Big Car. Big Car argues that Buyer's purchase through a middleman defeats privity with Big Car. Big Car essentially argues that the warranties it extends to purchasers of new Big Car vehicles are meaningless in the State of Florida unless the buyer buys the car directly at Big Car's facility in Michigan. This would seem to be a ridiculous argument. But is it?

In Florida, there is indeed case law stating that a warranty claim -- whether implied or express -- against a supplier of a product is barred if there is no privity between the injured party and the supplier. In T.W.M. v. American Medical Systems, Inc., 886 F. Supp. 842 (N.D. Fla. 1995), plaintiff was injured from a defective penile implant which plaintiff did not purchase from the manufacturer, but had surgically implanted by a doctor. Although the written opinion does not clarify whether a manufacturer's written warranty was delivered as part of the deal, it does make the following broad statement:

> The law of Florida is clear that to recover for the breach of a warranty, either express or implied, the plaintiff must be in privity of contract with the defendant. Kramer v. Piper Aircraft Corp., 520 So. 2d 37 (Fla. 1988); West v. Caterpillar Tractor Company, 336 So. 2d 80 (Fla. 1976). "Privity is required in order to recover damages from the seller of a product for breach of express or implied

> warranties." Intergraph Corp. v. Stearman, 555 So. 2d 1282, 1283 (Fla. 2d DCA 1990).

886 F. Supp. 844.[1]

On the other hand, there is also case law in Florida holding that an express warranty can be conferred to the ultimate user of the product -- either in written form or by direct assurances from the manufacturer/supplier - regardless of technical privity. Florida has long recognized that a person to whom an express warranty is conferred is entitled to enforce that warranty against that warrantor. *See* Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of American, Inc., 444 So. 2d 1068 (Fla. 3d DCA 1984); *Cf.* Motor Homes of America, Inc. v. O'Donnell, 440 So. 2d 422 (Fla. 4th DCA 1983) (citing Magnusson-Moss Warranty Act at 15 U.S.C.A. 2310(f)).

For example, in Monsanto Agricultural Products Company v. Edenfield, 426 So. 2d 574 (Fla. 1st DCA 1982), plaintiff, a farmer, purchased manufacturer's weed killer through a local farm supply dealer, but sued the manufacturer directly for, *inter alia*, breach of express warranty. The court gave effect not only to the express warranty but also to the written limitations and disclaimers, pursuant to the Uniform Commercial Code (UCC) as adopted in Chapters 671-679, Florida Statutes:

> With the demise of the privity doctrine in Florida, manufacturers became liable to remote purchasers for breach of both express and implied warranties. *See, e.g.*,

---

[1] *See also* O'Connor v. Kawasaki Motor Corporation, 699 F.Supp 1538 (S.D. Fla. 1988) (if there is no privity of contract with the manufacturer of the product, then there is no claim for breach of warranty or negligence against the manufacturer); Spolski General Contractor v. Jett-Aire Corporate Aviation Management of Central Florida, 637 So. 2d 968, 970 (Fla. 5th DCA 1994) ("there was no sale from [manufacturer] to [purchaser], no privity between [purchaser] and [manufacturer], no contract between [purchaser] and [manufacturer], no reliance by [purchaser] on any warranty, no warranty given to [purchaser]."); Brown v. Hall, 221 S.2d 454 (Fla. 2d DCA 1969) (injured service station attendant's claim for breach of implied warranty against seller of used dump truck for injuries sustained while changing left rear inside tandem wheel and tire was barred for lack of privity).

> Manheim v. Ford Motor Company, 201 So.2d 440 (Fla.1967). Although Manheim was decided after Florida's adoption of the Uniform Commercial Code, Chapters 671-679, Fla.Stat., (the UCC) the sale at issue in the case occurred prior to the adoption of the UCC. The Manheim court held that an express warranty limitation did not operate to preclude recovery on the basis of implied warranty where the product was defective and unsuitable for its ordinary and intended use. However, limitations of implied warranties of merchantability and fitness are now expressly authorized by the UCC if said limitations are made a part of the bargain between the parties, are reasonably consistent with any express warranties made, are in writing and are conspicious, and are not unconscionable. Sections 672.302, .316, .719, Fla.Stat.

426 So.2d at 576. Accordingly, although the plaintiff was not in direct privity with the manufacturer, the court upheld the jury's verdict against the manufacturer but reduced the plaintiff's damages to the warranty's remedy -- the price of the product.

In Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of American, Inc., 444 So. 2d 1068 (Fla. 3d DCA 1984), the court allowed a warranty claim by a hospital against the manufacturer of x-ray equipment which the hospital purchased through a dealer, because the **manufacturer** had made certain representations directly to the hospital. The decision provides a history of jurisprudence on the privity requirement in Florida. The court noted that Florida law had receded from the privity requirement with the announcement in Bernstein v. Lily-Tulip Cup Corp., 177 So.2d 364 (Fla. 3d DCA 1965), *aff'd*, 181 So.2d 641 (Fla.1966) that "privity no longer obtains in an implied warranty suit by a consumer against a manufacturer."[2] The Cedars court noted that the post-Bernstein enactment of Article 2 of the UCC renewed the debate over the privity requirement, given the emphasis in Article 2 on the terms "seller" and "buyer."[3] During that debate, as noted in Cedars, three lines of cases developed. One set of cases, starting with West v. Caterpillar Tractor Company, 336 So. 2d 80 (Fla. 1976), adopted the strict liability doctrine, thus "eliminat[ing] privity as a doctrinal barrier to filing suit against a manufacturer of

[2] Cedars, 444 So. 2d at 1070 (quoting Bernstein, 177 So.2d at 364).
[3] 444 So. 2d at 1071.

a defective product."[4] Another lines of cases "abrogated the necessity for privity in a contractual relationship" and allowed a party to sue for professional negligence against one with whom the injured party was not in privity.[5]

The Cedars court then discussed a third line of cases allowing an ultimate purchaser of a product, who is not in privity with the manufacturer, to sue the manufacturer for economic losses under an implied warranty theory:

> A third line of cases allowed an ultimate purchaser to sue a manufacturer for damages for breach of implied warranty of fitness for a particular purpose when there was only economic loss and no privity. Manheim v. Ford Motor Co., 201 So.2d 440 (Fla.1967); Chrysler Corp. v. Miller, 310 So.2d 356 (Fla. 3d DCA 1975); Rehurek v. Chrysler Credit Corp., 262 So.2d 452 (Fla. 2d DCA), *cert. denied*, 267 So.2d 833 (Fla.1972). The courts in both Miller and Rehurek based their decisions on the language of sections 672.315 and 672.316, Florida Statutes; that is to say, on the language of the Uniform Commercial Code. In so doing, the court in Rehurek stated:
>
> > When a purchaser answers the inducements made in the tremendous advertising campaigns carried on by the automobile industry and purchases a new automobile, he has the right to expect the automobile to perform properly and as represented. If it does not, through no fault of his, it appears to us that he should be allowed to seek redress.
>
> Id. at 456. These cases take the philosophy of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), and expand it to validate actions for damages which a purchaser suffers when he is induced to buy the manufacturer's product and the product turns out to be worthless. However, it is clear that there remains an abundance of uncertainty about the degree to which privity is required to maintain a breach of warranty action by an ultimate purchaser against a manufacturer where the only damages are those for loss of bargain. While it is incorrect to state that there is no cause of action for economic damages under a breach of warranty theory,[FN3] courts and jurisdictions differ as to when such a cause of action will be allowed and under what circumstances. *Cf*. L. Frumer & M. Friedman, Products Liability, vol. 2 (1983); R. Hursh & H. Bailey, American Law of Products Liability, vols. 1 & 2 (2d ed. 1974).

The Cedars court declined to squarely address whether privity is required to maintain a cause of action against a manufacturer for breach of the manufacturer's warranty under Florida's version

[4] *Id*.
[5] *Id*.

of the UCC, finding that the facts of the case indicated the existence of privity, though not a "strictly literalist" interpretation of privity:

> Whatever the outer limits of these cases are, the above discussion indicates that there is no good reason for us to adopt a strictly literalist adherence to the doctrine of privity. Nor is it necessary for us to push beyond the outer limits of the doctrine as developed thus far and hold that there is no requirement of privity when an ultimate purchaser has economic damages only from a defective product. The instant case has additional facts which make resolution of that issue unnecessary. Appellant's fourth amended and supplemental complaint alleges that sales representatives from appellee manufacturer called upon appellant and made direct representations that the equipment was very advanced and "state of the art," that the equipment produced a very high quality diagnostic t.v. image, that it was the very finest remote x-ray equipment available, and that the equipment was capable of handling the high volume hospital use for which it was needed. Appellant further alleges that it was shown samples of prior models and told the new model would perform even better. It also alleges that it relied on appellee's representations and inducements when it decided to purchase the two remote x-ray systems. It seems fundamentally unfair, and anomolous in the extreme, to allow the manufacturer to hide behind the doctrine of privity when the product, which it induced the purchaser to buy, turns out to be worthless. [FN4] It also seems absurd, under these circumstances, to find that the appellant has recourse against the appellee manufacturer only when the x-ray equipment injures someone. Requiring the purchaser to go against the seller, who must proceed in indemnification against the distributor, who must proceed against the manufacturer, is wasteful and inefficient. We find, therefore, that appellee's conduct, if proven, created both an express warranty and an implied warranty of fitness for a particular purpose under sections 672.313 and 672.315, Florida Statutes 1981). Sections 672.714 and 672.715 provide the measure of damages for the breach of these warranties.[6]

The enforceability of manufacturers' express warranties under Article 2 of the UCC was further addressed in In Re Bob Rigby, Inc., 62 B.R. 900 (M.D. Fla. 1986). In Bob Rigby, plaintiff purchased, through a third party, a portable rock crushing machine that came with an express warranty issued by manufacturer Eagle Crusher Company, Inc. In considering the purchaser's express warranty claim, the court noted as follows:

---

[6] *Id*. at 1071-72. *See also* McCraney v. Ford Motor Company, 282 So. 2d 878 (Fla. 1st DCA 1973) (claim for breach of express warranty on defective vehicle, purchased through dealer, went to jury although the court entered directed verdict for plaintiff's failure to offer proof of the value of the vehicle before it burned.).

> First, the transaction under consideration is governed by Article 2 of the Uniform Commercial Code as adopted by Fla. Stat. § 672.101, et seq., the statute which governs the sale of goods in this State. Second, while Eagle was not the actual seller of the machine, this is without significance. Fla. Stat. § 672.313 does not limit express warranty to the actual seller in spite of the fact that a literal reading of the Section might so indicate, but also extends the same to the manufacturer of the goods if, in fact, an express warranty arose by virtue of other means described in the Statute. Mobile Chemical Company v. Hawkins, 440 So. 2d 378, *pet. for rev. denied*, 449 So. 2d 264 (Fla. 1984); Monsanto v. Agricultural Products Company v. Edenfield, 426 So. 2d 574 (Fla. 1st DCA 1982); Sheppard v. Revlon, Inc., 267 So. 2d 662 (Fla. 3d DCA 1972).[7]

Under this analysis, a manufacturer would be deemed a "seller" to a purchaser under the terms of its own express warranty pursuant to Article 2 of the UCC as adopted by Florida Statute §§ 672.313, 672.314, 672.315, and 672.318.

In addition, the broad statement in T.W.M. quoted above -- "The law of Florida is clear that to recover for the breach of a warranty, either express or implied, the plaintiff must be in privity of contract with the defendant" -- does not hold up to scrutiny when examining the cases cited for that proposition. None of those cases -- Kramer v. Piper Aircraft Corp., 520 So. 2d 37 (Fla. 1988), West v. Caterpillar Tractor Company, 336 So. 2d 80 (Fla. 1976), and Intergraph Corp. v. Stearman, 555 So. 2d 1282, 1283 (Fla. 2d DCA 1990) -- appear to have involved express warranties on products governed by the UCC. Kramer involved injured passengers on a plane who purchased the service of air travel, not a product governed by the UCC. West simply established a cause of action for strict liability in the absence of privity of contract. Stearman, which is five sentences long, does not mention whether the warranty in question was expressly extended through an agent or intermediary. Nor do other cases on the issue – *e.g.*, Affiliates for Evaluation & Therapy, Inc. v. Viasyn Corp., 500 So.2d 688 (Fla. 3d DCA 1987) and Brown v.

[7] 62 B.R. at 905-906.

Hall, 221 So.2d 454, 458 (Fla. 2d DCA 1969) -- discuss the significance of an express assignment of an express warranty through an intermediary dealer.

As of the time of the writing of this article, there is no Florida state court appellate decision which closely examines the basis for the broad statement in T.W.M. or attempts to reconcile that statement with the UCC analysis set forth in Monsanto, Cedars, and Bob Rigby. Nor is there any case expressly retreating from the latter three cases. Accordingly, in the case of an express warranty issued in the name of a manufacturer, such as Big Car Company, but sold through a dealer or supplier, such as Dealer, the litigant is left with a great deal of uncertainty on how a court would enforce the express warranty. Joe Lawyer can hope that Florida's High Court or Legislature will one day clear up the uncertainty. But he should not hold his breath.

One option is to respond to the motion to dismiss with an opposing memorandum of law noting the UCC analysis of Monsanto, Cedars, and Bob Rigby. Moreover, one could argue that Florida is a notice pleading state and that privity will be shown through discovery. But what if the court rules adversely, deeming the T.W.M. language to bar any express warranty count regardless of the UCC analysis? Such a result is not hypothetical, as this author can personally attest. A more prudent approach may be to meet the privity issue directly and simply file an amended complaint that satisfies the issue. The following is a sample allegation that arguably satisfies the privity "requirement" while staying true to the facts of the case:

> In the course of Buyer's purchase of the vehicle, Big Car through persons authorized by Big Car made contacts with Buyer such that Big Car extended an express warranty to Buyer warranting that the vehicle would be free of defects in design and/or workmanship and/or would be merchantable and/or fit for the particular purpose for which it was sold, and Buyer reasonably relied upon such warranty.
>
> The contact and actions by and/or on behalf of Big Bar that occurred as part of the course of the sale of the vehicle were sufficient to create privity between Big Car and the Buyer and/or were sufficient for Big Car to be deemed a

seller within the meaning of Florida's version of Article 2 of the Uniform Commercial Code (UCC) relating to express and implied warranties.

Big Car may ultimately file a motion for summary judgment, but not before Joe Lawyer and Buyer get a chance to flush out the relationship between Big Car and Dealer. Discovery may very well reveal that Big Car (1) advertises its products heavily to potential buyers and only sells its products through dealerships, (2) expressly authorizes its dealerships to directly extend Big Car warranties to those buyers, (3) receives consideration for the warranties it extends to buyers, (4) routinely honors buyers' warranty claims, (5) is aware that dealerships routinely disclaim any warranties other than those of the manufacturer. If the facts warrant, it may also be appropriate to argue that the manufacturer has committed fraud or unfair and deceptive trade practices in issuing express warranties that it now takes the position are unenforceable.

It is difficult to imagine that a car company or any manufacturer can issue an express warranty to buyers in Florida but not honor their terms. But under current Florida law, there is no clear way of predicting how a particular judge might rule on that question in a case like the hypothetical presented above. Until the Florida Supreme Court or Legislature clarifies this issue, citizens of the State of Florida are holding express warranties that may not be worth the paper on which they are written.

John W. Reis is a member of Cozen O'Connor in Charlotte. Biographical information is available at www.cozen.com.